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DETERMINED IN THE
SUPREME COURT OF BRITISH GUIANA.

DAISY EVELYN WEEKES, Plaintiff,

v.

MARTHA LUCRETIA COURIAN, Defendant.

[1941. No. 338—DEMERARA.]

BEFORE DUKE, J. (Acting).

1943. JANUARY 4, 5, 6, 8.

Sale of land—Contract for—Action for breach of—Contract not in writing—Civil Law of British Guiana Ordinance, cap. 7, s. 3 (D), proviso (d)—Plea of—Contract unenforceable by action—Damages cannot be awarded.

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Where a contract of sale of immovable property is unenforceable by action by reason of proviso (d) to section 3 (D) of the Civil Law of British Guiana Ordinance, cap. 7, being pleaded, damages for breach of contract cannot be awarded against the person who pleaded the statute.

Lavery v. Pursell (1888) 39 Ch. D. 508, 518, 519 applied.

It is a general principle of equity not to permit the Statute of Frauds to be used by a defendant to cover a fraudulent act where he is in the position of a trustee or quasi-trustee towards the plaintiff.

Although a contract which is required by law to be made in writing cannot be varied by a new oral agreement, such a contract can be rescinded altogether by word of mouth, either expressly or by the parties entering into an oral contract entirely inconsistent with the written contract or, if not entirely inconsistent with it, inconsistent to an extent that goes to the very root of it.

The discharge of a contract is a matter of intention, and if there is a clear intention to rescind, as distinguished from an intention to vary, the original contract will be rescinded.

If the making of the new agreement was intended by the parties to be in accord and satisfaction of the old agreement, the old agreement has gone, and, if the substituted agreement is unenforceable by action, then neither of the parties is in a position to sue upon it.

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Action by the plaintiff Daisy Evelyn Weekes against the defendant Martha Lucretia Courian for specific performance, or, in the alternative, damages. The facts appear from the judgment.

S. L. van Batenburg Stafford, K.C., for the plaintiff.

A. J. Parkes (for L. A. Hopkinson), for the defendant.

Cur. adv. vult.

DUKE, J. (Acting.): This is an action by the plaintiff for specific performance of an agreement in writing made on the 11th March, 1936 between the plaintiff and the defendant for the sale by the defendant to the plaintiff of the S½ of lot 11-11, Wortmanville, Georgetown, for the sum of \$200. In the alternative, the plaintiff claims specific performance of an oral agreement alleged to be made between the plaintiff and the defendant in the month of October, 1937 for the sale by the defendant to the plaintiff of the S½ of the N½ of lot 11-11, Wortmanville, Georgetown, for the sum of \$90. In the further alternative, the plaintiff claimed \$350 as damages.

The terms of the agreement in writing of the 11th March, 1936 were as follows:

1. The vendor (Martha Lucretia Courian) hereby sells to the purchaser (Daisy Evelyn Weekes) who hereby purchases from the vendor South half lot 11-11, Norton to Princes Street, Wortmanville, Georgetown.

2. The consideration to be paid by the purchaser to the vendor for the property herein described is as follows:

(a) The purchaser shall pay to the vendor the sum of \$200 for the property herein described of which the sum of \$25 shall be paid on the 31st day of March, 1936, and the balance to be paid in quarterly instalments of \$25 each, until the aforesaid sum of \$200 is fully paid.

(b) On the full consideration being paid by the purchaser to the vendor the vendor shall pass transport to the purchaser.

3. All transport expenses shall be borne by the vendor and purchaser equally.

4. The vendor shall pay and be responsible for all rates and taxes during the year 1936.

5. Possession of the property herein described shall be given by the vendor to the purchaser on the signing of this agreement.

6. In the event of the death of the vendor before the termination of this agreement the purchaser shall make all payments herein agreed to the vendor's son one James Michael Bishop, who shall be bound to observe all and every condition or stipulation herein agreed.

By judicial sale transport dated the 14th October, 1930 No. 993 the defendant Martha Lucretia Courian acquired title for lot 11-11, Wortmanville, Georgetown.

This lot is cut into two portions by Norton Street. The northern portion, or northern half, lies between D'Urban Street on the northern side and Norton Street on the southern side. The southern portion, or southern half, lies between Norton Street on the northern side and Princes Street on the southern side.

By the written agreement of the 11th March, 1936 the defendant agreed to sell to the plaintiff, and the plaintiff agreed to purchase from the defendant, that part of lot 11-11, Wortmanville, lying between Norton Street on the north and Princes Street on the

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south for the sum of \$200, to be paid in 8 equal quarterly instalments of \$25 each, the first of such instalments to be payable on the 31st March, 1936 and the last on the 31st December, 1937. Possession was to be given to the plaintiff on the 11th March, 1936, the rates and taxes for the year 1936 were to be paid by the defendant, and transport was to be passed in favour of the plaintiff upon the purchase price being paid in full.

The agreement was prepared by a nephew of the plaintiff, a lawyer's clerk. It was signed in duplicate by the plaintiff and by the defendant. It was witnessed by the said lawyer's clerk, and by Sybil Gordon, a daughter of the plaintiff. One signed agreement was handed to the defendant, and the other signed agreement was taken away by the plaintiff on the same day. The agreement was signed at the defendant's house.

Acting under the authority conferred upon her by the agreement of the 11th March, 1936 the plaintiff entered into possession of the S½ lot 11-11, Wortmanville, (then the property of the defendant) on or about the 12th March, 1936, and she thereupon proceeded to endeavour to make the land suitable for building purposes. Similar efforts had previously been made by the defendant in the months of September, October and November, 1935.

The first quarterly instalment of the purchase price was due and payable on the 31st March, 1936, and it was so paid.

The plaintiff spent a sum not exceeding \$15 in filling up the S½ lot 11-11, Wortmanville. [His Honour reviewed the evidence, and continued:]

The plaintiff was put into possession of the S½ lot 11—11, Wortmanville: but, through lack of means, she was unable to fulfil those terms of the agreement of the 11th March, 1936 which were required to be performed by her. The purchase price was \$200, payable in 8 quarterly instalments of \$25 each. The plaintiff paid one instalment (payable after she entered into possession), but she failed to pay the second, third, fourth, fifth and sixth quarterly instalments of \$25 each. The plaintiff also failed to pay any portion of the rates and taxes for the year 1937.

On the 22nd September, 1937 the defendant agreed to sell the S½ lot 11-11, Wortmanville, to Edith Solomon for \$165, and the defendant put her into possession forthwith. Although the plaintiff had entered into possession on the 12th March, 1936, she did not build, or plant, on the land, and she did not erect any palings or enclose the land: the plaintiff never lived on the land, and at all material times she lived either at Lodge Village or at lot 18, Princes Street, Wortmanville. There was no building on the land on the 11th March, 1936, and there was no building on it on the 22nd September, 1937.

The defendant caused to be advertised in the *Official Gazette* of the 25th September, 1937, the 2nd October, 1937, and the 9th October, 1937, notice of her intention to pass transport of the

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S½ of lot 11-11, Wortmanville, in favour of Edith Solomon.

While the advertisements were appearing in the *Gazette*, Edith Solomon commenced to erect palings.

Some time in the month of September, 1937 (that is to say, at some time between the 22nd and the 30th days of September, 1937), the plaintiff's attention was directed to these palings. She approached the defendant on the subject. The plaintiff ascertained that the defendant had indeed agreed to sell the S½ of lot 11-11, Wortmanville, to Edith Solomon, and that Edith Solomon was in physical occupation of the land. The plaintiff told the defendant that she had intended to pay the rates and taxes for 1937 at the end of October, 1937. The plaintiff was silent as to the payment of the overdue instalments aggregating the sum of \$125 (if the conversation took place on the 30th September, 1937, the sum would have been \$150) which was then due by her to the defendant in respect of the agreement of the 11th March, 1936. She did not offer to pay that sum to the defendant, and she never said that she could, or would, pay it. The plaintiff made no demand on the defendant for the return of the sum of \$25 paid on the 31st March, 1936, or for reimbursement of the expenses incurred by her (which I find to be not more than \$15) in seeking to fill up the S½ of lot 11-11, Wortmanville.

At that interview, the plaintiff was accompanied by her daughter Sybil Gordon, and by two friends Lilian Bowling and Cecil Edwin Bradshaw. The defendant at that time was 76 years of age. She lived alone, and she was alone.

The plaintiff told the defendant that she would stop, that is to say, oppose the passing of the transport of the S½ of lot 11-11, Wortmanville by the defendant in favour of Edith Solomon. Thereupon, the defendant told the plaintiff that she would sell the S½ of the N½ of lot 11-11, Wortmanville. She fixed the price at \$90. The plaintiff signified her willingness to purchase at that figure, and the defendant told the plaintiff that when she was ready with the whole purchase price she could return. The S½ of the N½ of lot 11-11 (unlike the S½ of lot 11-11) is planted up by the defendant, and the defendant could not have been reasonably expected to deliver possession thereof to the plaintiff before payment of the purchase price of the S½ of the N½ of lot 11-11.

Sybil Gordon stated that the written agreement of the 11th March, 1936, with respect to the S½ of lot 11-11, Wortmanville, was finished with, and that there was substituted therefor an agreement of sale with respect to the S½ of the N½ of lot 11-11, Wortmanville.

Is alleged, on behalf of the plaintiff, that, in reply to Sybil Gordon, the defendant said that the sum of \$25 which was paid on the 31st March, 1936, in respect of the S½ of lot 11-11, Wortmanville, would be treated as part of the purchase price of

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\$90 for the S½ of the N½ of lot 11-11, Wortmanville. I do not believe that the defendant ever made any such concession. The plaintiff omitted to mention this circumstance when she was giving evidence. Further, the defendant had resold the S½ of lot 11-11, not for \$200 the price which the plaintiff had agreed to pay therefor, but for \$35 less than \$200.

According to the plaintiff the defendant raised the question as to whether the Town Clerk of the City of Georgetown would issue a certificate under section 129 (1) of the Georgetown Town Council Ordinance, cap. 86, and the plaintiff deposed that she told the defendant "Leave that to me". More than 5 years have passed since that day, yet it does not appear from the evidence that the plaintiff has made the slightest effort to ascertain whether such certificate would be granted.

The defendant refused to enter into a written agreement for the sale of the S½ of the N½ of lot 11-11, Wortmanville. According to the plaintiff, the defendant stated that they would work under the written agreement of the 11th March, 1936, but I do not believe that any such conversation ever took place.

The plaintiff did not oppose the passing of the transport of the S½ of lot 11-11, Wortmanville, by the defendant in favour of Edith Solomon, and the transport was duly passed on the 12th October, 1937, (No. 1045 of 1937).

In October, 1941, four years after the agreement between the plaintiff and the defendant for the sale of the S½ of the N½ of lot 11-11, Wortmanville, the plaintiff tendered the sum of \$65 to the defendant, and claimed transport of the said quarter lot.

The writ in this action was filed on the 28th November, 1941.

The defendant has pleaded proviso (*d*) to section 3 (*D*) of the Civil Law of British Guiana Ordinance, cap. 7 which enacts that "no action shall be brought whereby to charge anyone upon any contract or agreement for the sale of immovable property unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised". The plaintiff has not suggested that there were any acts of part performance of the parcel agreement for the sale of the S½ of the N½ of lot 11-11, Wortmanville, and none have been proved. The parcel agreement cannot therefore be enforced, in equity, by way of specific performance, and it cannot be enforced, at law by way of an action for damages for breach of contract. If any authority is needed for this conclusion, it will be found in the judgment of Chitty, J., in *Lavery v. Pursell* (1888) L.R. 39 Ch.D.508, 518, 519, a case which was determined after the passing of the Judicature Act, 1873.

Counsel for the plaintiff has, however, submitted that the defendant ought not to be permitted to plead proviso (*d*) to section 3 (*D*) of cap. 7, because James, L. J. said in *Haigh v. Kaye* (1872) L. R. 7 Chancery Appeals 469, 474, "The Statute

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of Frauds was never intended to prevent the Court of Equity from giving relief in a case of plain, clear and deliberate fraud”, and, according to counsel, the defendant had been guilty of plain, clear and deliberate fraud. The defendant is an old woman, now 81 years of age who had been induced by the plaintiff, with the assistance of the plaintiff’s nephew (a lawyer’s clerk), to make an agreement in writing for the sale by the defendant to the plaintiff of the S½ of lot 11-11, Wortmanville for \$200 to be paid in 8 equal quarterly instalments of \$25 each; and in that agreement nothing was payable to the defendant (a perfect stranger to the plaintiff) at the time of the making of the contract although possession was to be delivered forthwith to the plaintiff; and there was no express provision in the agreement for retaking possession and for a resale in the event of failure of the plaintiff to pay the instalments. The plaintiff well knew, when she made the agreement, that she would not have been able to pay the instalments, yet she entered into the agreement and took possession. If any one of the parties to this action can with any measure of propriety, be accused of plain, clear and deliberate fraud, that party is not the defendant.

In *Halsbury’s Laws of England*, 2nd (Hailsham) edition, vol. 7, p. 138, para. 188, Lord Atkin states: “It is a general principle of equity not to permit the Statute of Frauds to be used by a defendant to cover a fraudulent act where he is in the position of a trustee or quasi-trustee towards the plaintiff.” The defendant was never at any time a trustee of the S½ of the N½ of lot 11-11, Wortmanville for the plaintiff. Neither was she a quasi-trustee towards the plaintiff in respect of the land. The submission of counsel that this Court ought not to permit proviso (d) to section 3 (D) of the Civil Law of British Guiana Ordinance, cap. 7 to be set up by the defendant fails because (1) there is not even a scintilla of evidence that the defendant has been guilty of plain, clear or deliberate fraud in respect of her sale of the S½ of the N½ of lot 11-11, Wortmanville, to the plaintiff; and (2) the defendant was neither in the position of a trustee nor a quasi-trustee towards the plaintiff.

Shortly after Edith Solomon acquired title for the S½ of lot 11-11, Wortmanville on the 12th October, 1937, she erected a house on the land on the Princes Street side thereof. The plaintiff then resided, and still resides, at lot 18, Princes Street, two corners from the land of Edith Solomon. She took no steps to ascertain from the Deeds Registry whether Edith Solomon had obtained title for the S½ of lot 11-11, Wortmanville. Had she done so, the information would, on payment of a search fee of 24 cents, have been available to her that the transport was passed on the 12th October, 1937, and that it is registered as No. 1045 of 1937. And that information would have been given to her within less than a minute. She, however, elected to make no inquiries, and filed the writ in this action claiming specific perform-

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ance of a contract for the sale by the defendant to her of the S½ of lot 11-11, Wortmanville. That claim must, obviously, be refused. In the writ she, however, claims, in the alternative, the sum of \$350 as damages for breach by the defendant of that contract.

Counsel for the defendant has submitted that the written agreement of the 11th March, 1936, which satisfied the requirements of proviso (d) to section 3 (D) of the Civil Law of British Guiana Ordinance, cap 7, was rescinded by the parol agreement of September, 1937, which did not satisfy those requirements. In *Halsbury's Laws of England*, 2nd (Hailsham) edition vol. 7, p. 202, para. 281, Lord Atkin states: "Although a contract which is required by law to be made in writing cannot be varied by a new oral agreement, such a contract can be rescinded altogether by word of mouth, either expressly or by the parties entering into an oral contract entirely inconsistent with the written contract or, if not entirely inconsistent with it, inconsistent to an extent that goes to the very root of it. The discharge of a contract is a matter of intention, and if there is a clear intention to rescind, as distinguished from an intention to vary, the original contract will be rescinded". This statement is in full accord with the judgments of the House of Lords in *Morris v. Baron & Co.* (1918) A.C.1.

The evidence adduced by the plaintiff shows that there was an intention to rescind the written agreement of the 11th March, 1936, and this is supported by the subsequent conduct of the plaintiff who, from September, 1937, to November, 1941, took no steps to claim damages for breach of that agreement. The new agreement entered into in September, 1937, was not a mere variation of the written agreement of the 11th March, 1936. It varied with respect to (1) the land sold, (2) the purchase price paid, and (3) the time of payment of purchase price. Its only affinity to the written agreement of the 11th March, 1936, was that the vendor was the same, and the purchaser was the same.

The plaintiff could not pay \$200, for the S½ of lot 11-11, Wortmanville, and she was seeking a cheaper place. S½ of N½ of lot 11-11, Wortmanville, at \$90 and even this sum she was financially unable to pay at the time. She could not have intended to wish to continue as a purchaser of the S½ of lot 11-11, Wortmanville, and at the same time to be a purchaser of the S½ of the N½ of lot 11-11, Wortmanville. Further she knew that the S½ of lot 11-11 had been sold to Edith Solomon.

I am therefore of the opinion that the written agreement of the 11th March, 1936, which satisfied the requirements of proviso (d) to section 3 (D) of the Civil Law of British Guiana Ordinance, cap. 7, was rescinded by the parol agreement of September, 1937, which did not satisfy those requirements.

In *Halsbury's Laws of England*, 2nd (Hailsham) edition, vol. 29, p. 43, para. 49, note (t), Sir Leslie Scott, a Lord Justice of

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Appeal states: "The test appears to be whether the making of the new and unenforceable agreement was intended by the parties to be in accord and satisfaction of the old agreement. If it was, the old agreement has gone, and, the substituted agreement being unenforceable, neither of the parties is in a position to sue."

The parol agreement made in September, 1937, is unenforceable. It was, however, intended by the parties to be in accord and satisfaction of the written agreement of the 11th March, 1936. That written agreement has therefore gone, and neither the plaintiff nor the defendant can sue upon it.

It is unnecessary for me to determine whether, in the circumstances of this case, the plaintiff would have been entitled to damages for breach of contract, if the agreement of the 11th March, 1936, was not in fact rescinded in September, 1937, and by the agreement made in that month; or whether in such case the defendant would have been entitled to set-off the sum of \$35, the loss suffered by her on the resale, against the damages suffered by the plaintiff.

Had I found that the plaintiff was entitled to damages, such damages (including the return of the sum of \$25 paid on account of the purchase price) would not have exceeded \$40. The defendant would have been entitled to the general costs of the action except in so far, if at all, as they were, in the opinion of the Taxing Officer, increased by defending the plaintiff's claim for the return of the \$25 and for the reimbursement of the expenses paid to the man who dug the pits on the land, and to the boy who guided the rubbish carts on to the land. The plaintiff would have been entitled to no costs. She could have brought her claim in the Magistrate's Court, and, under section 63 of the Supreme Court of Judicature Ordinance, cap. 10, she would not have been entitled to costs.

In view of the conclusions at which I have arrived, the action of the plaintiff is dismissed, and judgment will be entered for the defendant with costs.

Judgment for defendant.

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

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F. G. FERREIRA, LTD., Plaintiffs,

v.

ISAAC AMERALLY, Defendant.

[1942. No. 36.—BERBICE.]

BEFORE DUKE, J. (Acting):

1943. MARCH 10, 11, 12, 25, 26; APRIL 10, 17, 21, 29.

Bailment—Chattel let for hire—Obligation of owner—To ascertain that chattel reasonably fit and suitable for purpose for which it was let out—Delivery of chattel to hirer—Implied warranty—Chattel as fit and suitable for that purpose as reasonable care and skill can make it—Owner not relieved from liability under implied warranty—By including in receipt for hire that hirer to be fully responsible for care and safe return in good order—By permitting hirer to make preliminary inspection of chattel.

Bailment—For reward—Degree of care required of bailee—That of ordinary prudent man—That he took reasonable and proper care for due security and proper delivery of bailment—Onus of proof on bailee.

Bailment—Obligation of hirer—To return chattel hired at expiration of term—Loss or damage to chattel while in possession of hirer—Prima facie presumption against hirer—Bailee liable if loss or damage caused by his failure to take care—Onus on hirer to prove that he was not guilty of negligence—Bailee not liable if loss or damage arises from causes not depending upon any want of skill or care on his part—Where hirer proved that he had taken every reasonable care of chattel—Hirer not required to prove how loss happened.

The owner of a chattel which he lets out for hire is under an obligation to ascertain that the chattel so let out by him is reasonably fit and suitable for the purpose for which it is expressly let out, and his delivery of it to the hirer amounts to an implied warranty that the chattel is in fact as fit and suitable for that purpose as reasonable care and skill can make it.

Hyman v. Nye (1881) 6 Q.B.D. 685, 686, and *Jones v. Page* (1867) 15 Law Times 619, 620 applied.

The plaintiffs let to the defendant a punt which needed caulking, and which was not reasonably fit for the particular purpose for which it was hired, namely, transporting building materials from Mara to New Amsterdam. The punt sprang a leak when it had gone about one-fourth of the journey, and the punt sank as a consequence thereof. The plaintiffs claimed from the defendant the return of the punt or its value.

Held, that the punt was lost owing to breach on the part of the plaintiffs of the implied warranty that the punt was reasonably fit for the particular purpose for which it was hired, and that the plaintiffs' claim must therefore fail.

The plaintiffs agreed to let a punt to the defendant. In the receipt for rent delivered by the plaintiffs to the defendant at the time of the agreement, the following words appeared: "The Hirer to be fully responsible for care and safe return of the punt in good order". At the time of the agreement, the plaintiffs had verbally told the defendant to take care of the punt and to deliver it back to them in good order

Held (1) that in order to justify the construction that the words in the receipt amount to an absolute engagement on the part of the defendant to deliver up, in any event, the punt at the end of the hiring or to pay its value, there must be clear and unequivocal language;

(2) that there was no such language in the receipt or in the negotiations which led up to it;

(3) that the implied warranty on the part of the plaintiffs that the punt was in fact as fit and suitable for the purposes of the hire as reasonable care and skill could make it, was neither modified nor excluded by reason of the words "The hirer to be fully responsible for care and safe return of the punt in good order."

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Schroder v. Ward (1863) 13 C.B.N.S. 410, and *Steel v. State Line Steamship Co.* (1877) L.R. 3 A.C. 72, 89, considered.

The owner of a chattel is not relieved from liability under his implied warranty that the chattel is reasonably fit for the particular purpose for which it was hired, merely by the fact that he has allowed the hirer a preliminary inspection of the chattel.

Jones v. Page (1867) 15 Law Times 619, 620 applied. A bailee for reward is only required to show the care of an ordinary prudent man, and is not liable for loss or damage to the goods bailed unless caused by the failure to show such care.

Searle v. Laverick (1874) L.R. 9 Q.B. 122 applied.

In a bailment for hire and reward, the bailee was bound to show that he took reasonable and proper care for due security and proper delivery of that bailment; the proof of that rested upon him.

Travers & Sons v. Cooper (1915) 1 K.B. 73, C.A. applied.

The hirer is under an obligation to return the chattel hired at the expiration of the agreed term. But if the performance of his contract to return the chattel becomes impossible because it has perished, this impossibility (if not arising from the fault of the hirer or from some risk which he has taken upon himself) excuses him.

The fact that the chattel bailed is lost or damaged while in the hirer's possession raises a *prima facie* presumption against him, and the onus is then on the hirer to prove that he was not guilty of negligence.

Travers & Sons v. Cooper (1915) 1 K.B. 73, C.A. applied.

The mere hiring of a chattel did not render the hirer liable for its loss, where such loss arises from causes not depending upon any want of skill or care on his part.

Faucett v. Smethurst (1915) 84 L.J.K.B. 473,476, applied. A punt was lost while in the possession of the defendant as a bailee for hire and reward. It was not lost as a result of causes depending upon any want of skill on his part. The bailors sued the bailee for the return of the punt.

Held, that the plaintiffs' claim for the return of the punt must fail.

Where the bailee proved that he had taken every reasonable care of the chattel bailed to him, he is not required, where the chattel was lost, to prove how the loss happened.

Bullen v. Swan Electric Engraving Co., Ltd. (1907) 23 T.L.R. 258, 259, C.A. applied.

The defendant affirmatively proved that he took reasonable and proper care for the due security and the proper delivery of a punt bailed to him by the plaintiffs for hire and reward; that there was no negligence on his part or on the part of any of his agents; and that the loss of the punt did not arise from any cause depending upon any want of skill or care on his part.

Held, that the defendant was not bound to prove what actually caused the loss of the punt.

ACTION by the plaintiffs, F. G. Ferreira, Limited, against the defendant, Isaac Amerally, claiming the return of a punt or its value \$760, the sum of \$100 as damages for wrongful detention; and the sum of \$142.50 as rent for the punt. The facts appear from the judgment.

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

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

Cur. adv. vult.

DUKE, J. (Acting): This is an action by the plaintiffs F. G. Ferreira, Limited, in which they claim from the defendant, Isaac Amerally, *firstly*, the delivery of 1 punt valued at \$760, the property of the plaintiffs, or alternatively, the value thereof, the said sum of \$760, the said punt having been wrongfully and illegally detained by the defendant from the plaintiffs on the 21st

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May, 1942; *secondly*, the sum of \$142.50 being the balance of an amount due and payable by the defendant to the plaintiffs for the hire of the said punt from the 11th day of March, 1942, to the 20th day of May, 1942, at the agreed rate of \$15 per week; and *thirdly*, the sum of \$100 as damages and pecuniary compensation for the wrongful and illegal detention of the said punt.

On the 11th March, 1942, the plaintiff's let a punt to the defendant at the rate of \$15 a week or part thereof. The defendant had purchased two 10-room ranges at Pln. Mara, east bank Berbice. He had dismantled them, and he required the punt for the purpose of transporting the materials from Pln. Mara to New Amsterdam. Before the plaintiffs agreed to let the punt, the defendant told them why he wanted to hire the punt.

In his defence, the defendant pleaded: (1) that, at the time of hiring, the plaintiffs warranted the punt to be seaworthy and in good condition and capable of transporting the defendant's building materials from Mara to New Amsterdam: alternatively, that such warranty was implied; and (2) that the punt was in an unseaworthy condition, and unfit for the purpose for which it was let by the plaintiffs. In their reply, the plaintiffs denied that there was any warranty, express or implied. They continued: "No assurances of any kind were furnished by the plaintiffs to the defendant who hired the punt at his own risk and after he had been told by the plaintiffs' agent to inspect and satisfy himself that the said punt was in every respect suitable for the purpose for which the defendant required it. The defendant did inspect the said punt prior to his entering into the said agreement with the plaintiffs to hire the said punt."

The plaintiffs owned three lumber punts,—Dot, Sam and Gay Adventure. The punt Dot was let to the Berbice Company, Limited, for an indefinite period. The plaintiffs used the punts Sam and Gay Adventure for the purpose of transporting lumber from Coomacka, and sand from Sand Hill, both up to the Berbice river, to the town of New Amsterdam. The plaintiffs carry on, *inter alia*, a saw-mill business.

John Greenock was employed by the plaintiffs, from time to time, as a punt captain. Punt captains are not salaried employees; they are paid by the trip. Mr. Clement Patrick Ferreira, the managing director of the plaintiffs, states that John Greenock is a capable punt captain.

During the first half of the month of February, 1942, the punt "Gay Adventure" with Greenock as second in charge, arrived at the plaintiffs' saw mill in New Amsterdam from Sandhills.

On the 23rd February, 1942, John Greenock was to have proceeded, on the Plaintiffs' business, up-river to Coomacka with the punts "Sam" and "Gay Adventure." He was, however, a day late. He went to the saw-mill flat of the plaintiffs on the

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24th February, 1942, when he found that the punts were missing.

The plaintiffs engaged the launch of Aloysius Cecil Pestano to search for the missing punts, and to tow them to the plaintiffs' saw-mill flat. The launch made about 6 trips from New Amsterdam for the purpose. John Greenock went with the launch on two occasions. The punts were found at Cotton Tree, and at No. 8 Village, West Coast, Berbice, high up on the mud-flat against the courida bush where they were taken by the incoming tides, and left by the receding tides, after they had drifted out to sea. On the 3rd March, 1942, the punts "Sam" and "Gay Adventure" were towed to the plaintiffs' saw-mill by Pestano's launch: John Greenock was not in either of the punts on the journey from West Coast, Berbice to New Amsterdam.

James Horatio Millington, a boat builder who gave evidence for the plaintiffs, deposed that if a punt got away from New Amsterdam for a week and was found on the mud-flat on the West Coast, Berbice, and the punt was brought by launch to the sawmill mud-flat in New Amsterdam, he would, on knowing the facts, make a careful examination of the punt and, if the punt needed repairs, he would repair it. John Arthur Sibley, an experienced master boat builder called on behalf of the plaintiffs, pointed out that in such circumstances, the sides of the punt might become weakened as a result of the punt coming into contact with the courida bush on the West Coast, Berbice, mud-flat. George Herbert Alleyne, an owner of punts for 40 years, who also gave evidence for the plaintiffs, deposed that, in the circumstances stated by Millington, he would, as a punt owner, have the punt examined. Joseph Read, called for the defence, gave evidence to the same effect.

Michael Jackson (the chief engineer of the plaintiffs' saw mill) deposed on oath that master boat builder John Arthur Sibley repaired the punts "Sam" and "Gay Adventure" after they were brought back to New Amsterdam from the West Coast, Berbice mud-flat; that the punt Gay Adventure was leaking a little and that it was overhauled by caulking; that the repairs were done at Sibley's workshop and not at the plaintiffs' sawmill; and that Sibley was paid for repairs done by him. This evidence tended to show that the punt "Gay Adventure" (which Jackson admits was leaking a little when it was brought back to the plaintiffs' mud-flat at New Amsterdam, from the West Coast, Berbice mud-flat) was taken to Sibley's yard where it could be properly examined by an experienced master boat builder with the object of determining what repairs were necessary, and that the necessary repairs were in fact done. Jackson, however, was only drawing upon his imagination. The punts "Sam" and "Gay Adventure" were not taken to Sibley's workshop; Sibley did not examine the punts; he did no repairs to them; and he was not paid for any repairs. Repairs were indeed done to the punt "Sam"; Jackson

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deposed that the punt which was let, and delivered to the defendant was the punt "Sam," but this is not so, the punt which was let, and delivered to the defendant, was "Gay Adventure". The repairs to the punt "Sam" were effected, not by Sibley, but by Millington; and Millington was never informed by the plaintiffs that the punt "Gay Adventure" had gone adrift from its moorings at the plaintiffs' saw-mill in New Amsterdam or that, a week later, the punt had been towed there by a launch from the West Coast Berbice mud-flat.

On the 11th March, 1942, the defendant paid to the plaintiffs the sum of \$7.50 on account of the hire of a punt; and Mr. Ferreira, on behalf of the plaintiffs, handed to the defendant a receipt in the following terms:

\$7.50

March 11th, 1942

Received from Isaac Ameerally-Alexander St. the sum of seven-50/ Dollars for an a/c Hire of punt: Terms \$15 per week or part thereof The Hirer to be fully responsible for care and safe return of the punt in good order.

F. G. FERREIRA, Ltd.,
per C. P. FERREIRA.

I have already pointed out that, before the plaintiffs agreed to let a punt to the defendant, they were informed by the defendant that the punt was required by him for the purpose of transporting from Pln. Mara, East Bank, Berbice to New Amsterdam, the materials from two ranges at Mara which the defendant had purchased and dismantled.

The plaintiffs were well aware that the defendant had no knowledge of punts, and they would not have agreed to let one of their punts to the defendant unless they were assured that the defendant would engage as his punt captain some one whom they considered to be capable. To this end, the managing director of the plaintiffs recommended to the defendant that he should engage John Greenock as punt captain, and the defendant acquiesced. Up to that time the defendant did not know that John Greenock was a punt captain.

From the evidence given by the managing director of the plaintiffs, it appears, that by reason of the default of John Greenock in not leaving New Amsterdam on the 23rd February, 1942, on the business of the plaintiffs, as instructed to do the plaintiffs incurred expenditure to the extent of \$87.47 as follows:

Paid for watching punts	... \$ 7 75
Paid for incidental labour	... 1 92
Paid A. C. Pestano for searching for 2 punts also touring from No. 8 flat to saw mills	... 40 00
Paid boatbuilder J. H. Millington	... 38 00
	<u>\$ 87.47</u>

These facts were not revealed by the plaintiffs to the defendant and, despite them, the plaintiffs considered him, and still consider him, to be a capable punt captain.

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Mr. Ferreira told the defendant to go to Zitman, an employee at the plaintiffs' saw-mill, and that Zitman would send for Greenock, He also told the defendant to show the receipt either to Jackson or Zitman at the saw-mill. I do not believe that Mr. Ferreira told the defendant that, on presentation of the receipt either Jackson or Zitman would allow him to go down on the sawmill mud-flat and inspect the punt. Mr. Ferreira was fully aware that the defendant knew nothing about punts. Further, no particular punt was agreed upon between Mr. Ferreira and the defendant.

The defendant says that the words "Hirer to be fully responsible for care and safe return of the punt in good order" appearing in the receipt were so inserted by Mr. Ferreira after he had explained to the defendant the necessity of sleeping in the punt in order to ensure that no one will cut the mooring ropes, because when a punt goes adrift delay and expense are caused. I have no doubt that the conversation as deposed to by the defendant did take place. The defendant is an intelligent man, and has a very good memory. Mr. Ferreira is a busy man, and his recollection of the circumstances surrounding the letting of a punt to the defendant on the 11th March, 1942, could not be expected to be as detailed or as complete as that of the defendant. Later in this judgment, I shall deal with the legal interpretation of the words "The Hirer to be fully responsible for care and safe return of the punt in good order."

The defendant proceeded to the plaintiffs' saw-mill, and he handed the receipt to Zitman who thereupon sent one Klass to call John Greenock. Arrangements were then made for Greenock to be captain of the punt, and he received \$4 on account of the sum of \$8 which he charged for his own services for the trip to Mara and back. Greenock told the defendant that another man was required, that he would secure a man whom the defendant would have to pay separately. It was arranged between the defendant and Greenock that the punt was to leave New Amsterdam for Mara on the night of the 11th March, 1942.

On the 11th March, 1942, Millington was effecting repairs to the punt "Sam." In examination-in-chief, he stated that Zitman called him off, in order that he might caulk the punt "Gay Adventure" which was required urgently, that he proceeded with the assistance of 2 men to caulk some leaks on that punt, that the work took 1 day to complete, that a launch towed away the punt "Gay Adventure" shortly after the caulking was completed, and that he was paid the sum of \$2 for his services. He was corroborated by Jackson to a certain extent. On the 14th March, 1942, Jackson handed the following order to Millington:

F.G. FERREIRA LTD.
14.3.1942.

Please advance J. H. Millington \$15.00 (fifteen dollars) on a/c of his job on punt.

M. N. JACKSON.

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It will be observed that Jackson did not use the word “punts” he used the word “punt”. On the 14th March, 1942, the punt “Gay Adventure” was already at Mara, so that if any work was indeed done by Millington with respect to that punt it was done prior to the 14th March, 1942. On the 21st March, 1942, Millington presented to the plaintiffs the following account, certified by Jackson, for payment, and he was duly paid on the same day.

		21/3/41 (sic)
Corking one punt	...	\$ 28 00
Extra work on punt		
3 Planks bolting 2 Beams	...	6 00
Corking one balahoo	...	2 00
Corking leaks on one punt	...	<u>2 00</u>
		39 00
Less cash received	...	<u>15 00</u>
		<u>23 00</u>

J. H. Millington

M. N. Jackson.

The receipt given by Millington was in the following terms:

Received from F. G. Ferreira Ltd. the sum of twenty-three dollars \$23.00 for repairs to punt.

J. H. Millington
21/3/42

2 cts.
Stamp
Cancelled.

The account is open to the construction that all the work was done in respect of one punt only, that there was originally a charge of \$28 for caulking, and that extra work was done on that punt amounting in the aggregate to \$10, and including the item of caulking leaks on one punt \$2. The receipt refers not to “punts,” but to “Punt.” When Jackson was examined by the Court, he stated quite definitely that all the items specified in Millington’s account which was certified by him Jackson related to one punt and to one punt only. In answer to the Court, Millington stated that when he received the order dated 14th March, 1942, from Jackson to obtain an advance of \$15 from the plaintiffs he had not yet done the work referred to by him in his account of 21st March, 1942, (wrongly dated 21st March, 1941, by him) as “Corking leaks on one punt \$2.00.” As the punt “Gay Adventure” was at Mara on the 14th March, 1942, and has never returned to New Amsterdam, Millington could not have been referring to that punt: indeed, he does not know the names of any of the punts of the plaintiffs.

The evidence called on behalf of the plaintiffs is so unsatisfactory that I am not satisfied therefrom that any repairs were effected to the punt “Gay Adventure”. The defendant saw no work being done, and he is supported by Joseph Read. On the whole evidence in the case I find that no repairs of any sort whatever were effected to the punt “Gay Adventure”.

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The punt did not leave on the night of the 11th March, 1942, as Greenock had not yet secured the services of another man.

On Thursday, the 12th March, 1942, the defendant, becoming anxious about the safety of his building materials which were at Mara, made arrangements with Tong Shun for him to tow the punt from the plaintiffs' saw-mill to Mara, and paid him \$8 therefor. He then informed Zitman that he would take the punt up by a launch as he hadn't seen Greenock or the man who was to assist him. Zitman told the defendant that the punt "Sam" was under repairs, and he pointed to the punt "Gay Adventure," which was not as high up on the flat as the punt "Sam," saying that the defendant could have the punt "Gay Adventure". The defendant observed 3 men working on the punt "Sam". He knew nothing at all about punts, he did not inspect the punt "Gay Adventure" with the view of determining whether it was seaworthy or not, and he was never told to do so. The defendant did not know that that punt had gone adrift, or that it had been on the West Coast, Berbice mud-flat for a week, or that it was brought back to the saw-mill flat from there by a launch on the 3rd March, 1942.

Later in the day, the defendant saw Greenock who was informed of the alteration in the defendant's plans. Greenock agreed to travel up to Mara that night, and the defendant told Greenock that he would get somebody to assist Greenock in bringing the punt back from Mara to New Amsterdam. In the mean time the punt "Gay Adventure" had been removed by the launch of Tong Shun from the plaintiffs' flat to the wood stelling, a quarter mile up the Berbice river. About 4 p.m. the defendant returned to the plaintiffs' saw-mill; the punt "Gay Adventure" had already been removed. The defendant met Thomas Ogleton, a punt captain, and made arrangements with him to be at Mara on the afternoon of Saturday the 14th March, 1942, to assist Greenock in bringing down the punt to New Amsterdam.

The punt "Gay Adventure" left New Amsterdam at 10 p.m. on Thursday the 12th March 1942, towed by the launch of Tong Shun. The defendant and Greenock travelled in the launch which arrived at Mara at 4 a.m. on Friday the 13th March, 1942. At about 6 a.m. Greenock took the punt on the Mara flat where it floated. This flat is the loading and the landing place for all punts at Mara. Greenock tied the punt to a breadnut tree. The punt had a balahoo or tender.

On Friday the 13th March, 1942, building materials of the defendant (which were then on the Mara public road) were transported to the Mara landing; this work was completed at about 4 p.m. The materials at the landing were bricks, scantlings, boards and galvanised sheets.

On Friday night, when the tide came in, the punt floated.

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The defendant, his brother-in-law Nazar Khan, Joseph Bacchus and Greenock slept on the punt that night.

The defendant alleged in his defence that the punt sprang a leak in the Berbice river while on its way from Mara to New Amsterdam, and that it eventually sank on the 17th March, 1942. The defendant claims that he suffered the loss of most of the building materials which were being conveyed in the punt and that he incurred expenses in recovering some of them and suffered great inconvenience. And the defendant counter-claimed \$644.64 as damages, as hereunder:—

PARTICULARS.

Materials lost and their value, to wit:—

62 galvanised sheets at 72 cents each ...	...	\$ 44.64
2,000 ft. second hand White Pine boards at 8 cents per foot ... ..	...	160.00
1,500 ft. White Pine scantling at 8 cents per foot	...	120.00
1,000 bricks at 8 cents each ... ..	...	80.00
32 plain galvanised sheets at 50 cents each ...	...	16.00
1 cart axle ... ..	...	8.00
Expenses incurred in dismantling range ...	...	100.00
Expenses incurred for salvaging other materials loaded in the said punt ...	...	<u>116.00</u>

Total ... \$ 644.64

In their reply, the plaintiffs put the damages in issue. They did not admit that the punt sprang a leak: and they pleaded (1) that if the punt did spring a leak, as alleged, the plaintiffs will contend that they are not legally liable to the defendant in law for any damage he may have suffered as a result thereof, the said leak being the result of some latent defect unknown to the plaintiffs and for any consequences arising therefrom the defendant made himself wholly responsible therefor, and (2) in the alternative, the punt was overloaded by the defendant's servants or agents as the result of which the said punt sank during the journey from Mara to New Amsterdam.

On Saturday the 14th March, 1942, the loading of the punt, started under the directions and the Superintendence of the captain of the punt, John Greenock, and with his active assistance. The captain directed that the bricks be put first in the punt and packed on the ceiling at the bottom of the punt. The bricks were passed from hand to hand, and were packed in the punt by Greenock himself. There was a board between the Mara landing and the punt. Greenock ordered that the scantlings be loaded next, and that they be placed on top of the bricks: this was done. Work ceased at about 4 p. m. when all the bricks (except broken bricks) and all the scantlings had been put aboard the punt. After loading had stopped for the day, Thomas Ogleton, who was to assist Captain Greenock in bringing the punt to New Amsterdam, arrived at Mara.

When the tide came in on Saturday night the 14th March,

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1942, the punt floated. Greenock, Bacchus and the defendant slept aboard the punt that night. Khan had left Mara at about 11 a. m. that day, and Ogleton slept ashore.

On Saturday the 15th March, 1942, the loading of the punt was resumed at about 8 a. m. and it was completed at about 4.30. p. m. Captain Greenock directed that the boards be put in, and these were placed over the scantlings: he then directed that the zinc sheets be brought in, and these were packed over the boards. After the zinc sheets were put in the punt, there remained on the landing for transportation to New Amsterdam, 2 cart wheels, a cart axle, some broken bricks and some boards which were under the bricks. Greenock said "Dont bring anything more. Only bring cart wheels and cart axle, nothing more." The cart wheel and the cart axle were put on top of the galvanised sheets. Nothing else was put in the punt.

It is part of the duty of a punt captain to "trim" and to "stow" the punt of which he is in charge, and to direct where the cargo is to be placed. Greenock stated that nobody can dictate to him about that, Mr. Ferreira stated that John Greenock in addition to being a capable punt captain, has commonsense. Greenock stated that an owner of a punt cannot control him in respect of the performance of his duties as punt captain: and, further, that he would not risk his life for anybody, not for any money. The plaintiffs have employed Greenock as a punt captain, subsequent to the loss of the punt "Gay Adventure."

The punt "Gay Adventure" was loaded, and the cargo was stowed in the punt, in accordance with, and not contrary to, the directions of Captain Greenock.

At about 9 a.m. on Sunday, the 15th March, 1942, Captain Greenock sent his assistant, Ogleton, to cut a spar; at that time the boards were being loaded on the punt. When he returned in the late afternoon, the 2 cart wheels; the cart axle and the zinc sheets were already in the punt, and the punt was ready to leave.

Mara is 25 miles up river from New Amsterdam. At high tide, the punt floated, and it was pushed out with a pole at about 7 p.m. on Sunday, the 15th March, 1942.

The punt, which had a depth of 6 feet 6 inches, slid into the river, and the water of the river was then 2 feet 6 inches below the gunwale of the punt. The punt was not overloaded.

Greenock, Ogleton, Bacchus and the defendant were in the punt. Greenock and Ogleton were at the oars. When the punt left Mara the tide was just starting to fall, and the river was smooth. Greenock stated that, at nights, the river at Mara is not rough, and that it is only rough in the day time.

When the punt reached opposite Plegt Anker on the east bank of the Berbice River, 7 miles from Mara, there was a noise as of water coming from the seams of the punt. Investigation was

made by Greenock and by Ogleton, and it was ascertained that water was indeed coming into the punt through the seams. Bailing was done, but the water in the punt continued to increase in volume, and came in through other seams in the sides of the punt. Cargo was shifted by Greenock and Ogleton in order that they might locate the leaks, and emergency measures were tried to stop the leaks, but these measures proved to be unavailing. The water was coming into the punt at points below the level of the water in the Berbice river. Things became so bad that Captain Greenock decided to abandon the punt when it was in the middle of the river, opposite Beyerstein on the west bank.

At about 5 minutes to midnight, on Sunday, the 15th March, 1942, Greenock, Ogleton, Bacchus and the defendant went into the tender or balahoo attached to the punt, and they proceeded to the east bank of the Berbice river. Bacchus and the defendant landed at a platform called Rossfield platform on the east bank of Gangoo Creek. They walked to Lighttown, East Bank, Berbice. Bacchus remained at Lighttown, while the defendant borrowed a bicycle and rode to Kortberaad where he saw Nazar Khan. The two of them then proceeded to New Amsterdam, and arrived there at about 2.30 a.m. on Monday, the 16th March, 1942.

Captain Greenock and Ogleton (who is a punt captain with 31 years' river experience) returned to where the punt was and followed it. When the tide washed, the punt was taken back to a point opposite Mara, but it was not possible to pull the punt back to the landing.

When the defendant reached New Amsterdam, he immediately went to the house of Zitman; he awakened him from his sleep and he made a report. The defendant told him that he was going to Mr. Ferreira's house, but Zitman told him that it was no use going there, as Mr. Ferreira was at Coomacka, high up the Berbice river. The defendant, in the early hours of Monday morning, the 16th March, 1942, made unsuccessful efforts to hire a launch to go up river to tow the punt to New Amsterdam: Pestano's launch was up river, and Phillips' launch was going up river on its owner's business.

After daybreak, the defendant went to Sibley and obtained the loan of 4 pieces of wire rope. At about 10 am. the defendant and Khan joined the launch of Phillips, and proceeded up river: the defendant had with him the wire rope which he had obtained from Sibley, and a letter to the captain of Pestano's launch which he had obtained from Pestano. Phillips' launch met the punt in the vicinity of Beyerstein, west bank Berbice. Phillips' launch was unable to assist in mooring the punt. The wire rope was left with Greenock and Ogleton who were in the tender at the side of the punt.

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The defendant continued up river in Phillips' launch. Pestano's launch, which was coming down river to New Amsterdam, stopped Khan and the defendant transferred to Pestano's launch which proceeded on its journey down river. At Beyerstein they met the punt coming up river. The pump of Pestano's launch was broken, and the launch was unable to tow the punt to New Amsterdam. The launch was, however, able to manoeuvre the punt so that Greenock and Ogleton were able to moor it with the aid of 2 pieces of the wire rope tied to a cork wood tree.

At that time the punt was full of water. The middle of the punt was about 6 inches from the water: the bow and stern of the punt were a little higher than the gunwale.

On Monday night the 16th March, 1942, Khan and the defendant proceeded to New Amsterdam in Pestano's launch. Greenock and Ogleton remained with the punt at Beyerstein.

The defendant arrived in New Amsterdam at about 7 o'clock on the Monday night. On Tuesday, the 17th March, work was being done the whole day on Pestano's launch, and the defendant waited the whole day in Pestano's workshop. On that morning Captain Greenock and Ogleton, being short of rations, had perforce to leave the punt; they went to Lighttown in the punt tender and, then walked to New Amsterdam. They met the defendant in Pestano's workshop.

On Wednesday morning the 18th March, the pump of the launch was tried, but it didn't work. Ogleton and Khan went up-river in a boat. Greenock and the defendant remained in Pestano's workshop.

Before Ogleton and Khan arrived at the spot where the punt had been tied to the cork-wood tree by means of wire rope, boards were observed drifting away. On arrival at the spot at about 4 p.m. it was observed that the punt had gone down, and that only the wire rope could be seen.

On Wednesday evening Greenock, Cecil Amerally, and the defendant left New Amsterdam at about 7 p.m. in Pestano's launch. At about the same time Ogleton and Khan were trying to float the raft made by the materials washed off the punt. The launch arrived at Beyerstein at about 9 p.m. The defendant could not see the punt; he saw the tree to which it had been tied, and he saw the raft. Greenock, being a man of sound common sense, realised that it was too late to save the punt, and he returned to New Amsterdam in the launch with Cecil Amerally. Ogleton, Khan and the defendant remained at Beyerstein and went ashore.

On Thursday morning the 19th March, 1942, the raft of materials which the defendant had noticed the previous night, was by the river bank. The raft consisted of 2 cart wheels and 2 pieces of wire rope, galvanised sheets and boards. The sheets and boards were only part of what was loaded into the punt at Mara.

The boards were at the bottom; the galvanised sheets were over the boards, and the cart wheels and wire rope were over the sheets. The materials which formed the raft were taken ashore.

Ogleton took the punt tender and went about picking up materials which be brought ashore. In the afternoon, the defendant observed that the 2 wire ropes were tied stiff to the corkwood tree, but he could not see the punt. Cecil Amerally returned with a boat and a pole 20 feet long. The pole was not long enough to reach the punt.

On Thursday, the 19th March, 1942, Captain Greenock made a report to Zitman as to the accident to the punt. That report must have been very inaccurate, as the managing director of the plaintiffs stated that he was informed that the punt had sunk at Mara, and he further stated that he didn't know that the punt was on the west bank of the Berbice River.

Ogleton and Khan continued to pick up materials, while the defendant left Beyerstein to seek a boat to transport the salvaged materials to New Amsterdam. Bacchus went up to Beyerstein to assist in picking up materials.

The defendant could not obtain a boat, neither in Islington nor in New Amsterdam. On the 21st March, 1942, the defendant arranged to hire Pestano's punt at the rate of \$3 a day and he paid Pestano the sum of \$4 by way of advance. On the same day he paid Pestano the sum of \$9 for his services in respect of his launch.

The defendant made various trips to Beyerstein and back to New Amsterdam.

It was not until the 30th or the 31st March, 1942, that Pestano's punt, towed by a launch, removed some of the salvaged materials from Beyerstein. Pestano's punt is smaller than the punt "Gay Adventure."

Before any materials of the defendant were loaded into Pestano's punt there were in the punt, 1,000 pieces of wallaba wood belonging to Pestano and 2,500 pieces of wallaba wood (said to be half of a punt load) belonging to Daljit. The salvaged materials brought down by Pestano's punt occupied a very small percentage of the cargo-carrying space of the punt. Pestano said in his evidence that he had to put up stanchions 6 feet high in order to bring down to New Amsterdam the part of the salvaged materials that he did. The defendant says that the stays on the punt were two feet from the gunwale. Pestano is not an accurate witness, and I accept the testimony of the defendant who is both truthful and accurate.

In Pestano's punt zinc sheets and 2 cart wheels were packed on top of the punt; and in the punt itself there were boards and scantlings' mixed.

The materials left at Beyerstein were subsequently brought to New Amsterdam in a sloop. The expenses incurred by the

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defendant in salvaging the materials at Beyerstein, in transporting them to New Amsterdam, and in seeking to save the punt and its cargo, as proved at the trial, amount to the sum of \$77.40 as follows:—

Paid Ogleton for services in salvaging materials		\$ 9 00
" T. Hutson for services	... ..	1 20
" A. Prince " "	... ..	2 00
" NazarKhan " "	... ..	8 00
" Pestano for punt hire	... ..	4 00
" C. Brown for services	... ..	1 00
" C. Brown " "	... ..	2 00
" C. Brown and others for services in load- ing punt at Beyerstein	... ..	7 20
" C. Harris for services in transporting materials from Beyerstein to Stanleytown, New Amsterdam	... ..	18 00
" Sibley for use of wire rope, and for wire rope lost	... ..	16 00
" Pestano for launch hire	... ..	<u>9 00</u>
Total	... ..	<u>\$77 40</u>

The defendant has proved the loss of the materials set forth in the counter-claim. There is no evidence in contradiction. Counsel for the plaintiffs has asked me to find that all, or nearly all, of the materials were salvaged, but I can make no such finding on the evidence adduced in this case.

On the 23rd March, 1942, the plaintiffs' solicitor wrote to the defendant a letter of demand claiming the sum of \$775 being *firstly*, the sum of \$760 as damages and pecuniary compensation for that on the 15th March, 1942, though the carelessness and negligence of himself and/or his servants or agents he caused the plaintiffs' punt to sink at Mara, Berbice River and *secondly*, the sum of \$15 as rental due and payable for the said punt. The punt did not sink at Mara, and when water commenced to enter the punt through leaks in the seams, the punt was at Plegt Anker, and not at Mara. This letter was delivered to the defendant's wife in New Amsterdam, and while it was being taken up to Beyerstein where the defendant then was, it was lost.

On Saturday the 4th April, 1942 the defendant went to the managing director of the plaintiffs to explain about the punt, but Mr. Ferreira did not want to hear him. He told him that the plaintiff's could not lose their punt and that the defendant would have to deliver their punt to them. Had Mr. Ferreira been disposed to listen with an attentive ear to what the defendant was seeking to say, he would at least have known that the punt did not sink at Mara, and further, that the defendant was claiming that he had lost a considerable quantity of building materials which were being conveyed to New Amsterdam in the punt "Gay Adventure."

On the 14th May, 1942 the solicitor for the plaintiffs wrote a letter to the defendant determining the contract of hire of the punt

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which was entered into on the 11th March, 1942, and demanding, within seven days, delivery of the punt and payment of the sum of \$127.50 being amount due for hire.

On the 22nd May, 1942, the plaintiff's filed the specially indorsed writ in this action, returnable for the 8th of June, 1942. On the 3rd June, 1942, the defendant swore to his affidavit of defence, and on the 8th June, 1942, he was granted leave to defend.

On the evidence adduced on behalf of the plaintiffs and of the defendant I find:

- (1) that the punt "Gay Adventure" got adrift from its moorings at the plaintiffs' saw mill in New Amsterdam on the 23rd February, 1942, and was subsequently found on a mudflat on the West Coast, Berbice, from which it was removed and towed by the launch of Aloysius Cecil Pestano to the flat of the plaintiffs' saw-mill, on the 3rd March, 1942;
- (2) that, in those circumstances, any prudent punt-owner would have caused an examination to be made, by a boat-builder, of the punt, with the object of ascertaining whether (and, if so, what) repairs to the punt were necessary;
- (3) that no such examination was made;
- (4) that no repairs whatever were effected by the plaintiffs to the punt on or after the 3rd March, 1942;
- (5) that on the 12th March, 1942, the punt "Gay Adventure" was leaking and needed caulking;
- (6) that the plaintiffs never informed the defendant of any of the foregoing facts; and the defendant did not know of any of them at the time of the making of the contract of hire on the 11th March, 1942, nor at the time of the departure of the punt "Gay Adventure" from New Amsterdam on the 12th March, 1942, nor at the time of the departure of the said punt from Mara, on the 15th March, 1942;
- (7) that the defendant had purchased two 10-room ranges at Plantation Mara, had dismantled them, and wished to hire a punt for the purpose of transporting the building materials from Mara to New Amsterdam;
- (8) that the defendant told the plaintiffs the reason why he wished to hire a punt;
- (9) that the plaintiffs agreed to let a punt to the defendant;
- (10) that at all material times the defendant, as the plaintiffs well knew nothing about punts;
- (11) that the plaintiffs would not have agreed to let one of their punts to the defendant unless they were assured that the defendant would engage as his punt captain some one whom they considered to be capable;
- (12) that the plaintiffs recommended to the defendant that he should engage John Greenock (whom the defendant did not know as a punt captain), and the defendant agreed;
- (13) that John Greenock is admitted by the plaintiffs to be a capable punt captain, and was employed by the plaintiffs as a punt captain, subsequent to the loss of the "Gay Adventure;"
- (14) that no particular punt was mentioned on the 11th March, 1942, to the defendant by the managing director of the plaintiffs, that detail being left to be determined by Jackson or Zitman, employees at the plaintiffs' saw-mill;
- (15) that the defendant was not told to go and inspect any punt;
- (16) that the defendant engaged John Greenock as punt-captain;
- (17) that on the 12th March, 1942, Zitman pointing to the punt "Gay Adventure," told the defendant that he could have that punt;
- (18) that the defendant never inspected the punt;
- (19) that the flat at Mara where the punt "Gay Adventure" was loaded, was the usual place where punts moored at Mara for the purpose of loading and discharging cargo;
- (20) that on Friday, the 13th March, 1942, building materials were transported from the public road to the Mara landing;

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- (21) that the loading of the punt "Gay Adventure" did not commence until Saturday, the 14th March, 1942, on which date the bricks and the scantlings were placed in the punt;
- (22) that Thomas Ogleton did not arrive at Mara until the late afternoon of Saturday, the 14th March, 1942, after loading had ceased for the day;
- (23) that Thomas Ogleton had nothing whatever to do with the loading of the punt "Gay Adventure";
- (24) that Thomas Ogleton was employed as an assistant to Captain John Greenock, and he functioned as such;
- (25) that on Sunday morning the 15th March, 1942, Captain Greenock sent Ogleton to cut a spar;
- (26) that on Sunday, the 15th March, 1942, loading of the punt "Gay Adventure" was resumed, and boards, galvanised sheets, and 2 cart wheels and an axle were placed in the punt;
- (27) that no more articles were placed in the punt, subsequent to the 2 cart wheels and the axle;
- (28) that, on the instructions of Captain John Greenock and in compliance therewith, a quantity of broken bricks and some boards which were under the bricks, were not loaded in the punt "Gay Adventure";
- (29) that when Thomas Ogleton returned to Mara landing in the late afternoon of Sunday, the 15th March, 1942, the loading of the punt had already been concluded;
- (30) that neither the defendant nor Ogleton at any time usurped, or attempted to discharge, the duties or functions of punt captain of the punt "Gay Adventure";
- (31) that the punt "Gay Adventure" was loaded at Mara, and the cargo was stowed in the punt, in accordance with and not contrary to, the directions of Captain John Greenock;
- (32) that John Greenock actively exercised and performed the duties of captain of the punt "Gay Adventure" from the night of Thursday, the 12th March, 1942, when the punt left New Amsterdam for Mara up to the night of Wednesday, the 18th March, 1942, at Beyerstein when he saw that the punt "Gay Adventure" was completely covered by mud and water;
- (33) that on Friday night, the 13th March, 1942, and on Saturday night, the 14th March, 1942, the punt "Gay Adventure" floated on the Mara mud-flat when the tide came in;
- (34) that the punt "Gay Adventure" floated when it went down into the Berbice river on the night of Sunday, the 15th March, 1942;
- (35) that water did not "engulf" the punt when it entered the Berbice river on the night of Sunday, the 15th March, 1942;
- (36) that when the punt reached Plegt Anker, 7 miles from Mara, water started to come into the punt, through seams in the sides of the punt below the level of the water of the river;
- (37) that all efforts made by the defendant and/or his agents to bale out the water or to stop the leaks proved futile;
- (38) that it was not possible to stop the leaks while the punt was in the river;
- (39) that it was not possible to get the punt "Gay Adventure" in such a place that the leaks might be properly looked after;
- (40) that the defendant and his agents acted reasonably in leaving the punt;
- (41) that the defendant acted with diligence in seeking to obtain a launch to tow the punt to New Amsterdam or other place where the leaks could be properly attended to;
- (42) that although the defendant and his agents left the punt, the punt remained under the watchful care of Captain Greenock and Ogleton;
- (43) that it was through no fault of the defendant that his efforts to obtain a launch to proceed early on Monday morning the 16th March, 1942, up the Berbice river to tow the punt "Gay Adventure" to New Amsterdam, failed;
- (44) that it was through no fault of the defendant that Pestano's launch which had a broken pump was unable to tow the punt "Gay Adventure" from Beyerstein on Monday afternoon, 16th March, 1942;
- (45) that the defendant endeavoured to preserve the punt and its cargo by getting Pestano's launch to manoeuvre the punt in such a position that Captain Greenock and Ogleton were able to moor it with 2 pieces of wire rope tied to a corkwood tree;

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- (46) that on Monday afternoon the 16th March, 1942, the punt "Gay Adventure" was so moored; the punt was full of water, the middle of the punt was about 6 inches from the water, and the bow and stern were a little higher than the gunwale;
- (47) that Captain Greenock and Ogleton were left in charge of the punt
- (48) that it was not unreasonable for Captain Greenock and Ogleton to leave the punt on Tuesday morning the 17th March, 1942, as they were short of rations;
- (49) that the repair of the pump of Pestano's launch was not completed on Tuesday the 17th March, 1942;
- (50) that Ogleton and Nazar Khan went to Beyerstein, on Wednesday the 18th March, 1942;
- (51) that when they arrived there, the punt had gone down, but it was still tied to the cork-wood tree;
- (52) that, had Captain Greenock and Ogleton not left Beyerstein for New Amsterdam, they could not have prevented the punt "Gay Adventure" from sinking;
- (53) that when Pestano's launch arrived at Beyerstein on Wednesday evening the 18th March, 1942, it was impossible to tow the punt to New Amsterdam;
- (54) that the defendant did everything that was in his power to save the punt with the cargo;
- (55) that, after the punt had definitely sunk, the defendant did his utmost to recover as much of the cargo as was possible;
- (56) that the value of the materials lost by the defendant was \$321.48, three-fourths of the sum of \$428.64, the value placed upon them by the defendant; and
- (57) that the expenses incurred for salvaging other materials loaded in the punt and for trying to save the punt amounted to the sum of \$77.40.

The law is well settled that the owner of a chattel which he lets out for hire is under an obligation to ascertain that the chattel so let out by him is reasonably fit and suitable for the purpose for which it is expressly let out and that his delivery of it to the hirer amounts to an implied warranty that the chattel is in fact as fit and suitable for that purpose as reasonable care and skill can make it: see *Hyman v. Nye* (1881) 6 Q. B. D. 685, 686. It makes no difference whether the obligation is considered as arising *ex contractu*, or whether the obligation may properly be treated as being founded on tort. The extent of the obligation is the same in either case. For instance, in *Jones v. Page* (1867) 15 Law Times 619, 620, Kelly, C.B. said:

It is *negligence* in any one to let out to hire a carriage to convey a number of people or a quantity of merchandise without *previously* taking care, before lives are jeopardised or property endangered, to ascertain that the carriage is reasonably safe.

The plaintiffs were therefore under an obligation to ascertain, prior to the delivery by them to the defendant of the punt let to him, that the punt was as fit and suitable for the purpose of transporting building materials from Mara to New Amsterdam as reasonable care and skill could make it; and there was an implied warranty to that effect.

The punt which was let to the defendant was the "Gay Adventure". On the 23rd February, 1942, this punt got adrift from its moorings on the flat of the plaintiffs' saw-mill in New Amsterdam, it was subsequently found on the mud-flat on the West Coast, Berbice, and on the 3rd March, 1942, it was towed by a launch to

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the flat of the plaintiffs' saw-mill. According to the evidence (which I accept), in those circumstances, an examination should be made by a boatbuilder with the object of ascertaining whether (and if so what) repairs to the punt were necessary. No such examination was made, and no repairs were effected on or after the 3rd March, 1942. On the 12th March, 1942, the plaintiffs, who had agreed on the 11th March, 1942, to let a punt to the defendant for the purpose of transporting building materials from Mara to New Amsterdam, delivered the punt "Gay Adventure" to the defendant for the purpose of the hire. The plaintiffs, therefore, failed to fulfil their obligation to ascertain, prior to the delivery by them to the defendant of the punt "Gay Adventure" let by them to the defendant, that the punt was as fit and suitable for the purpose of transporting build-ins; materials from Mara to New Amsterdam as reasonable care and skill could make it: and they committed a breach of their implied warranty to that effect.

Further, the plaintiffs, through their agent Jackson the chief engineer at their saw-mill, knew that the punt "Gay Adventure" was leaking and needed caulking. No such work was done to the punt. A punt that needs caulking is liable to spring a leak, with probable serious consequences to the cargo. The plaintiffs well knew of this. They let and delivered to the defendant a punt which they knew was not reasonably fit and suitable for the purpose of the hire, namely, of transporting building materials from Mara to New Amsterdam, a distance by river of 25 miles. They therefore committed a breach of the implied warranty cast upon them as being the person who let the punt.

The words "The Hirer to be fully responsible for care and safe return of the punt in good order" which appear in the receipt given to the defendant on the 11th March, 1942, by Mr. Ferreira on behalf of the plaintiffs, merely express in writing what Mr. Ferreira told the defendant verbally. In his evidence Mr. Ferreira stated: "I told him (defendant) to take care of punt and deliver it back to me in good order". The words in the receipt do not amount to an absolute engagement on the part of the defendant to deliver up, in any event, the punt at the end of the hiring, or to pay its value: compare *Schroder v. Ward* (1863) 13 C.B.N.S 410. The words in the receipt do not mean that the plaintiffs stipulated with the defendant as follows: "We will let you the punt for the purpose of transporting building materials from Mara to New Amsterdam, but we shall not be responsible at all, though our punt is ever so unfit for the purpose. If you put your goods on board our rotten punt, that is your look out: you shall not have any remedy against us if you do". In order to justify such a construction, clear and unequivocal language must

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be used, and there is no such language in the receipt or in the negotiations which led up to it: compare *Steel v. State Line Steamship Co.* (1877) L.R. 3 A.C. 72, 89, per Lord Blackburn.

The implied warranty on the part of the plaintiffs is therefore neither modified nor excluded by reason of the words "The Hirer to be fully responsible for care and safe return of the punt in good order" appearing in the receipt for hire issued by the plaintiffs to the defendant on the 11th March, 1942.

The defendant did not inspect the punt "Gay Adventure" prior to the issue by the plaintiffs of that receipt, neither did he inspect it prior to its delivery to him on the 12th March, 1942. Even if the defendant had been allowed by the plaintiffs to have a preliminary inspection of the punt "Gay Adventure" (and he was not so allowed), the law is well settled that the owner of a chattel is not relieved from liability under his implied warranty that the chattel is reasonably fit for the particular purpose for which it was hired, merely by the fact that he has allowed the hirer a preliminary inspection of the chattel. In *Jones v. Page* (supra), Kelly, C.B. stated that, if the rule of law were otherwise, it would be a dangerous doctrine.

In *Searle v. Laverick* (1874) L.R. 9 Q.B. 122, it was held that a bailee for reward is only required to show the care of an ordinary prudent man, and is not liable for loss or damage to the goods bailed unless caused by the failure to show such care. The fact, however, that the chattel bailed is lost or injured whilst in the hirer's possession raises a *prima facie* presumption against him: see *Halsbury's Laws of England*, 2nd (Hailsham) edition, volume 1, p. 759, para. 1245, note (s). The onus is on the hirer to prove that he was not guilty of negligence. In *Travers & Sons v. Cooper* (1915; 1 K. B. 73, C. A., Buckley, L. J. said:

Here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for due security and proper delivery of that bailment; the proof of that rested upon him.

In *Faucett v. Smethurst* (1915) 84 L. J. K. B. 473, 476, Atkin, J., stated that the mere hiring of a chattel did not render the hirer liable for its loss where such loss arises from causes not depending upon any want of skill or care on his part. In *Bullen v. Swan Electric Engraving Co., Ltd.* (1907) 23 T. L. R. 258, 259, C. A., Sir Gorell Barnes stated that:

It was enhancing the burden of proof to an absurd extent if he (the bailee) had to prove not only that he had taken every reasonable care but also that he knew how the loss happened.

The defendant has affirmatively proved that he took reasonable and proper care for the due security and the proper delivery of the punt "Gay Adventure" bailed to him by the plaintiffs for hire and reward; that there was no negligence on his part or on the part of any of his agents; and that the loss of the punt did not arise from any cause depending upon any want of skill or care

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on his part. In these circumstances the defendant was not bound to prove what actually caused the loss of the punt. In *Halsbury's Laws of England*, 2nd (Hailsham) edition, vol. 1, p. 760, para. 1246 it is stated that:

The hirer must reborn the chattel hired at the expiration of the agreed term. But if the performance of his contract to return the chattel becomes impossible because it has perished, this impossibility (if not arising from the fault of the hirer or from some risk which he has taken upon himself) excuses him.

The punt "Gay Adventure" was lost while in the possession of the defendant as a bailee for hire and reward; it was not lost as a result of causes depending upon any want of skill or care on his part; and the plaintiffs' claim for the return of the punt must therefore necessarily fail.

In the course of establishing that he was not negligent as a bailee of the punt, the defendant proved that the punt "Gay Adventure" needed caulking, that the punt was not reasonably fit for the particular purpose for which it was hired, namely, transporting building materials from Mara to New Amsterdam, that the punt sprang a leak when it had gone about one-fourth of the journey, and that the punt sank as a consequence thereof. The plaintiffs were under a legal obligation to deliver to the defendant a punt which was reasonably fit for the particular purpose for which it was hired, they failed to do so, and the punt sank because it was not reasonably fit for the purpose for which it was hired. The loss must therefore fall on the owners of the punt, the plaintiffs in this action. The plaintiffs' claim for the return of the punt "Gay Adventure" which was lost owing to the breach on the part of the plaintiffs of the implied warranty that the punt was reasonably fit for the particular purpose for which it was hired, must therefore fail, on this ground also.

The question of damages for detention does not therefore arise.

The punt "Gay Adventure" was delivered to the defendant on the 12th March, 1942; it sank on the 17th or 18th March, 1942; and on the 19th March, 1942, the plaintiffs were appraised of the loss. The plaintiffs have however, claimed rent for 10 weeks. The plaintiffs are clearly not entitled to rent for more than 1 week, inasmuch as the punt sank through the default of the plaintiffs in delivering to the defendant a punt which was not reasonably fit for the particular purpose for which it was hired. Later in this judgment, I shall consider the question as to whether the plaintiff's are entitled to the sum of \$7.50, balance due for one week's rent.

As a direct result of the plaintiffs' breach of the implied warranty, the defendant has suffered loss and has incurred expenses. The materials lost were second hand materials, and I have estimated their value as being three-fourths of the values placed upon them by the defendant. The value of the materials lost is therefore \$321.48. The defendant cannot recover from the

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plaintiffs the expenses incurred in dismantling the ranges; those expenses related not only to the materials lost, but also to the materials recovered, and to the materials left at the Mara landing; and, further, the defendant is recovering in these proceedings the value of the materials which he has lost. The expenses incurred by the defendant in consequence of the punt springing a leak amount to the sum of \$77.40. The damages proved by the defendant are therefore \$398.88. The punt was let at the rate of \$15 per week or part thereof. The sum of \$7.50 was paid on account, leaving the sum of \$7.50 due to the plaintiffs in respect of the first week or part thereof. The damages recoverable by the defendant should therefore be reduced by the sum of \$7.50: the net amount so recoverable is therefore \$391.38.

On the plaintiffs' claim there will therefore be judgment for the defendant with costs; and on the defendant's counterclaim there will be judgment for the defendant against the plaintiffs for the sum of \$391.38 with costs and I certify for counsel.

Judgment for defendant on claim and counter-claim.

Solicitors: V. D. P. Woolford; E. A. Luckhoo, O.B.E.

SUNICHERY v. SOOKNANNAN

SUNICHERY, Appellant (Defendant),

v.

SOOKNANNAN, Respondent (Plaintiff).

[1942. No. 349.—DEMERARA].

BEFORE FULL COURT: VERITY, C.J., AND FRETZ, J.

1943. MARCH 31; APRIL 30.

Executor and administrator—Estate of a deceased person—Claim against—Corroboration—Required as a rule of prudence, not as a rule of law.

Evidence—Corroboration—What is.

Trust—Civil Law of British Guiana Ordinance, cap 7 sec. 3, proviso (d)—Extends to creation or declaration by parties only—Not to creation or operation of resulting, implied, presumed or constructive trusts, or to trusts created by operation of law.

Trust—Property purchased in name of stranger—Resulting trust—Presumed in favour of person who paid purchase money as purchaser.

Statute of Frauds—Land conveyed to one person—Claimed by another person—Competent for that person—To prove by parol evidence—That it was so conveyed upon trust for claimant—Payment of purchase price even though otherwise expressed in deed.

Statute of Frauds—Land conveyed to person as trustee who knows it was conveyed—Fraud on his part—To deny fraud and claim land himself.

Transport—Immovable property—Full and absolute title to—Vested in a person as trustee—Held by registered owner in trust—Deeds Registry Ordinance, cap. 177, s. 21.

Trust—Of immovable property—Beneficiary in possession for 30 years—Trust not repudiated, and no attempt to dispossess beneficiary—No effort made by beneficiary for 30 years to acquire legal title—Delay of beneficiary in so doing—Holder of legal title not prejudiced in any way—Beneficiary not disentitled to equitable relief.

Immovable property—Transportee—Already dead—When attorney accepted transport on his behalf—Defect in title—Deeds Registry Ordinance, cap. 177, s. 21 (2)—Covered by.

It is a rule of prudence, rather than law, that a claim against a deceased person cannot be maintained upon the unsupported testimony of the claimant.

The respondent deposed that he gave K., now deceased, the sum of \$60 to purchase a parcel of land at Woodley Park. On behalf of the respondent it was proved, and the proof was not confined to the respondent's own testimony, that K., did in fact purchase three parcels of land at Woodley Park (lots 2, 3 and 4) each for the sum of \$60; that he retained two only (lots 2, 3) in his own possession; that he allowed the respondent to enter into possession of the third (lot 4); and that the respondent remained in possession thereof throughout the life-time of K.

Held, that there was to be found in these circumstances sufficient corroboration to justify the trial judge in accepting the respondent's evidence if he believed it to be true.

Proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, cap. 7 extends to creations or declarations by the parties only, and does not affect the creation or operation of resulting, implied, presumed or constructive trusts, or trusts created by operation of law.

When real or personal property is purchased in the name of a stranger, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money in the character of purchaser.

Notwithstanding the Statute of Frauds it is competent for a person, who claims land which has been conveyed to another, to prove by parol evidence that it was so conveyed upon trust for the claimant.

It is competent for the purchaser to prove his payment of the purchase money by parol evidence, even though it be otherwise expressed in the deed.

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It is a fraud on the part of a person to whom land is conveyed as a trustee and who knows it was so conveyed, to deny the trust and claim the land himself.

Parol evidence was adduced that the respondent handed to K., the sum of \$60 to purchase for him a parcel of land at Woodley Park. Lot 4 was allocated to the respondent, and K., obtained legal title therefor. *Held* (1) that parol evidence of the payment of the purchase money by the respondent was rightly admitted;

(2) that when K. obtained legal title for lot 4 there resulted a trust of the legal estate in favour of the respondent, and this trust was created by operation of law upon the proof not of the declaration or creation of an express trust by the parties but of the acts of the parties from which the trust will be presumed;

(3) that such a trust is not required, by proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, cap. 7 to be in writing.

Section 21 of the Deeds Registry Ordinance, cap. 177 does not enable a trustee, in whom the full and absolute title to immovable property is vested, to attract to him the benefit of the property held by him in trust for another.

By virtue of section 21 of the Deeds Registry Ordinance, cap. 177, full and absolute title was acquired, by transport, to lot 4, Woodley Park, Those in whom that title was vested held that property in trust for the respondent.

Held that the respondent was entitled to claim that those in whom was vested the full and absolute title to the property should be required in conscience to carry out the trust upon which they held such title, and to transfer the title to the respondent.

K. was a trustee for S. of immovable property, the title to which was registered in the name of K.

S. was in possession of the property for a period of over 30 years, and he never attempted to acquire legal title thereto. During that period, neither K. nor his successors in title sought to dispossess S; they left him undisturbed, and they did not attempt to repudiate the trust.

The appellant was one of the successors in title of K. She advertised transport of an interest in the immovable property; S. opposed the passing of the transport.

At the trial of the action, it was adjudged that the opposition was just, legal and well-founded; the Court granted an injunction restraining the passing of transport in favour of any person other than S., and further ordered the appellant to pass transport in his favour.

Held (1) That the failure of S., to seek to acquire legal title earlier than he did, did not prejudice the appellant in any way; and

(2) that, in the circumstances, the delay of the respondent in attempting to enforce the trust did not disentitle him to equitable relief.

A. defect in title, arising from the fact that a transportee was already dead when his attorney accepted a transport in 1911 on his behalf, is covered by section 21 (2) of the Deeds Registry Ordinance, cap. 177.

APPEAL by the defendant from the judgment of Duke, J. (Acting), reported at (1942) L.R.B.G. 260. (1941 No. 49, Berbice).

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

E. W. Adams, 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 judgment of the Supreme Court whereby it was adjudged that opposition entered by the respondent to the passing of a certain transport by the appellant was just, legal and well-founded. The Court granted an injunction restraining the passing of transport in favour of any person other than the respondent and further ordered the appellant to pass transport in his favour.

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The principal ground of the opposition was that Kangal through whom the appellant claimed as executrix of his widow, was trustee for the respondent of the land in question. The respondent alleged and the learned trial judge found as a fact that he had given Kangal \$60 wherewith Kangal was to purchase a parcel of land part of Woodley Park, that Kangal purchased the land obtaining transport in his own name, but putting the respondent in possession of a lot which subsequently became known as Lot 4. No particular parcel of land was specified at the time Kangal was given the money and he in fact purchased three lots for all of which he obtained transport in his own name and for none of which did he ever give title to the respondent. The respondent remained in possession of lot 4 during the remainder of the life of Kangal who was his brother-in-law and with whom he appears to have been on intimate terms, and the learned trial Judge found that he had in fact remained in undisturbed possession from 1906 until certain attempts made within the past 6 or 7 years by the sons of Kangal to interrupt his possession.

In regard to these findings of fact it is submitted on behalf of the appellant that the learned Judge erred in finding that the sum of \$60 was paid to Kangal by the respondent in that the allegation is made in support of a claim against a deceased person which by a rule of prudence rather than law cannot be maintained upon the unsupported testimony of the claimant. The learned judge found in the evidence, however, circumstances which he deemed ample evidence confirming the respondent's statement. This confirmation would appear to lie in the fact that Kangal did in fact purchase three parcels each for the sum of \$60, that he retained two only in his own possession and allowed the respondent to enter into possession of the third and that the respondent remained in possession thereof throughout Kangal's lifetime.

We are of the opinion that there is to be found in these circumstances, proof of which is not confined to the respondent's own testimony, sufficient corroboration to justify the learned judge in accepting the respondent's evidence if he believed it to be true, which in fact he did.

The next question to arise is whether upon the facts so found the learned trial judge was right in holding that Kangal held the property in trust for the respondent.

It is submitted on behalf of the appellant that no trust arises therefrom but that if there is a trust it is an express or declared trust and so by virtue of the provisions of Sec. 3 proviso (*d*) of the Civil Law Ordinance, Cap. 7 no action can be brought whereby to charge anyone thereon unless some memorandum or note thereof is in writing and signed by the party to be charged. It is necessary therefore to determine the nature of the trust but

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this question would appear to present no grave difficulty. A trust of this nature arises in circumstances described by the learned author of *Lewin* on Trusts (13th Edn. p. 178) as the creation of trusts by the operation of law and under the heading "Resulting trusts upon purchase in the name of a stranger" he states the general rule to be that "when real or personal property is purchased "in the name of a stranger a resulting trust will be presumed in favour of the "person who is proved to have paid the purchase money in the character of "purchaser." In *Dyer v. Dyer* (1788), 2 Cox 93, Lord Chief Baron Eyre said "The clear result of all the cases without a single exception is that the trust of a "legal estate . . . whether taken in the name of the purchasers and others jointly "or in the name of others without that of the purchaser; whether in one name or "several . . . results to the man who advances the purchase money." In the present case the respondent paid the purchase money in the character of purchaser for he delivered the money to Kangal for the purpose of purchasing a lot of land. Immediately Kangal acquired in his own name the lot of land subsequently allocated by him to the respondent there resulted a trust of the legal estate in favour of the respondent. It is clear that in such cases the provisions of the Statute of Frauds from which the proviso (*d*) to Sec. 3 of Cap. 7 is derived cannot apply. The trust is created by operation of law upon the proof not of the declaration or creation of an express trust by the parties, but of the acts of the parties from which the trust will be presumed. There is moreover ample authority for this conclusion, and in *Rochefoucauld v. Boustead* (1897) 1 Ch. p. 196, Lindley, J. assigned the equitable ground upon which it is based, when he said, "It is further established by a series of cases . . . that the Statute of "Frauds does not prevent the proof of fraud; and that it is fraud on the part of a "person to whom land is conveyed as a trustee and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently notwithstanding the statute, it is competent for a person claiming land conveyed to "another to prove by parol evidence that it was so conveyed upon trust for the "claimant. . ." *Lewin* (at p. 180) states the general rule in the following terms: "as the Law of Property Act, 1925, like the Statute of Frauds, extends to creations or declarations by the parties only and does not affect the creation or "operation of resulting, implied or constructive trusts, it is competent for the "purchaser to prove his payment of the purchase money by parol evidence "even though it be otherwise expressed in the deed" and the learned author cites a number of authorities in support of this rule.

The learned Judge was right therefore in admitting parol evidence of the payment of the purchase money by the respondent and in his conclusion that a trust in favour of the

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respondent resulted therefrom by the operation of law.

It is further submitted on behalf of the appellant, however, that by reason of Sec. 21 of the Deeds Registry Ordinance, Cap. 177, the transport to Kangal conferred upon him the "full and absolute title to the immovable property or to "the rights and interest therein described in that transport," and that even when obtained by fraud the transport might only have been declared void within a time now long since expired. It may first be observed that there is in this case no suggestion that the transport was obtained by fraud. The respondent is in no way attacking the transport nor the full and absolute legal estate of Kangal or his successors in title. As the learned Judge has stated in his judgment "The "plaintiff does not dispute that the title to Lot 4 . . . is indefeasible; his case is "that the full and absolute title. . . is held . . . in trust for him and should be "transferred to him." He does not claim any right or interest under the transport either legal or equitable but merely that those in whom is vested the full and absolute title to the property should be required in conscience to carry out the trust upon which they hold such title and so transfer the same to him. We think that this claim is well founded for only if it were expressed in the clearest possible terms would a court of equity so interpret a statute as to enable a trustee to attract to himself the benefit of the property held by him in trust for another.

The last point raised by counsel on behalf of the appellant refers to the delay of over 30 years in attempting to enforce the trust a delay which he ascribes to the respondent and which it is submitted disentitles him to equitable relief. We are not of the opinion that this contention should be upheld. The respondent was in possession for over 30 years during which time those who now seek to dispossess him left him undisturbed. While it is true that now he seeks for the first time to acquire legal title from those who have held the same in trust for him all these years, yet considered in the light of his continued possession it cannot be held that his failure to do so earlier has in any way prejudiced the appellant. It is in fact the appellant and her predecessor who have been guilty of such delay in attempting to repudiate the trust as to have placed the respondent in a position of embarrassment, if any. The form of action required by the peculiar system of conveyancing in this colony has placed the respondent in the position of a plaintiff but this does not do away with the substantial fact that it is the appellant who has after the lapse of over thirty years taken steps for the first time to assert her alleged rights.

The notice of the Court was drawn by counsel for the appellant to the fact that at the date when the attorney of Kangal accepted transport in 1911 on his behalf, Kangal was in point of fact dead. It is suggested that the transport is therefore a nullity

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and that there is in the appellant no legal estate which she can be called upon to transfer to the respondent. We are of the opinion that this is a defect in title which is covered by the operation of Sec. 21 of the Deeds Registry Ordinance and cannot now be raised in opposition to the order of the Court against which this appeal has been brought.

The appeal having thus failed on all grounds is dismissed with costs.

Appeal dismissed.

Solicitors: *H. C. B. Humphrys; D. P. Debidin.*

M. DEEN, Appellant (Defendant),
 v.
 LAMBERTIS JACKMAN P.C. 4193, Respondent (Complainant).

(1942. No. 344.—DEMERARA].

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

1943. APRIL 2, 30.

Criminal law and procedure—Evidence of witness not to be accepted with reserve—Merely because he makes a complaint to, and obtains the assistance of, the police, and acts upon their advice—Witness not a police agent.

Appeal—From magistrate's court—Conflict of evidence—More or less evenly balanced—Magistrate must make up his mind which side he will accept—When he has done so—Impossible for Appeal Court to say magistrate wrong—Magistrate had advantage of seeing witnesses and hearing their testimony.

Appeal—From magistrate's court—Weight of evidence overwhelmingly on one side—Other side accepted by magistrate—Only justifiable for some good reason to which magistrate should have given expression—No such reason stated by magistrate—Finding of fact—Reversed.

M. attempted to purchase, for the purpose of use in his bakery, flour, a price-controlled article, by wholesale (as defined by Order 636 B made by the Competent Authority under regulation 44 of the Defence Regulations 1939). He was overcharged, and he made complaint to the police. Having then received certain instructions, he returned to the seller, and he completed the purchase at a price exceeding the maximum price fixed by the said order. The police then intervened, and instituted proceedings against the seller for selling a price-controlled article at a price exceeding the maximum price prescribed by order. The seller was convicted, and he appealed.

Held (1) that these circumstances do not constitute what is commonly known as a "police trap";

(2) that a member of the public who makes a complaint to the police cannot be deemed a police agent;

(3) that the evidence of a person is not to be accepted with reserve merely because he obtains the assistance of the police and acts upon their advice;

(4) that the real purpose of the purchase was that the flour might be used in the manufacture of bread for sale to the public, the prosecution arising therefrom being purely incidental; and

(5) that had the seller on the second visit of the purchaser charged no more than the prescribed price, the flour would have been purchased for its original purpose, and no prosecution would have followed.

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When there is a conflict of evidence more or less evenly balanced, the magistrate must make up his mind which he will accept. When he has done so, it is impossible for the Appeal Court to say that he is wrong, for he has had the advantage of seeing the witnesses and hearing their testimony at first-hand.

The Appeal Court may however reverse a magistrate's findings of fact where the weight of evidence is so overwhelmingly on one side that acceptance of the other could only be justified by some good reason to which the magistrate should have given, but did not give, expression.

APPEAL by the defendant from a conviction for selling a price-controlled article at a price exceeding the maximum price fixed by an order made under the Defence Regulations.

J. A. Luckhoo, K.C., 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 for selling a certain price-controlled article at a price exceeding that prescribed by Order 636 B, made by the Competent Authority under Regulation 44 of the Defence Regulations, 1939.

It is submitted that the circumstances show the purchase to have been in the nature of a "police trap": that the learned Magistrate failed to direct himself as to the degree of caution to be exercised in considering the evidence of the police agent; and that the evidence of this witness is so utterly unreliable that had he viewed the evidence properly the learned Magistrate could not reasonably have arrived at the decision from which the appeal is brought.

In this case the allegations are: that the principal witness for the prosecution having attempted to purchase the article and having been overcharged, made complaint to the police, and that having then received certain instructions returned to the appellant and completed the purchase, whereupon the police intervened and instituted these proceedings. We are not of the opinion that these circumstances constitute what is commonly known as a "police trap," nor can a member of the public who makes a complaint to the police be deemed a police agent and his evidence be accepted with reserve merely because he obtains their assistance and acts upon their advice.

Counsel pointed out a number of alleged discrepancies, inconsistencies and improbabilities in the evidence for the prosecution which, he suggested, when compared with the evidence for the defence, rendered acceptance of the former unreasonable. Nevertheless, the learned Magistrate accepted that evidence and disbelieved the evidence of the appellant and his witnesses. The defects in the evidence of the witnesses for the prosecution-are not in our view so patent as to be fatal to the acceptance of

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the story told by them. The case rests upon the testimony of the purchaser, supported in material particulars by that of the police constable and by the admitted facts that the appellant received \$6.00, or \$2.00 in excess of the controlled price, for one half bag of flour, and actually delivered to the purchaser no more than one half bag. The defence rests upon the evidence of the appellant and two witnesses supported by certain documents which, however, as having been made by the appellant himself, are not in themselves conclusive evidence of their own truth. It cannot be said that in these circumstances the weight of evidence is so overwhelmingly on one side that acceptance of the other could only be justified by some good reason to which the Magistrate should have given expression. When there is a conflict of evidence more or less evenly balanced the Magistrate must make up his mind which he will accept. When he has done so it is impossible for this Court to say that he is wrong for he has had the advantage of seeing the witnesses and hearing their testimony at first-hand. That is the position in this case and we are not prepared to disturb the learned Magistrate's findings of fact.

It was submitted on behalf of the appellant that on those findings there was no proof of a sale by wholesale as defined by the Order under which the proceedings were brought, in that the flour was purchased not for the purpose of use in the purchaser's bakery but merely in order to found criminal proceedings against the appellant. It is, we think, clear from the evidence that the real purpose of the purchase was that the flour might be used in the manufacture of bread for sale to the public, the prosecution arising therefrom being purely incidental. Had the appellant on the second visit of the purchaser charged no more than the prescribed price there can be no doubt that the flour would have been purchased for its original purpose and no prosecution would have followed. The sale therefore fell within the Order even if the definition of "wholesale" therein be given its narrowest interpretation.

The appellant was properly convicted and his appeal is dismissed with costs.

Appeal dismissed.

I. BAIRD & ANR. v. W. SOLOMON & ANR.

ISAAC BAIRD AND GERALD S. DRAGTEN, Plaintiffs,
 v.
 WILLIAM SOLOMON AND COMMISSIONER OF LANDS
 AND MINES, Defendants.

[1943. No. 15.—DEMERARA.]

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

1913. MAY 10, 17.

Practice—Writ—In names of partners of firm—Authority to solicitor to institute action—Signed by one partner on behalf of partners—Writ properly issued by Registrar—Rules of Court, 1900, Order 3, rule 9.

Practice—Writ issued by one partner in names of partners—Without the knowledge or consent of partner and with his express disapproval—Right of other partner—To apply for indemnity—In respect of costs which defendant may become entitled to recover against him as one of the plaintiffs—Order for indemnity—Will be made under ordinary circumstances—Ought not to be made where dissenting partner is colluding with defendant—But a judge in chambers cannot determine that question, as a rule, on a summons.

Practice—Joint contractor—One refuses to join other in suing upon contract—The one can join the other as a defendant—Condition precedent thereto—Offer of indemnity against costs to the other, if he joins as co-plaintiff—But not if dissenting co-contractor has colluded with defendant in action—Whether there was collusion, and whether plaintiff was bound to offer the dissenting co-contractor an indemnity before joining him as defendant—To be determined at trial of action.

A writ is properly issued in the names of the partners of a firm, where the authority to the solicitor to institute the action (required by rule 9 of Order 3 of the Rules of Court 1900 to be produced when a solicitor presents to the Registrar a writ of summons to be filed) is signed by one partner on behalf of the partners.

Phillips & Li v. Small, (1914) L.R. B.G. 36, applied.

Where a partner sues in the names of the partners of a firm without the knowledge or consent of his partner and with his express disapproval, the other partner has a right to apply to the Court for an indemnity in respect of the costs which the defendant may become entitled to recover against him as one of the partners, and, under ordinary circumstances, an order for indemnity will be made.

Whitehead v. Hughes, (1834) 149 E.R. 782 applied.

Johnson v. Stephens & Carter, Ltd. and Golding, (1923) 92 L.J.K.B. 1048, 1050, referred to.

Where one of two joint contractors refuses to join the other as plaintiff in suing on the contract, it is, as a general rule, a condition precedent to the right of the other co-contractor to make him a defendant, that he should offer him an indemnity against costs if he will join as plaintiff, but if the dissenting co-contractor has colluded with the defendant in the action, and has brought about the breach of contract, the indemnity need not be offered. The questions as to whether there was collusion between the defendant in the action and the dissenting co-contractor, and as to whether the plaintiff was bound to offer the dissenting co-contractor, before joining him as defendant, an indemnity against costs if he would join as plaintiff, would be determined at the trial of the action.

Johnson v. Stephens & Carter Ltd. and Golding, (1923) 92 L.J.K.B. 1048, applied.

Semble, that where a partner sues in the firm name without the knowledge or consent of his partner and with his express disapproval, and the other partner has colluded with the defendant in relation to the subject-matter of the action, the Court would not order the partner who sued in the firm name to give to the other partner an indemnity against the costs which the defendant might become entitled to recover from him.

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Johnson v. Stephens & Carter Ltd., and Golding (1923) 92 L.J.K.B. 1048, 1050, 1051, considered.

A., and B., were partners. A., instituted an action, in the names A., and B., against C., in which it was claimed that certain gold in the possession of C., was the property of the partnership and should be delivered to the plaintiffs. The action was instituted without the knowledge or consent of B., and with his express disapproval. B., took out a summons for an order that A., give him an indemnity against costs which C., might become entitled to recover against B., as one of the plaintiffs, and that the action be stayed until the indemnity is given. In answer to the summons, A., filed an affidavit in which he alleged that B., had colluded with C., with intent to deprive him A., of his interest in the subject-matter of the action. In reply, B., filed an affidavit in which he stated that, as a partner, he obtained possession of the gold and sold it to C., who was a creditor of the partnership.

Held (1) that *prima facie*, B., was entitled to an indemnity against the costs of the action which the defendant might become entitled to recover against B., as one of the plaintiffs;

(2) that issues as to fraud and collusion cannot be properly determined on affidavits however strong they may, on the face of them, appear to be;

(3) that a finding by a judge in chambers that there was no fraud and collusion would be tantamount to a finding that there must be a judgment against the plaintiffs; and a finding that there was such fraud and collusion would be tantamount to a finding that there must be judgment against the defendant who was not a party to the summons;

(4) that the issue as to fraud and collusion could not be determined on the summons, on the affidavits filed;

(5) that the summons could not be adjourned into Court for disposal at the trial of the action, inasmuch as if the issue of fraud and collusion were then decided in favour of B., it would then be too late to make an order staying proceedings until an indemnity is given as at that time the action would already have been heard and determined;

(6) that as A., at this stage of the proceedings, is unable to establish that, in relation to the subject-matter of the action, there was such fraud and collusion between B., and the defendant C., as would entitle him A., to have dismissed B.'s application which was properly brought by way of summons, an order would be made requiring A., to give an indemnity to B., within 21 days against the costs which B., as one of the plaintiffs may become liable to pay to C., and directing that, if such indemnity were not given within the specified time, the action would be stayed until the indemnity was given.

SUMMONS by the plaintiff Gerald S. Dragten for an order staying the action until the plaintiff Isaac Baird gives to the plaintiff Gerald S. Dragten a full indemnity, coupled with security, against all costs, charges or liability incurred or to be incurred by the said plaintiff Gerald S. Dragten by reason of the said action.

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

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

Cur. adv. vult.

DUKE, J. (Acting): This is a summons taken out in this action by the plaintiff Gerald S. Dragten—

(a) for an order that this action be stayed until the plaintiff Isaac Baird give to the plaintiff Gerald S. Dragten a full indemnity, coupled with security, against all costs, charges or liability incurred or to be incurred by the said plaintiff Gerald S. Dragten by reason of the said action, and

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(b) for an order that the costs of and incidental to this application be taxed and paid by the plaintiff Isaac Baird.

On the 18th January, 1943, the writ in this action was filed in the names of Isaac Baird and of Gerald S. Dragten as plaintiffs. They are partners in a mining partnership. The plaintiff Dragten says that there was a third partner, one Caroline Baird. It does not appear that the existence of a third partner is admitted by the plaintiff Isaac Baird, and for the purposes of this application the partnership will be treated as consisting of two persons only, namely, the plaintiff Baird and the plaintiff Dragten.

The authority of the solicitor to act for the plaintiffs in this action (required by rule 9 of Order 3 of the Rules of Court, 1900 to be produced, when a solicitor presents a writ of summons to the Registrar to be tiled) was not signed by both plaintiffs; it was only signed by the plaintiff Baird, and it was signed as follows: "Isaac Baird & Gerald S. Dragten per Isaac Baird Partner". Apart from this statement in the signature to the authority to the solicitor, there was no allegation in the writ of summons that the plaintiff Baird and the plaintiff Dragten were trading together in partnership. However, it was not disputed by the plaintiff Dragten that the plaintiffs are partners and that the action is brought in their names as partners.

In *Phillips and Li v. Small* (1914) L.R.B.G. 36, Rayner, C. J. held that an authority to a solicitor to institute an action in the names of the members of a partnership is sufficient, if the authority is signed by one partner only. So far, therefore, as this Court was aware, the authority to the solicitor was properly signed by the plaintiff Baird on behalf of the plaintiffs, and consequently the writ was properly issued in the names of Isaac Baird and Gerald S. Dragten.

However, the plaintiff Dragten has, subsequent to the issue of the writ, informed the Court—and it is not denied by the plaintiff Baird—that the writ was filed without his knowledge or consent and with his express disapproval. From the nature of the proceedings it is clear that the plaintiff Baird knew that the plaintiff Dragten would never have consented to his name appearing in the writ as one of the plaintiffs.

In *Whitehead v. Hughes* (1834) 149 E. R. 782 Bayley, B. stated:

One of several partners has a clear right to use the names of the other partners. If they object to their names being used, they may apply for an indemnity against the costs to which they might be subjected by the use of their names.

In *Johnson v. Stephens & Carter, Ltd.* and *Golding* (1923) 92 L. J. K. B. 1048, 1050, Lord Justice Atkin said:

I do not propose to consider whether that case is law now, or whether one partner can, under those circumstances, use the names of his co-partners against their will.

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However, the ruling in *Whitehead v. Hughes* has not been disapproved of, and I am therefore bound to follow it.

Counsel for the plaintiff Dragten has submitted that where a partner sues in the firm's name without the knowledge or consent of his partner and with his express disapproval, the other partner has a right to apply to the Court for an indemnity in respect of costs, and that the Court has no discretion in the matter.

It was, however, submitted by Counsel for the plaintiff Baird that the Court has a discretion in the matter, and that the Court would not, in the exercise of its discretion, order the plaintiff Baird to give to the plaintiff Dragten an indemnity against costs inasmuch as, in relation to the subject-matter of the action, the plaintiff Dragten has colluded with the defendant William Solomon, or, in relation to the said defendant, has acted in some way in fraud of the plaintiff Baird.

It is not desirable that, where an action is instituted in the names of partner, one of the plaintiffs should be alleging that the other plaintiff has colluded with the defendant in relation to the subject-matter of the action. Neither is it necessary, for the protection of the interests of the partner who alleges collusion, that the partner against whom the allegation is made should be a plaintiff.

In *Johnson v. Stephens & Carter Ltd. and Golding* (1923) 92 L. J. K. B. 1048, Johnson and Golding were partners; Golding refused to join Johnson as plaintiff in suing on a contract made between Johnson and Golding on the one hand and Stephens & Carter Ltd., on the other hand, whereupon Johnson made Golding a defendant as being a necessary party to the action instituted by him. In his Statement of Claim Johnson, after pleading the contract and the breach, alleged that there was a conspiracy between Golding and Stephens & Carter Ltd., in respect of the contract, with intent to deprive Johnson of his interest thereunder. The defendant Golding applied at Chambers to have his name struck out of the action, on the ground that the plaintiff Johnson had not offered him any indemnity against costs if he would consent to be joined as plaintiff, and he contended that there was no valid cause of action against the defendants. Swift, J. ordered Golding's name to be struck out, on the ground that the offer of such an indemnity was a condition precedent to the right of one of two co-contractors to join the other as defendant against his will in an action for a breach of the contract. The plaintiff appealed to the Court of Appeal.

In the course of his judgment, Atkin, L. J. said:

I have no doubt that it has always been the practice, that if one of two co-contractors desires to sue in his own name, before he can constitute the action properly, he must offer his other co-contractor an indemnity against costs and then only under ordinary circumstances, is he entitled to consti-

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tute the action by suing himself in his own name and making his co-contractor a defendant. That was not done in this case, and, under those circumstances, under normal conditions, I think that the defendant would have been entitled to have said that the action was not properly constituted and he objected to being made a defendant in any action which could not be properly brought as framed. But I do not think that is a rule without an exception. It appears to me that if the co-contractor refuses to join in an action for breach of contract because that co-contractor has procured the breach or has acted in some way in fraud or in wrong of his co-contractor, that circumstance would entitle the remaining co-contractor to bring an action without performing what ordinarily is a necessary condition of offering an indemnity against costs. That is a very special set of circumstances, but still it is one that occasionally arises, and if it does arise, I think that the plaintiff would be entitled to frame his action in the way this has been framed.

And Lord Justice Atkin continued as follows:

Now that is in substance the allegation in this statement of claim. It may or may not be unfounded, but it does contain a substantive cause of action based upon that very wrong doing, and therefore it has to be determined as it stands, and, under those circumstances, I think that it would be wrong at this stage, in view of that issue of fact which has to be tried, to decide that the plaintiff has no right to join the defendant Golding without offering an indemnity. If he establishes his allegation of fact, I think the true conclusion is that the action is properly constituted, but if he fails, then I think that the action will be wrongly constituted.

In these circumstances the proper order, I think, is to allow the appeal, and discharge the order which at the present moment strikes the defendant Golding out of the action. If the issue which is raised in paragraph (5)—relating to the conspiracy—is allowed to remain as an issue in the action, and if it is determined in favour of the plaintiff, then I think the action will be properly constituted as to the original claim in paragraphs (1) to (4)—relating to the contract and breach. If, on the other hand, that allegation is not made out, then I think the action will be wrongly constituted, and this allowing of this appeal at this stage is without prejudice to the right of the defendant to take that point.

It will be observed that the issue of fact as to whether there was collusion and fraud between Golding and Stephens & Carter Ltd., with intent to deprive the plaintiff Johnson of his interest under the contract, was left to be determined at the trial of the action.

In short, this case decides that where one of two joint contractors refuses to join the other as plaintiff in suing on the contract, it is, as a general rule, a condition precedent to the right of the other co-contractor to make him a defendant, that he should first offer him an indemnity against costs if he will join as plaintiff, but if the dissenting co-contractor has colluded with the defendant in the action, and has brought about the breach of contract, the indemnity need not be offered. And it was indicated by the Court of Appeal that the questions as to whether there was collusion between the defendant in the action and the dissenting co-contractor, and as to whether the plaintiff was bound to offer the dissenting co-contractor, before joining him as defendant, an indemnity against costs if he would join as plaintiff, would be determined at the trial of the action.

On the analogy of *Johnson v. Stephens & Carter, Ltd., and Golding*, it would seem that where a partner sues in the firm's name without the knowledge or consent of his partner and with his

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express disapproval, and the other partner has colluded with the defendant in relation to the subject-matter of the action, the Court would not order the partner who sued in the firm's name to give to the other partner an indemnity against the costs which the defendant might become entitled to recover from him.

The plaintiff Baird's claim that he should not be required to give to Dragten an indemnity for costs on the ground of fraud and collusion alleged to exist between Dragten and the defendant William Solomon in relation to the subject-matter of the action, would have been left to the trial judge to determine, had he Baird followed what was done in *Johnson v. Stephens & Garter Ltd., and Golding*, and instituted an action in his own name against William Solomon, and added Dragten as a defendant, (see *Cullen v. Knowles and Birks* (1898) 2 Q.B. 380 and *Ellis v. Kerr* (1910) 1 Ch. 529, 540), or had he Baird, after the institution of the action in the names of Dragten and himself, obtained an order of the Court striking out the name of Dragten as a plaintiff and adding him as a defendant; see *In re Matthews, Oates v. Mooney* (1905) 2 Ch. 460, 464.

Issues as to fraud and collusion cannot be properly determined on affidavits, however strong they may, on the face of them, appear to be. I cannot, on the affidavits filed in support of, and in opposition to, this summons, determine the issues as to fraud and collusion raised by the plaintiff Baird. If a judge in chambers were to find that there was fraud and collusion, it would be tantamount to a finding that there must be judgment against the defendant Solomon who is not a party to this summons: and if a judge in chambers were to find that there was no fraud or collusion, it would be tantamount to a finding that there must be judgment against the plaintiff's. The issue as to fraud and collusion which, I should imagine, should be a main issue at the trial of the action, cannot be determined on this summons.

The plaintiff Dragten's application for a stay of the proceedings in this action until the plaintiff Baird gives an indemnity for costs is properly made by way of summons. If the application is adjourned into Court for disposal at the trial of the action, and it were determined in favour of the plaintiff Dragten, the action would already have proceeded to a finality, and no order could, at that stage, be made for a stay of proceedings. Indeed, as I have already pointed out, if the issue as to fraud and collusion is determined in favour of Dragten, that would be tantamount to a finding that judgment would be entered for the defendant Solomon with costs which costs the plaintiff Dragten would be liable to pay. An order made, after the trial of the action, that the plaintiff Baird give an indemnity for the costs of the plaintiff Dragten would be useless, If the Court gave judgment for the plaintiff's, then an order for indemnity would not be necessary; and, if the Court

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gave judgment for the defendant Solomon with costs, an order for indemnity would be useless at that stage.

Had the plaintiff Baird elected to frame his action in the manner set forth in *Johnson v Stephens & Carter Ltd. and Golding* (supra), the practical difficulties in the way of his establishing on the hearing of an application made by the plaintiff Dragten by summons in chambers that he the plaintiff Baird be ordered to give him Dragten an indemnity against costs, that there was fraud and collusion between the plaintiff Dragten and the defendant Solomon would not have arisen. The plaintiff Baird has only himself to blame, if, by reason of the procedure which he has voluntarily adopted, he is forced into a position where, on an application properly made by the plaintiff Dragten by way of summons, he is unable to resist it, because, at that stage of the proceedings, he cannot establish that there was fraud and collusion between the plaintiff Dragten and the defendant Solomon.

The position then is as follows: *Prima facie*, the plaintiff Dragten is entitled to an indemnity for the costs of this action, and the plaintiff Baird is unable, at this stage of the proceedings, to establish that, in relation to the subject-matter of the action, there was such fraud and collusion between the plaintiff Dragten and the defendant Solomon as would entitle him (the plaintiff Baird) to have the summons of the plaintiff Dragten dismissed.

In these circumstances the application of the plaintiff Dragten is granted, and there will be an order that the plaintiff Baird, within 21 days from the date of entry of this order, give an indemnity (the form and sufficiency whereof to be determined, in case of dispute between the plaintiff Baird and the plaintiff Dragten, by the Registrar of the Supreme Court) to the plaintiff Dragten against the costs which the defendant Solomon may become entitled, in these proceedings, to recover against the plaintiffs, and that if such indemnity is not given within the said time the action be stayed until the indemnity is given. Liberty is given to apply. The plaintiff Dragten is entitled to recover against the plaintiff Baird his costs of and incidental to this summons, and I certify for Counsel.

Leave is granted to the plaintiff Baird to appeal.

Application granted.

Solicitors: *M. S. Fitzpatrick*, for applicant Dragten;
Carlos Comes, for respondent Baird.

E. COUNTOURARIS v. S.S. "HYDROUSSA".

EVANGELOS COUNTOURARIS, Plaintiff

v.

THE SHIP "HYDROUSSA", Defendant.

[1943. No. 82.—DEMERARA].

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

1943. MAY 31; JUNE 5, 7.

Admiralty—English Admiralty Court practice—Applicability in this Colony—Vice Admiralty Courts' Rules, 1883, rule 207.

Admiralty—Action in rem—Writ served—Warrant for arrest issued—Guarantee by ship's agents—To pay amount awarded by Court in respect of action or settlement thereof—Warrant not served—No appearance to action—Leave to proceed ex parte—Granted—Vice Admiralty Courts Rules, 1883, rules 109 (b), 207.

Rule 109 (b) of the Vice-Admiralty Courts Rules 1883, which provides that "if there has not been any appearance, the plaintiff may set down the action for trial, on obtaining from the Judge leave to proceed *ex parte*, in an action *in rem* (not being an action against proceeds in court), after the expiration of two weeks from the filing of the warrant", is not exhaustive, and does not contain all the circumstances under which a Judge may give leave to a plaintiff in an action *in rem* (not being an action against proceeds in court) to which no appearance has been entered, to proceed *ex parte*.

The plaintiff instituted an action *in rem* against the defendant for seaman's wages, in the Supreme Court as a Colonial Court of Admiralty. The writ was addressed to "The owners and all others interested" in the defendant ship, and it was duly served. An affidavit leading to a warrant for the arrest of the ship was filed, and a warrant of arrest was issued by the Registrar of the Court. At the request, however, of the agents in the Colony of the ship the plaintiff refrained from arresting the ship in consideration of a guarantee given to the plaintiff by the ship's agents that they would pay "any or all sum or sums of money which may be awarded against the ship by the Supreme Court of British Guiana or any other Court of the Colony in respect of the action or in respect of any settlement thereof".

The defendant did not enter appearance. Rule 207 of the Vice-Admiralty Courts Rules 1883, provides that "in all cases not provided for by those Rules the practice of the Admiralty Division of the High Court of Justice of England shall be followed".

Held, that on the authority of Rule 207, and of *THE NAUTIK* (1895) P. 121, 124, leave would be given to the plaintiff to proceed *ex parte*, and to set down the action for trial *ex parte*.

MOTION in Chambers by the plaintiff for an order that the plaintiff be at liberty to proceed *ex parte* with the action and that the plaintiff may have such other orders as may be fit.

N. C. Janki, solicitor, for plaintiff.

Cur. adv. vult.

DUKE, J. (Acting): This is an *ex parte* motion in chambers made by the plaintiff for an order that the plaintiff be at liberty to proceed *ex parte* with this action, and that the plaintiff may have such other orders as may be fit.

This action is for seaman's wages, and is instituted in the Supreme Court of this Colony as a Colonial Court of Admiralty under the authority of the Colonial Courts of Admiralty Act, 1890

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(53 & 54 Vict. c. 27) and of section 29 of the Supreme Court of Judicature Ordinance, cap. 10. The procedure of the Supreme Court of this Colony as a Colonial Court of Admiralty is regulated by the Rules for the Vice-Admiralty Courts in Her Majesty's Possessions Abroad made by Her Majesty with the advice of Her Privy Council, on the 23rd day of August, 1883, under the authority of the Vice-Admiralty Courts Act, 1863 (26 & 27 Vict.c. 24); and by one of those Rules (Rule 207) it is enacted that in all cases not provided for by the Vice-Admiralty Courts Rules 1883 the practice of the Admiralty Division of the High Court of Justice of England shall be followed. And it is provided by section 16 (3) of the Act of 1890 that "so far as any such rule (the Vice-Admiralty Courts Rules 1883) are inapplicable or do not extend, the rules of court for the exercise by a court of its ordinary civil jurisdiction shall have effect as rules for the exercise by the same court of the jurisdiction conferred by this Act".

The action was commenced by a writ of summons which was filed on the 23rd March, 1943. The writ of summons was *in rem*, and is in Form No. 4 in the Appendix to the Vice-Admiralty Courts Rules, 1883. It is properly addressed to "The Owners and all others interested in the ship "Hydroussa", Port of Georgetown". Service of the writ was duly effected on the 24th March, 1943, in accordance with Rule 10 (a).

In accordance with Rule 5 the Writ was indorsed "with a statement of the nature of the claim, and of the relief or remedy required, and of the amount claimed".

In accordance with the Form No. 4 in the Rules the defendant was required to enter appearance to the writ within one week after service. No appearance was entered within the time limited by the writ, and no appearance has been entered at any subsequent time.

On the 23rd March, 1943, the plaintiff filed an affidavit in the Form No. 11 prescribed by the Rules, to lead warrant for the arrest of the ship "Hydroussa": and on the same day the Registrar of the Court issued a warrant for the arrest of the ship. The agents of the ship, Sprostons Limited, became aware that the warrant of arrest had been issued, and they arranged a meeting on the 24th March, 1943, at which the following persons were present:

- (a) Mr. M. B. G. Austin, representative in the Colony of the British Ministry of War Transport;
- (b) Lieutenant Clairmont, representing the Defence Security Officer;
- (c) Captain Georgialis, master of the ship "Hydroussa";
- (d) Mr. C. Farrar, traffic superintendent of Sprostons Limited;
- (e) Mr. C. V. Wight, of the legal firm of Kings, lawyers of Sprostons Limited and;
- (f) Counsel and solicitors for the plaintiff.

At that meeting it was accepted by all present that it would be in the best interests of the war effort if the ship was not

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arrested: and it was agreed that, in consideration of the plaintiff refraining from exercising his rights to arrest the ship, Sprostons Limited would give a guarantee to the plaintiff against any sum which might be awarded by any Court in the Colony as judgment and costs, or for any sum which might be arrived at between the parties in the event of a settlement. The guarantee was given, and, so far as is relevant to these proceedings, was as follows:

In consideration of your having at our request agreed not to arrest the ship s.s. "Hydroussa" in respect of your claim against the s.s. "Hydroussa" filed in the Supreme Court of British Guiana as Action No. 82 of 1943, we hereby guarantee the payment of any or all sum or sums of money which may be awarded against the said ship by the Supreme Court of British Guiana or any other Court of the Colony in respect of the said action or claim or in respect of any settlement thereof.

Dated the 24th day of March, 1943.

24 cents
stamps
cancelled

Sprostons Limited,
J. H. Watson, Director.

To:—Evangelos Countouraris,
Georgetown.

As a consequence of the guarantee having been given, the warrant of arrest, which had been issued on the 23rd March, 1943, was not served upon the ship, and the ship was permitted to depart from the jurisdiction of this Court without being arrested.

It is in these circumstances that on the 20th May, 1943, the plaintiff applied to a judge for leave to proceed *ex parte*.

Rule 109 (b) is as follows:—

If there has not been any appearance, the plaintiff may set down the action for trial, on obtaining from the judge leave to proceed *ex parte* in an action *in rem* (not being an action against proceeds in court), after the expiration of two weeks from the filing of the warrant.

This is an action *in rem*, and it is not an action against proceeds in Court. The warrant referred to in Rule 109 (b) is a warrant of arrest, under Rule 29, of the property proceeded against. Rule 35 provides that, upon service being made of the warrant, the property proceeded against shall be deemed to be arrested. By Rule 37 the warrant is to be filed by the Marshal within one week after service thereof has been completed, with a certificate of service indorsed thereon. There can therefore be no "filing of the warrant" within the meaning of Rule 109 (b) unless and until the warrant has been served and the property proceeded against arrested: and a judge has no power under Rule 109 (b) to give leave to a plaintiff to proceed *ex parte* in an action *in rem* (not being an action against proceeds in Court) in which there has been no appearance, if a warrant of arrest has not been served.

Rule 159 provides that any person desiring to prevent the arrest of any property may file a notice undertaking, within three days after being required to do so, to give bail to any

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action or counter-claim that may have been, or may be, brought against the property, and thereupon the Registrar shall enter a caveat in the caveat warrant book required to be kept by him under Rule 193. It will be observed that there is no provision (as exists in England under rules 11 and 12 of Order 29 of "The Rules of the Supreme Court of October, 1883") requiring the person entering the caveat to undertake to enter an appearance in any action that may be commenced against the property. Rule 163 provides that the entry of a caveat warrant shall not prevent the issue of a warrant, but a party at whose instance a warrant shall be issued for the arrest of any property in respect of which there is a caveat warrant outstanding, shall be condemned in all costs and damages occasioned thereby, unless he shall show to the satisfaction of the judge good and sufficient reason to the contrary. Where, therefore, a caveat warrant has been entered, and bail given in accordance therewith, no warrant of arrest can be served or issued: and there is no undertaking on the part of the defendant in the action to enter appearance. So that, in those circumstances, where the defendant has not entered appearance, a judge has no power under Rule 109 (b) to give leave to the plaintiff to set down the action for trial. The object of Rules 159 and 163 is to avoid the arrest of ships, and the delays caused thereby. It could not therefore have been intended that the defendant in the circumstances mentioned could, by not entering appearance, deprive the plaintiff of his right to have his action heard. I therefore am of opinion that Rule 109 (b) is not exhaustive, and does not contain all the circumstances under which a judge may give leave to a plaintiff in an action *in rem* (not being an action against proceeds in court) to which no appearance has been entered, to proceed *ex parte*.

The writ in this action was addressed to "The owners and all others interested in the ship 'Hydroussa'," and, on service being effected, notice was given to all persons interested in the ship, of the claim indorsed upon the writ. In order to found jurisdiction in an Admiralty action *in rem*, it is not necessary that the property proceeded against should have been arrested. As Bruce, J. said in *The Nautik* (1895) P. 121, 124:

Service of a writ *in rem* upon property within the jurisdiction of the Court, is notice to all persons interested in the property of the claim indorsed upon the writ. It is quite true that, according to the older practice, a suit *in rem* was commonly commenced by a warrant arresting the property, just as, in still earlier practice, a suit *in personam* was commonly commenced by a warrant arresting the person. But all that is necessary to found jurisdiction is to give formal notice to the persons interested that a claim is made against them or against their property in a court of competent jurisdiction, and that, if they do not appear to vindicate their rights, judgment may be given in their absence. The Rules of the Supreme Court directed that actions *in rem* should be commenced by writ, and I think the service of the writ on the property has the same effect so far as notice to the persons interested in the property is concerned, as service of a warrant had under the former practice. To confer jurisdiction it is not, I think, necessary that the property, the subject-matter of a suit, should be

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actually in the possession of the Court or under the arrest of the Court; it is enough that it should, according to the words of Lord Chelmsford, in the case of *Castrique v. Imrie* (1870) L.R. 4 H.L. 414 at p. 418, "be within the lawful control of the State under the authority of which the Court sits". The same view is expressed by *Jessel* M.R. in *The City of Mecca* (1881) 6 P.D. 106, 112. That learned judge says: "An action for enforcing a maritime lien may no doubt be commenced without an actual arrest of the ship."

A seaman has a maritime lien for his wages. In *The Nautik*, supra, it was held that it was part of the practice of the Admiralty Division of the High Court of Justice in England that judgment could properly be given by default where a writ of summons *in rem* was served and a warrant of arrest issued but before it could be served, the ship clandestinely put out to sea. Under Rule 207 the Supreme Court of this Colony, as a Colonial Court of Admiralty is bound to follow this decision, and to be guided by its *ratio decidendi*. In the present case the warrant of arrest which had been issued was not served because the defendant ship *Hydroussa*, through its agents, requested the plaintiff not to serve the warrant. Had the warrant of arrest been served upon the ship, the ship could have been released under Rule 48 (b) on the filing of a bail bond, or under Rule 48 (c) or Rule 48 (d) on satisfactory arrangements being made with the plaintiff, out of Court, for the payment of the judgment and costs, in the event of the plaintiff succeeding in the action. The giving of the guarantee had the same effect as if the warrant of arrest had been served and the ship released under Rule 48 (b) or Rule 48 (c). The defendant should have entered appearance to the writ on or before the 31st March, 1943, but up to the present moment no appearance has been entered. In the ordinary course of events, the warrant would have been filed on or before the 31st March, 1943, with a certificate of service indorsed thereon. The plaintiff's application was made more than 7 weeks after the date upon which, had the plaintiff not yielded to the solicitations of the defendant, the warrant of arrest would have been served and filed. No injustice will be done to the defendant to proceed *ex parte*, but there would be a denial of justice to the defendant if such leave were refused.

On the authority, therefore, of Rule 207 of the Vice-Admiralty Courts Rules, 1883, and of *The Nautik* (1895) P. 121, 124, I grant leave to the defendant to proceed *ex parte*, and to set down the action for trial *ex parte*, and I direct that the action shall be tried on Thursday, the first day of July, 1943, at the hour of 9.30 of the clock in the forenoon.

And I further direct that at the trial of the action, the plaintiff shall be at liberty to produce in evidence the affidavit sworn to and filed by him herein on the 23rd March, 1943, either in substitution for, or in addition to, his oral testimony.

The plaintiff's costs of and incidental to this motion will be costs in the cause.

Application granted.

Solicitor: *N. C. Janki*, for applicant.

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MAHAMAD DIN, Plaintiff,

v.

BOODHOO AND TETRY, Defendants.

[1939. No. 204.—DEMERARA].

BEFORE SIR JOHN VERITY, C.J.:

1943. MAY 10, 11, 12, 13, 14; JUNE 9.

Local Government—Local Government Ordinance, 1907 (No. 13), s. 27—Meaning of—No disposition to be made upon the division of a single holding into lots—Until a plan of proposed division showing streets, roads and means of access to each lot approved by Local Government Board and deposited in Registrar's Office—After such approval and deposit, no disposition to be made save in accordance with approved plan—When plan becomes operative—On the day of its deposit.

Contract—Performance of—In breach of statute—Forbidden under heavy penalty—Prohibition—Illegality—Contract void—Local Government Ordinance, 1907 (No. 13), s. 27.

Construction—Local Government Ordinance, 1907, s. 27—Plans approved by Local Government Board and deposited in Registrar's Office under—Plan of earlier date modified by plan of later date—Both made at request of same person—Plans to be read together—Earlier plan to be read and to be operative subject to modifications effected by later plan—Transport of parcel of land passed with respect to earlier plan—Subdivision modified by later plan—Transport to be construed as if passed subject to later plan—Portion of lot reserved in later plan, no reservation in earlier plan—Transportee no title to portion marked "Dam" on later plan—Title thereto could not be transferred by transportee.

Transport—Passed in breach of statute—Prohibition—Illegality—Transport void—Local Government Ordinance, 1907, (No. 13), s. 27.

Transport—Immovable property—Title to—Void by statute—Possessory rights therein—Local Government Ordinance, 1907 (No. 13), s. 27.

Limitation of actions—Right of way—Action for declaration as to—Possession of defendant—Right of way not exercised for 20 years—Civil Law of British Guiana Ordinance, cap. 7, s. 4 (2).

The New Colonial Company, Limited as owners of Plantation Windsor Forest intended to sell the property in lots to a number of different persons and caused surveys to be made and plans prepared in compliance with the requirements of section 27 of the Local Government Ordinance, 1907 (No. 13) which was then in force. This section required that such plans be laid before the Local Government Board and when approved by the Board be deposited in the Deeds Registry.

As the result of surveys of the land in question a plan was made and dated the 29th October, 1908, and a subsequent plan was made and dated the 11th December, 1908. Both plans were approved by the Board, and were deposited in the Registrar's Office, on the 19th March, 1909. The plan dated 29th October, 1908, purports to be a "plan of a part of Plantation Windsor Forest (East) *cum annexis* showing 341 lots of land laid out at the request of the New Colonial Co., Ltd. by W. M. A. Roberts, Sworn Land Surveyor." That of the 11th December, 1908, purports to be a "diagram of a portion of Plantation Windsor Forest (east) *cum annexis* made to illustrate the subdivision of lots 21 and 25 as shown on a plan by W. M. A. Roberts dated 29th October, 1908, now known as lots 21 A, 21 B, 24, 25 A and 25 B and subdivided at the request of the New Colonial Co., Ltd."

The plan dated 29th October, 1908, delineated lot No. 24 having access to a road marked "Private Road," and lot No. 25 having access to a road marked "High Dam." These were the only means of access to these two lots as appearing on that plan. The plan of 11th December, 1908, showed a subdivision of lot 25 into two lots numbered 25 A and 25 B and an alteration of

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the boundaries of lot 24 providing along the southern boundary thereof a dam along which access could be found to lot 25 A which without this dam had no means of access such as is contemplated by the Ordinance.

On the 22nd May, 1909, transport was passed in favour of Tetri, the second named defendant, of lot 24 described therein as being laid down and defined by the October plan. On the same day transport was passed in favour of the plaintiff's predecessor in title of lot 25 A described therein as being laid down and defined by the December plan. In 1926 lot 25 A was transferred by transport to the plaintiff's father by the original purchaser from the Company; and in 1931 the same lot was transferred to the plaintiff by transport.

Title to lot 24 remained in Tetri until 1937 when she transferred the same to her son Boodhoo the first named defendant. At the time this transport was advertised the Registrar of Deeds, having before then observed the apparent conflict between the October and December plans in relation to these and certain other lots and being of opinion that the December plan was that which had been intended to have been referred to in Tetri's transport, in order to give effect to the transfer of lot 25 A passed on the same day (22nd May, 1909) as that upon which the transport of lot 24 was passed in favour of Tetri, amended the description of lot 24 as advertised, and, in the transport passed in Boodhoo's favour on the 3rd February, 1937, the lot was described as laid down and defined in the December plan.

Boodhoo claimed that the transport which was passed in his favour should be rectified by substituting, for the reference to the December plan, reference to the October plan.

Held (1) that it was clear from the terms of section 27 of the Ordinance that it was intended that no disposition should be made upon the division of a single holding into lots until a plan of the proposed division showing streets, roads and means of access to each lot had been approved by the Board and deposited in the Registrar's Office, and that after such approval and deposit no disposition should be made save in accordance with the approved plan;

(2) that for the owner to proceed or attempt to proceed otherwise, is forbidden under heavy penalty, and the matter is plainly one in which the imposition of a penalty amounts to such a prohibition as would render void for illegality any contract or agreement made or attempted to be made in breach of the statute;

(3) that no agreement or attempted agreement prior to the date of deposit is of any effect, and no allegation of such prior agreement can avail the person relying thereon;

(4) that no transport can *prima facie* be deemed valid if its terms are in breach of the statute, for it will have been void *ab initio* by reason of its illegality;

(5) that the October plan and the December plan were deposited on the same day, and they thereby became operative at one and the same time;

(6) that the reference in the December plan to the October plan, the statement that both were made at the request of the New Colonial Co., Ltd., the approval of both by the Board and their deposit by the Company in the Registry on the same date, make it perfectly clear that those two plans were intended to be, and in accordance with their terms should be, read together, and that, in so far as the October plan differs from that of December it is to be read and be operative subject to the modifications effected by the latter plan;

(7) that any transfer or attempted transfer of lots, the sub-division of which was approved in accordance with the later plan, by reference to the earlier plan alone would be other than in accordance with the mode of sub-division approved by the Board;

(8) that if such is the purport of Tetri's transport, then it is void by reason of its illegality and no title whatever passed to her;

(9) that it may be that the reference to the October plan in her transport could be reasonably interpreted as meaning a reference thereto subject to the December plan, to which its validity must indeed be subject even though there is no specific reference thereto;

(10) that Tetri never acquired any legal title to the strip of land to the south of lot 24 as shown on the plan of the 11th December, 1908, and marked

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thereon by the word “dam”, and that she could never therefore have transferred the same to Boodhoo;

(11) that whether (8) be correct or whether (9) be correct, Boodhoo now holds title to all that lot to which Tetri could legally have secured title, that is to say, lot 24 as defined by the December plan, and his transport should not be rectified so as to confer upon him that to which Tetri could at no time have acquired a legal title, that is to say, lot 24 as defined by the October plan.

In 1939, the plaintiff instituted an action against the defendants Boodhoo and Tetry for a declaration that he is entitled to the use of a certain way giving access to lot 25A, Windsor forest, owned by him, for an injunction restraining the defendants from obstructing the way, and for damages.

The land over which the plaintiff, as the owner of lot 25A, sought to pass, was a dam or road reserved on the 19th March, 1909, by the then owners of Plantation Windsor Forest as a means of access to lot 25A, in accordance with section 27 of the Local Government Ordinance, 1907 (No. 13). The surveyor who surveyed the land and made a plan thereof on the 11th December, 1908, marked the location of the dam not only on his plan but on the earth by means of paals at least one of which is still to be observed. On the 22nd May, 1909, the then owners of Plantation Windsor Forest purported to convey to the defendant Tetry title to the dam or road, but she in fact held no legal title thereto. During the first two years after the 22nd May, 1909, the dam was used by persons who wished to reach lot 25A.

In 1911 or 1912 a surveyor, at the request of the then owners of Plantation Windsor Forest, laid down means of access to lot 25A, other than by way of the dam or road which was reserved on the 19th March, 1909, hereinbefore referred to.

That dam or road although originally intended as a means of access to lot 25A, has not been used as such since 1911 or 1912. The land originally reserved for that purpose has been occupied by the defendants Boodhoo and Tetry without disturbance at least from the year 1919.

Held (1) that as the defendant Boodhoo is now in possession of the dam the right of the plaintiff to pass over it can only be secured to him by dispossessing the defendant and restoring to the strip of land its original character of a dam as a means of access to lot 25 A;

(2) that any right of action so to dispossess the defendant accrued the moment the area was taken into possession in 1919, not less than 20 years ago;

(3) that by reason of section 4 (2) of the Civil Law of British Guiana Ordinance, cap. 7, the owners of the plantation in whom resides the legal title to all parts thereof not alienated, cannot now make any entry or bring any action to recover the dam;

(4) that if any right of action at all lies in the plaintiff it cannot rest on any higher ground than that which would vest a right in the owners, and as the owners' right is barred by statute, so must be barred any right which the plaintiff might otherwise have had to bring any action, the effect of which would be, if successful, to dispossess the defendant and restore to the owners that which they could not themselves recover.

ACTION by the plaintiff Mahamad Din, for a declaration that he was entitled to the use of a certain way giving access to a lot owned by him; for an injunction restraining the defendants from obstructing the way, and for damages. The defendants counter-claimed for an order rectifying the description in the transport by which the first-named defendant Boodhoo holds title to a lot of land adjoining that of the plaintiff.

C. A. Burton, for the plaintiff.

L. M. F. Cabral, for the defendant Boodhoo.

C. Shankland, for the defendant Tetry.

Cur. adv. vult.

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VERITY, C.J.: In this case the plaintiff claims a declaration that he is entitled to the use of a certain way giving access to a lot of land owned by him, an injunction restraining the defendants from obstructing this way, and damages. The defendants resist the plaintiff's claims and counter-claim for an order rectifying the description in the transport by which the first-named defendant holds title to a lot of land adjoining that of the plaintiff.

In order that the position may be made clear it is necessary to consider the history of the title of the parties to the respective lots held by them. It appears that the New Colonial Company, Limited, as owners of Plantation Windsor Forest, intended to sell the property in lots to a number of different persons and caused surveys to be made and plans prepared in compliance with the requirements of the Local Government Ordinance then in force, the terms of which are to be found in the original section 27 of Chapter 84 of the Revised Laws of this colony. This section which was then in force but has since been repealed, required that such plans be laid before the Local Government Board and when approved by the Board be deposited in the Deeds Registry. As the result of surveys of the land in question, a plan was made and dated the 29th October, 1908, and a subsequent plan was made and dated the 11th December, 1908. Both plans were approved by the Board, and were deposited in the Registrar's Office, on the 19th March, 1909. The plan dated 29th October, 1908, delineated lot No. 24 having access to a road marked "Private Road" and lot No. 25 having access to a road marked "High Dam". These were the only means of access to these two lots as appearing on that plan. The plan of 11th December, 1908, showed a subdivision of lot 25 into two lots numbered 25A and 25B and an alteration of the boundaries of lot 24 providing along the southern boundary thereof a dam along which access could be found to lot 25 A which without this dam had no means of access such as is contemplated by the Ordinance.

On the 22nd May, 1909, transport was passed in favour of Tetri, the second-named defendant, of lot 24 described therein as being laid down and defined by the October plan to which I have referred. On the same day transport was passed in favour of the plaintiff's predecessor in title of lot 25A described therein as being laid down and defined by the December plan. In 1926 lot 25A was transferred by transport to the plaintiff's father by the original purchaser from the Company and in 1931 the same lot was transferred to the plaintiff by transport. Title to lot 24 remained in Tetri until 1937 when she transferred the same to her son, Boodhoo, the first-named defendant. At the time this transport was advertised the Registrar of Deeds, having before then observed the apparent conflict between the October and December plans in relation to these and certain other lots and being of the opinion that the December plan was that which had

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been intended to have been referred to in Tetri's transport, in order to give effect to the transfer of lot 25A passed on the same day, amended the description of lot 24 as advertised, and, in the transport passed in Boodhoo's favour on 3rd February, 1937, the lot was described as laid down and defined in the December plan. No objection was taken by Boodhoo at the time of accepting transport, though it is fair to state that his attention had not been drawn to the alteration by notice or otherwise. On 29th November, 1938, however, he took out an originating summons praying rectification of the description in his transport so that the same should conform with that to be found in Tetri's transport. This application was dismissed on the ground that the applicant should have proceeded by action. There the matter remained until the plaintiff issued the writ in the present action on 15th July, 1939.

On the face of the documents of title, therefore, the position is that while both the plaintiff and the first-named defendant hold lots 25A and 24, respectively, as described in the December plan upon which access to lot 25A is shown to the south of lot 24, Tetri held title to lot 24 as shown on the October plan upon which no such access is shown, the southern boundary of that lot abutting on lot 22. A preliminary question therefore arises as to the validity of the title of Tetri to lot 24 as shown on the October plan, for upon determination of this question depends in the first place whether Boodhoo is entitled to rectification of his deed and what other consequences flow therefrom.

It is clear from the terms of section 27 of the Ordinance that it was intended that no disposition should be made upon the division of a single holding into lots until a plan of the proposed division showing streets, roads and means of access to each lot had been approved by the Board and deposited in the Registrar's Office and that after such approval and deposit no disposition should be made save in accordance with the approved plan. For the owner to proceed or attempt to proceed otherwise is forbidden under heavy penalty and the matter is plainly one in which the imposition of a penalty amounts to such a prohibition as would render void for illegality any contract or agreement made or attempted to be made in breach of the statute.

It follows that no agreement or attempted agreement prior to the date of deposit is of any effect and no allegation of such prior agreement can avail the defendants. In the same way no transport can *prima facie* be deemed valid if its terms are in breach of the statute for it will have been void *ab initio* by reason of its illegality.

The preliminary question amounts therefore to this: was Tetri's transport in breach of the Ordinance by reason of an attempt to effect disposition of a part of the land other than in accordance with the approved plan deposited in the Registry and

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showing the mode in which it was proposed to sub-divide the land?

It appears, however, that there are two such plans and that their contents are in certain respects conflicting. It is incumbent upon the Court nevertheless to give effect to the Board's approval of both plans and to the intention of the vendors if this may reasonably be done upon the evidence before it. There does in fact appear to me to be but little difficulty in giving effect to the Board's approval of both plans, more especially when it is borne in mind that both were deposited on the same day and thereby become operative at one and the same time. The endorsements on the two plans would appear to put the matter beyond doubt. The plan dated 29th October, 1908, purports to be a "plan of a part of Plantation Windsor Forest (East) *cum annexis* showing 341 "lots of land laid out at the request of the New Colonial Co., Ltd., by W. M. A. "Roberts, Sworn Land Surveyor." That of 11th December, 1908, purports to be a "diagram of a portion of Plantation Windsor Forest (East) *cum annexis* "made to illustrate the sub-division of lots 21 and 25 as shown on a plan by W. "M. A. Roberts dated 29th October, 1908, now known as lots 21A, 21B, 24, "25A and 25B and sub-divided at the request of the New Colonial Co., Ltd."

The reference in the December plan to that of October; the statement that both were made at the request of the New Colonial Co., Ltd.; the approval of both by the Board and their deposit by the Company in the Registry on the same date, make it perfectly clear, in my view, that these two plans were intended to be, and in accordance with their terms should be, read together, and that in so far as the October plan differs from that of December it is to be read and be operative subject to the modifications effected by the latter. No other interpretation of the intention and effect of the approval and deposit of both plans is consistent either with reason or with the terms of the endorsement on the December plan.

Any transfer or attempted transfer of lots, the sub-division of to which was approved in accordance with the later plan, by reference the earlier plan alone would be other than in accordance with the mode of sub-division approved by the Board. If such is the purport of Tetri's transport then it is void by reason of its illegality and no title whatever passed to her. It may be, however, that the reference to the October plan in her transport could be reasonably interpreted as meaning a reference thereto subject to the December plan to which its validity must indeed be subject even though there is no specific reference thereto. In either case Boodhoo now holds title to all that lot to which Tetri could legally have secured title, that is to say, lot 24 as defined by the December plan and his transport should not be rectified so as to confer upon him that to which Tetri could at no time have ac-

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quired a legal title; that is to say, lot 24 as defined by the October plan, for my view is that Tetri never acquired any legal title to the strip of land to the south of lot 24 as shown on the plan of 11th December, 1908, and marked thereon by the word "dam" and could never, therefore, have transferred the same to Boodhoo.

It might appear that in view of this finding the plaintiff is entitled to the declaration and injunction claimed, but further considerations arise from the facts in this case with which I now propose to deal.

It is submitted on behalf of the defendants that even if the strip of land over which the plaintiff claims right of user is not the property of the defendant and even if the plaintiff had at any time a right to the use thereof enforceable by action against the defendants then by reason of the Limitation Ordinance this right of action is barred. By the terms of section 15 of Cap. 184 it is at least open to doubt whether section 14, if that be the appropriate section, is operative but the provisions of section 4 (2) of the Civil Law Ordinance (Cap. 7) are identical in effect and if applicable to the present case would operate to bar the plaintiff's right of action, if any.

The facts are, however, in dispute and it is necessary therefore that I should determine what I find them to be. The plaintiff avers that he and his predecessors in title enjoyed the undisturbed use of the dam referred to in the December plan as a means of access to lot 25A until the year 1931 when, he alleges, it was blocked by the first-named defendant. His own memory goes back to the year 1917 at the earliest, but he states that from then he knew of the use of the dam until after the death of his father in 1930. He further alleges that up to 1931 the public also used this dam although it is not clear for what purpose, for at no time did it lead to any public place. He is supported in this testimony by his brother who states that there was a "street" there "long ago" which was blocked by the defendant "about 11 years ago—in 1931." There is also the evidence of the plaintiff's cousin who states there was a "street" next to Boodhoo's lot which he and others used until it was closed about 1931, although his further evidence might indicate that it was closed as early as 1928 and its use virtually precluded by the removal of the fridge leading thereto two or three years earlier. The last and oldest of the plaintiff's witnesses goes no further than to say that there was a street south of Boodhoo's lot but that he does not remember when it was closed.

On the other side there is the testimony of the defendant Boodhoo himself who states that when the land was first bought by Tetri a passage was left over the southern part of the lot for the passage of his cattle to the pen, wired on each side to prevent the cattle from entering the adjoining lot or his own

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yard but open at both ends. He states that neither he nor Tetri had any objection to the use of this path by neighbours but denies that they had any right thereto. He further states that the western end was closed by him in 1911 upon complaint by an occupier of lot 25A that his cattle were damaging the track and going on to the adjoining lots. This was done, he alleges, after enquiry by the authorities into whose hands the property had by then passed. It is apparent that there would then have been no means of access to lot 25A except across adjoining lots which appear to have been open. Early in the following year, however a Government Surveyor laid down a road or street from lot 25A across the northern portion of lot 25B as appears from a plan made in 1912. The defendant states that he then left open the eastern end of the pathway for the use of his own cattle but that upon disposing of a number of cattle in 1919 he closed that end also, removed the wire fencing and enclosed the whole lot with wood palings.

He is supported by Mr. Jackson, who was at one time head-teacher of a neighbouring school and who is now a Nominated Member of the Legislative Council and one to whom it appears impossible to ascribe any personal interest other than his acquaintance with Boodhoo for many years. This witness states that he remembers a passage on the southern part of lot 24 just after the purchase in 1908 or 1909, over which people passed to the back lots. He adds that the defendant sold his cattle between 1918 and 1920 and after doing so removed the wire fence and that he knows that the whole lot has been enclosed by a wooden fence for over 20 years; that is to say from before 1923. While this witness is not at all times certain as to dates or times and declined to bind himself when he felt uncertain he is apparently correct enough as to the date of the sale of Boodhoo's cattle which is confirmed by the auctioneer's books as having been in 1919 and I do not think that when he states that he has known the whole lot to have been enclosed for over 20 years he is 8 or 9 years out in his recollection. I have no doubt whatever as to the honesty of this witness' evidence and it very strongly supports the defendant's story. The defendant also called the official who was Government overseer of the property from 1919 till 1939 and who avers that at no time did he know of any dam or street to the south of lot 24, nor of any complaint which can be related to the existence of such a street until 1938 when, upon a complaint by the plaintiff that the defendant had moved his palings too far to the south, he visited the spot and found the palings in the position in which he had always known them. Again, in regard to this witness there is disclosed no personal interest in the matter other than acquaintance with Boodhoo and I see no reason to doubt his honesty.

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In the first place there can be no doubt as to the intention of the original owners to reserve a dam as means of access to lot 25A nor any doubt that the surveyor marked the location of this dam not only on his plan but on earth by means of paals at least one of which is still to be observed. There is no doubt that during the first two years after purchase this dam was used by persons who wished to reach lot 25A. There can also be no doubt that, relying upon the plan to which reference is made in Tetri's transport, the defendants considered this dam to be part and parcel of lot 24 and that they were supported in this view by the authorities as shown by the fact that in 1912 a surveyor on their behalf laid down other means of access to Lot 25A. In these circumstances and in view of the complaints which appear to have given rise to this fresh survey it would appear more than probable that the defendant did in fact then block off the western end of the path and not improbable that on disposing of a number of his cattle he enclosed the whole lot. On the other hand, it might be thought improbable that the plaintiff and his predecessors in title would have taken no action for over 30 years and it is therefore more likely that the passage was closed at a later date, as alleged by the plaintiff. It is to be remembered, however, that on the plaintiff's own showing seven or eight years elapsed between the blocking of the road and the bringing of this action and even seven years is a very long time for a man to remain idle when deprived of what he alleges to be the only reasonable means of access to his property if, indeed, that means has been used by him for as long as he can remember. It is true that the plaintiff testifies to complaints made by him to responsible officers but these appear to have been of no effect and it is remarkable that none of these officers have been called in his support, an omission hardly to be excused on the ground put forward by counsel that if the plaintiff's evidence were untrue the defendant might have called these officers to disprove it, a proposition more refreshing by reason of its novelty than of its nature.

Taking everything into consideration I have come to the conclusion that the dam, although originally intended as a means of access to lot 25A, has not been used as such since 1911 or 1912 when other means were provided and that the land originally reserved for that purpose has been occupied by the defendants without disturbance at least from the date when the whole lot was enclosed in 1919. I do not accept the plaintiff's evidence that the dam was first blocked in 1931 nor that all trees and erections now found thereon were placed there since then for the purpose of giving colour to the defendant's present story.

I have already held that the defendants have at no time held any legal title to the area in dispute; the longest period of undisturbed possession capable of being deduced from the evidence, that is since 1911, was insufficient at the time at which this action

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was brought in 1939, to enable the defendant to acquire a prescriptive title under section 4 (1) of the Civil Law Ordinance, but the question remains whether the plaintiff is not barred from any action which would dispossess the defendant of land which has been in his possession for a period which is certainly longer than twelve years.

It is desirable that it should be made clear that this is the purpose and would be the effect of the plaintiff's claim if successful. He does not and could not on the evidence claim a right of way over the defendant's land. On the evidence in this case there can be no question of dominant and servient tenements or any relationship between the two lots essential to the establishment of such a right. There can be no question of the grant of any such right nor can there have been in the first place any question of a way of necessity even were the incidents of such a way to be related to any issue between the present parties. The first real issue is whether the land over which the plaintiff seeks to pass is a road reserved by the original owners or is it the property of the defendants? This question I have answered favourably to the plaintiff and unfavourably to the defendants. In view of my finding that this piece of land is not part of lot 24 as originally created and approved but was reserved by the owners, then as the defendant is now in possession of it the right of the plaintiff to pass over it can only be secured to him by dispossessing the defendant and restoring to the strip of land its original character.

Any right of action so to dispossess the defendant accrued the moment the area was taken into possession not less than twenty years ago. It would appear to be clear that by reason of section 4 (2) of the Civil Law Ordinance the owners of the plantation in whom resides the legal title to all parts thereof not alienated cannot now make any entry or bring any action to recover this area. If any right of action at all lies in the plaintiff it cannot rest on any higher ground than that which would vest a right in the owners and as the owner's right is barred by statute so must be barred any right which the plaintiff might otherwise have had to bring any action the effect of which would be, if successful, to dispossess the defendant and restore to the owners that which they could not themselves recover.

In regard to the alleged obstruction by the defendants of the drainage of the plaintiffs lot I am not satisfied that any such obstruction has been proved and the plaintiff's claim in that connection also fails, as does his claim to damages based upon either of the alleged acts of obstruction.

The plaintiff's whole claim must therefore be dismissed, as must be the defendant's counter-claim for reasons which I have already given. The defendants having succeeded in their defence to the claim and the plaintiff having succeeded in his defence to the counter-claim each might be entitled to the costs of

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his successful defence, but I am satisfied that any such order would involve greater difficulty and expense in taxation than the eventual balance (if any) in favour of either party would justify. There will be, therefore, no order as to costs.

Judgment for defendant on claim; and for plaintiff on counterclaim.

Solicitors: *N. C. Janki*, for the plaintiff;

Carlos Gomes, for the defendants.

Re MARIA DE MONTE GOMES;
Ex parte MANOEL LUIZ FERREIRA, *et al.*
[1943. No. 166.—DEMERARA].

BEFORE DUKE, J. (Acting): IN CHAMBERS

1943. JUNE 19, 21.

Lunacy—Proceedings in—For benefit and protection—Of persons believed to be incapable—By reason of Mental infirmity—Of protecting themselves and their property.

Lunacy—Interim receiver—Jurisdiction to appoint—Civil Law of British Guiana Ordinance, cap. 7, s. 23—Appointment without medical evidence—In special circumstances of case.

Practice—Originating summons—For appointment of receiver—Civil Law of British Guiana Ordinance, cap. 7, s. 23 (2), s. 23 (3) (c) (i)—Service—Directions as to.

The theory upon which proceedings in Lunacy are taken is that the proceedings are for the benefit and protection of the persons who are believed to be incapable, by reason of mental infirmity, of protecting themselves and their property.

The Supreme Court of British Guiana has jurisdiction, in matters under section 23 of the Civil Law of British Guiana Ordinance, cap. 7, to appoint an interim receiver, that jurisdiction being part of the inherent jurisdiction of the Court to protect the property of persons of unsound mind.

An order for the appointment of an interim receiver of the property of a person believed by the applicants to be incapable of managing her affairs through mental infirmity arising from age, was made, in the special circumstances of the case, although there was no medical evidence.

Service of originating summons taken out by relatives for the appointment of a receiver under section 23 (2) and section 23 (3) (c) (i) of the Civil Law of British Guiana Ordinance, chapter 7, deemed to be sufficiently effected by delivery of originating summons and accompanying documents to the attorney in the Colony of the person believed by the relatives to be incapable of managing her affairs by reason of mental infirmity arising from age, and by publication, of the order giving directions as to service once in each of three successive weeks in a newspaper printed and published in the Colony and once in each of three successive weeks in a newspaper printed and published in Barbados where the person was believed to be residing.

Re M. D. GOMES; Ex parte M. L. FERREIRA, et al.

APPLICATION made *ex parte* by Manoel Luiz Ferreira, Augusta Ferreira, Joao Luiz Ferreira and Julie de Souza (*a*) for the appointment of a receiver of the property of Maria de Monte Gomes until the hearing and determination of the originating summons filed herein on the 5th June, 1943, for the appointment of a receiver under section 23 (2) and section 23 (3) (c) (*i*) of the Civil Law of British Guiana Ordinance, Chapter 7, and (*b*) for service of the originating summons.

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

Cur. adv. vult.

DUKE, J. (Acting): By the originating summons filed herein on the 5th June, 1943, Manoel Luiz Ferreira, Augusta Ferreira, Joao Luiz Ferreira and Julie de Souza, who claim to be brothers and sisters of Maria de Monte Gomes, make application under section 23 (2) and section 23 (3) (c) (*i*) of the Civil Law of British Guiana Ordinance, Chapter 7, for the appointment of Vivian Charles Dias, the Public Trustee of British Guiana or such other person as to the Court may seem fit, as receiver in the matter of the estate or property of Maria de Monte Gomes. The applicants have now applied *ex parte*

(*a*) for an order appointing the Public Trustee of British Guiana as receiver of the property of Maria de Monte Gomes until the hearing and determination of the originating summons herein; and

(*b*) for directions as to how service of the originating summons herein may be effected upon Maria de Monte Gomes who is at present out of the jurisdiction of the Court.

Maria de Monte Gomes is not literate; she can neither read nor write. She has been thrice married.

Her first husband was Manoel Collette, and on his death she inherited property said to be presently valued in a sum in excess of \$100,000.

Her second husband was Francis Edward de Abreu, and on his death on the 19th June, 1941, she inherited property of the value of \$109,247.57 comprising movable property of the value of \$94,147.57 and immovable property of the value of \$15,100. On the 10th and 17th days of September, 1941, she executed documents appointing Anthony Celestine Gomes as her sole attorney. Her attorney has been administering the estate of Francis Edward De Abreu, deceased, but he has not yet filed an account of his administration.

Her third husband is Anthony Hilary Gomes to whom she was married on the 29th April, 1943. Anthony Hilary Gomes is a son of Anthony Celestine Gomes, and he arrived in the Colony on or about the 10th March, 1943, from Barbados. Anthony Hilary Gomes is 19 years of age, and Maria de Monte Gomes is 74 years of age. On the 6th May, 1943, Anthony Celestine

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Gomes obtained from Maria de Monte Gomes a fresh power of attorney in his favour.

Maria de Monte Gomes has left this Colony with her husband Anthony Hilary Gomes. She is believed to be somewhere in the Island of Barbados.

The applicants allege:

- (1) that Maria de Monte de Abreu was entirely under the influence of her attorney Anthony Celestine Gomes;
- (2) that in or about the year 1942, Beatrice Gomes, the wife of the attorney, acquired from Maria de Monte de Abreu lot 175, Middle Street, Georgetown, for the sum of \$8,000;
- (3) that there was a conspiracy between the attorney, his wife and his son Anthony Hilary Gomes to bring about the marriage of Anthony Hilary Gomes with Maria de Monte De Abreu for the sake of her fortune;
- (4) that Anthony Hilary Gomes is now acquiring, for the sum of \$15,000, a property in Croal Street, Georgetown, which property the attorney told his principal Maria de Monte de Abreu he was giving to his son Anthony Hilary Gomes as a wedding present; and
- (5) that Maria de Monte Gomes is incapable of managing her affairs through mental infirmity arising from age.

Counsel for the applicants has submitted that there is immediate danger of the property of Maria de Monte Gomes being disposed of to her detriment, and has urged that an interim order for the appointment of a receiver is necessary for the protection of the property of Maria de Monte Gomes who is believed by the applicants to be incapable, by reason of mental infirmity, of protecting her property.

In *Re Sherrett*, 1938 No. 215 (Bound in Motions and Summonses 1938-1939, at pages 301 to 330), there was medical evidence as to incapacity to manage affairs by reason of mental infirmity arising from age. In the present case Maria de Monte Gomes is not in the Colony, and it is alleged on behalf of the applicants that it was impracticable to arrange for a medical examination before she left the Colony.

In *Re Cathcart* (1893) 1 Ch. 471, Lord Halsbury stated that “the theory upon which proceedings in lunacy are taken is, that the proceedings are for the benefit and protection of the persons who are believed to be incapable, by reason of mental infirmity, of protecting themselves and their property.” On the facts as deposed to in the affidavits filed in support of the summons there is a reasonable case for inquiry as to whether or not Maria de Monte Gomes is incapable of managing her affairs.

The Court has jurisdiction, in matters under section 23 of the Civil Law of British Guiana Ordinance, chapter 7, to appoint an interim receiver, that jurisdiction being part of the inherent

jurisdiction of the Court to protect the property of persons of unsound mind: see *Theobald's Law* relating to Lunacy, (1924), pages 401, 402, *Heywood & Massay's Lunacy Practice* (1911), 4th edition, pages 75 to 78, and *Halsbury's Laws of England*, 2nd (Hailsham) edition volume 21, page 307, paragraph 530.

No medical evidence has been produced to me on the hearing of the *ex parte* application, but in view of the special circumstances of this case as stated in the affidavits filed on behalf of the applicants, an interim order will be made for the appointment of the Public Trustee of British Guiana, without security, as receiver of the property of Maria de Monte Gomes until the hearing and determination of the originating summons herein or until further order. This order is for the benefit and protection of the property of Maria de Monte Gomes, and no damage will be suffered by the said property as a result of the making of the order: on the other hand, the property of Maria de Monte Gomes might suffer irreparable loss if, in the particular circumstances of this case, the order for the appointment of an interim receiver were refused.

The interim receiver will be authorised in the name and on behalf of the said Maria de Monte Gomes to receive and give a discharge for:

- (a) the rents and profits accrued and to accrue of the immovable property belonging to Maria de Monte Gomes, and to manage and let the same for any period not exceeding one year, and to pay all proper outgoings in respect thereof;
- (b) all dividends, interest and income and all arrears thereof to which the said Maria de Monte Gomes is or may become entitled;
- (c) any sum or sums of money standing to the credit of the said Maria de Monte Gomes on current account, or on deposit account or on deposit receipt at any bank in the Colony;
- (d) all sums of money in the hands of Anthony Celestine Gomes or any other person for and on behalf of Maria de Monte Gomes; and
- (e) all debts due and owing by any person or persons to Maria de Monte Gomes.

The interim receiver will be authorised in the name and on behalf of the said Maria de Monte Gomes to take possession of all her property, and to demand possession thereof from Anthony Celestine Gomes, Anthony Hilary Gomes or any other person.

The interim receiver will have general liberty to apply.

So long as the order appointing the Public Trustee of British Guiana as receiver of the property of Maria de Monte Gomes is in force, the operation of the power of attorney of the 6th May, 1943, is suspended, and Anthony Celestine Gomes, during such

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period, is restrained from acting as, or exercising the powers of, attorney for Maria de Monte Gomes under or by virtue of the said power of attorney.

In view of the circumstance that an order for the appointment of an interim receiver has been made, I am satisfied that Maria de Monte Gomes, who is illiterate and has not been managing her own affairs, will be promptly informed of the nature of the originating summons. The following directions as to service of the originating summons will therefore be sufficient.

Service on Maria de Monte Gomes of a sealed copy of the originating summons filed herein and of a sealed copy of this order and copies of the affidavits of Elisa Martha Gouveia and Manoel Luiz Ferreira filed herein the 5th day of June, 1943, and of any other affidavits which the applicants may file (which they are hereby given liberty to so file) may be effected on Maria de Monte Gomes

- (a) by delivery of the said documents to Anthony Celestine Gomes referred to in the affidavit of Elisa Martha Gouveia as Anthony Casimiro Gomes; and
- (b) by publication of a sealed and certified copy of this order once in each of three successive weeks in a newspaper printed and published in British Guiana and once in each of three successive weeks in a newspaper printed and published in the island of Barbados.

Service on Maria de Monte Gomes shall be completed on or before the 31st day of July, 1943, and Monday the 30th day of August, 1943, at the hour of 9.30 in the morning is fixed for the originating summons herein.

The costs of and incidental to this *ex parte* application and to this order and the execution thereof are reserved. I certify for counsel.

Application granted.

Solicitor for applicants: *J. Edward de Freitas.*

EDITOR'S NOTE.—It appears from *In re a debtor* (1941) 110 L.J. Ch. 220, 221; 165 L.T. 417; (1941) 3 A.E.R. 11 that an interim receiver was appointed by the Master in Lunacy.

Re T. ROSS; *ex parte* E. A. COATES.

Re THOMAS ROSS;

ex parte ELLA AZORE COATES.

[1943. No. 190.—DEMERARA].

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

1943. JULY 12, 16.

Opposition to transport or mortgage—Action to enforce—Deemed altogether abandoned and incapable of being revived—Rules of Court, 1900, Order 32, rule 5 (2)—Opposition declared abandoned—Application for order—Rules of the Supreme Court (Deeds Registry), 1921, rule 11—Whether necessary to be made—Before transport can be passed.

Where by virtue of rule 5 (2) of Order 32 of the Rules of Court, 1900, an action to enforce an opposition to a transport is deemed altogether abandoned and incapable of being revived, the person seeking to pass the transport can apply under rule 11 of the Rules of the Supreme Court (Deeds Registry) 1921, for an order that the opposition be declared abandoned.

Wills v. Eleazar (1941) L.R.B.G. 12, 17, followed.

Quaere: whether, in such circumstances, it is necessary to make such an application before the transport can be passed.

ORIGINATING SUMMONS taken out by Ella Azore Coates for an order declaring an opposition entered on the 24th day of September, 1938, to the passing of a transport, abandoned.

R. G. Sharples, solicitor (for M. S. Fitzpatrick, solicitor), for the applicant on her *ex parte* application.

Cur. adv. vult.

DUKE J. (Acting): This is an originating summons taken out by Ella Azore Coates for an order that an opposition entered by Thomas Ross on the 24th day of September, 1938, to the passing of a transport by her in favour of John Henry be declared abandoned with costs.

The transport was advertised in the *Gazette* of the 10th, 17th and 24th days of September, 1938. Within ten days after the Registrar of Deeds had signed the certificate required by rule 3 of the Rules of the Supreme Court (Deeds Registry), 1921, Thomas Ross, in compliance with rule 7 (1) of those Rules, filed on the 3rd October, 1938, a writ of summons against Ella Azore Coates to enforce the opposition. The writ was duly served upon her on the 6th day of October, 1938. No appearance was entered to that writ (No. 276 of 1938) and the plaintiff never took any further proceeding in the action. By rule 5 (2) of Order 32 of the Rules of the Court 1900, the action which was brought to enforce the opposition was deemed altogether abandoned and incapable of being revived, upon the expiration of twelve months after the 3rd day of October, 1938, when the writ was filed, or, at the latest, upon the expiration of 12 months after the 6th day of October, 1938, when the writ was served

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upon Ella Azore Coates. There is a certificate of the Registrar of the Supreme Court to this effect.

It is now too late for Thomas Ross to bring, within the time limited by rule 7 (1) of the Rules of the Supreme Court (Deeds Registry) 1921, another action to enforce the opposition.

In *Wills v. Eleazar* (1941) L. R. B. G. 12, 17, Camacho, C. J., in circumstances similar to those of the present case stated:

The effect of the certificate under Order 32 rule 5 (2) was to determine for the time being the right to enforce the cause of action, based on the notice of opposition whether it did or did not altogether destroy it, and rule 7 of the 1921 Rules finally extinguished the right.

In that case, the learned Chief Justice indicated that where an action to enforce an opposition to a transport by virtue of rule 5 (2) of Order 32 of the Rules of Court 1900, is deemed altogether abandoned and incapable of being revived, the person seeking to pass transport could then apply under rule 11 of the Rules of the Supreme Court (Deeds Registry) 1921, for an order that the opposition be declared abandoned. The learned Chief Justice did not, however, decide that it was necessary to make such an application before the transport could be passed.

On the authority of *Wills v. Eleazar* I make an order in terms of the application, with costs.

Application granted.

WILLIAM ALFRED PHANG, Petitioner,
v.
CHRISTIAN BEATRICE PHANG, Respondent.

[1942. No. 396—DEMERARA].

BEFORE DUKE, J. (Acting):

1943. JULY 19, 22.

Husband and wife—Restitution of conjugal rights—Order in favour of wife—Disobeyed by husband—Order prescribing payments to wife—Order for periodical payment of money—Matrimonial Causes Ordinance, cap 143, s. 26—Same meaning as in s. 28.

Husband and wife—Dissolution of marriage—Permanent maintenance for wife—Order for—Application to modify—Matrimonial Causes Ordinance, cap. 143, s. 28—No bearing on, or relevancy to, the application—Cap. 143, s. 14 (2), proviso (a).

Husband and wife—Judicial separation—Permanent alimony—Rules of Court (Matrimonial Causes), 1921, rule 39—Allotment under—Petition for diminution—Under rule 40—Applicability of rule 40—Only to judicial separation, not to dissolution of marriage.

Husband and wife—Dissolution of marriage—Permanent maintenance—Application to modify order for—To be made by summons—In proceedings in which order made for permanent maintenance—Matrimonial Causes Ordinance, cap. 143, s. 2—Rules of Court, 1900, Order XL (c), rule 13 (1) (h)—Rules of Court (Matrimonial Causes), 1921, rule 53. (b)—Matrimonial Causes Ordinance, cap. 143, s. 14 (2), proviso (a).

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An order for the periodical payment of money within the meaning of section 28 of the Matrimonial Causes Ordinance, cap. 143, means, and only means, an order made under section 26 of the Ordinance prescribing the payments to be made to a wife by a husband who disobeys an order for restitution of conjugal rights, and does not include an order made in a petition for dissolution of marriage.

Section 28 of the Matrimonial Causes Ordinance, cap. 143, has no bearing or relevancy to an application under proviso (a) to section 14 (2) of the Matrimonial Causes Ordinance, cap. 143, for an order modifying an order for maintenance made under that subsection.

Abbott v. Abbott (1931) 100 L. J. P. 36, and *Duffy v. Duffy* (1931) 100 L. J. P. 90, applied.

Rule 40 of the Rules of Court (Matrimonial Causes), 1921, which provides, *inter alia*, that a husband may at any time after alimony has been permanently allotted to the wife, file a petition for a diminution of the alimony allotted, by reason of his reduced facilities, only relates to matters where permanent alimony is allotted under rule 39 in proceedings for judicial separation and does not relate to proceedings for dissolution of marriage.

By virtue of section 2 of the Matrimonial Causes Ordinance, cap. 143, rule 3 (1) (h) of Order XL (C) of the Rules of Court, 1900 as enacted by the Rules of Court, 1932, and rule 53 (b) of the Rules of Court (Matrimonial Causes), 1921, an application made under the authority of proviso (a) to section 14 (2) of the Matrimonial Causes Ordinance, cap. 143, may not be made by way of petition, but must be made by way of summons.

An application under section 14 of the Matrimonial Causes Ordinance, cap. 113 for permanent maintenance must be made in the proceedings in which the decree *nisi* for dissolution (or nullity) of marriage was made. *Luke v. Luke* 1942 L.R.B.G. 198 applied.

An application under proviso (a) to section 14 (2) of the Matrimonial Causes Ordinance, cap. 143 to discharge or modify an order made under that subsection must necessarily be made in the proceedings in which the order was made.

PETITION by William Alfred Phang for an order that the sum of \$65 per month payable by him to Christian Beatrice Phang under order of Court dated the 21st March, 1938 (made in petition No. 166 of 1937 brought by Christian Beatrice Phang against William Alfred Phang for dissolution of marriage) be reduced to \$15 per month or to such other sum as the Court deems fit.

L. M. F. Cabral, for the petitioner William Alfred Phang.

H. C. Humphrys, K.C., for the respondent Christian Beatrice Phang.

Cur. adv. vult.

DUKE, J. (Acting): This is a petition by William Alfred Phang for an order that the sum of \$65 per month payable by him to Christian Beatrice Phang under order of the Court dated the 21st March, 1938, (made in petition No. 166 of 1937 brought by Christian Beatrice Phang against William Alfred Phang for dissolution of marriage) be reduced to \$15 per month or to such other sum as the Court deems fit.

On the 21st March, 1938, a decree *nisi* for dissolution of the marriage was made on the application of Christian Beatrice Phang; and on the same day, to quote the words of the formal order which was drawn up and entered on the 30th September, 1938, it was "by consent ordered that, (William Alfred "Phang) do pay to (Christian Beatrice Phang) permanent alimony at \$65 per

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“month, the first payment to be made on the 31st day of March, 1938.” It was also ordered that the children issue of the marriage between Christian Beatrice Phang and William Alfred Phang should remain in the custody of Christian Beatrice Phang until further order of the Court. The said children were born, respectively, as follows: (1) on the 23rd March, 1919; (2) on the 21st August, 1921; (3) on the 6th November, 1922; (4) on the 4th September, 1927; (5) on the 16th March, 1929; and (6) on the 27th June, 1931. On the application of Christian Beatrice Phang the decree *nisi* for dissolution of marriage was made *absolute* on the 17th October, 1938.

Upon the petition of William Alfred Phang herein coming on for hearing, counsel for Christian Beatrice Phang took the preliminary objection that, assuming that an application can be made by William Alfred Phang for modification of the terms of the consent order of the 21st March, 1938, the application should have been made not by way of petition but by way of summons or motion, and that the petition should therefore be dismissed. Counsel for William Alfred Phang conceded that if the application could not be brought by way of petition there was no alternative to the making of an order for dismissal of the petition.

For the purposes of determining the validity or otherwise of the preliminary objection, it is assumed that the order of which William Alfred Phang is seeking modification was made under section 14 (2) of the Matrimonial Causes Ordinance, cap. 143. This subsection empowers the Court, on any decree for dissolution of marriage, to 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.

By proviso (a) to that subsection, it is provided that “if the husband afterwards from any cause becomes unable to make those payment the Court may “discharge or modify the order. . .”. In the course of his argument counsel for William Alfred Phang urged that, apart from that proviso, section 28 of the Matrimonial Causes Ordinance, cap. 143, conferred upon the Court very wide powers to vary or modify the terms of the order of the 21st March, 1938, which was made in a petition for dissolution of marriage. Section 28 is as follows:

The Court may from time to time vary or modify any order for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any part of the money so ordered to be paid, and again revive the order wholly or in part, as the Court thinks just.

Learned counsel for William Alfred Phang has submitted that the consent order of the 21st March, 1938, is an order for the periodical payment of money, within the meaning of section 28 of the Matrimonial Causes Ordinance, cap. 143. Section 26 of the Ordinance contains provisions as to “periodical payments” ordered

to be made to a wife by her husband who disobeys a decree for the restitution of conjugal rights, and there is no other provision in the Ordinance for making an order for 'periodical payments'. Section 28 was adapted from section 4 of the Matrimonial Causes Act, 1884 (47&48 Vict. c.68), which section is now section 196 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49) Section 26 of the Matrimonial Causes Ordinance cap. 143 is adapted from section 2 of the Matrimonial Causes Act, 1884, which section is now section 187 of the Supreme Court of Judicature (Consolidation) Act, 1925. It was held by Langton, J. in *Abbott v. Abbott* (1931) 100 Law Journal Probate, 36, 40 and by Lord Merrivale P. in *Dufty v. Dufty* (1931) 100 Law Journal Probate, 90, 96, 97, 98 that, in view of the history of sections 187 and 196 of the Act of 1925, an order for the periodical payment of money within the meaning of section 196 of the Act of 1925 (which section was section 4 of the Matrimonial Causes Act, 1884, and is section 28 of the Matrimonial Causes Ordinance, cap. 143), means and only means, an order made under section 187 of the Act of 1925 (which section was section 2 of the Matrimonial Causes Act, 1884, and is section 26 of the Matrimonial Causes Ordinance, cap. 143) prescribing the payments to be made to a wife by a husband who disobeys an order for restitution of conjugal rights. It therefore follows that an order for the periodical payment of money within the meaning of section 28 of the Matrimonial Causes Ordinance, cap. 143, means, and only means, an order made under section 26 of the Ordinance prescribing the payments to be made to a wife by a husband who disobeys an order for restitution of conjugal rights, and does not include an order made in a petition for dissolution of marriage. Section 28 has therefore no bearing or relevancy to the petition by William Alfred Phang for an order modifying the consent order of the 21st March, 1838.

No procedure is provided in the Matrimonial Causes Ordinance cap. 143, as to how an application may be made under proviso (a) to subsection (2) of section 14, by a husband, to discharge or modify an order made under section 14 (2). The Rules of Court (Matrimonial Causes), 1921, do not specifically provide for the mode of making such an application: see rules 43 to 48 and compare rule 70 of the Matrimonial Causes Rules, 1924 of England. Rule 40 of the local Rules which provides that a husband may at any time after alimony has been permanently allotted to the wife, file a petition for a diminution of the alimony allotted, by reason of his reduced facilities, only relates to matters where permanent alimony is allotted under rule 39 in proceedings for judicial separation and does not relate to proceedings for dissolution of marriage: compare rules 62 and 63 of the Matrimonial Causes Rules, 1924. By section 2 of the Matrimonial Causes Ordinance, cap. 143, the jurisdiction of

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the Supreme Court in respect of divorces and other matrimonial causes and disputes shall as far as possible be exercised in the same manner and in accordance with the same principles and rules as jurisdiction in those matters is exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice in England, subject to any rules of Court made under that Ordinance or the Supreme Court of Judicature Ordinance, cap. 10, or any amending Ordinance. No rules of Court relating to the manner of making applications under proviso (a) to section 14 (2) of cap. 143 have indeed been made: but by rule 13 (1) (h) of Order XL (C) of the Rules of Court, 1900, as enacted by the Riles of Court, 1932, (made under the Supreme Court of Judicature Ordinance, cap. 10) any application under the authority of an Ordinance may be made by summons where no procedure is provided by the Ordinance. The application of William Alfred Phang herein is made under the authority of an Ordinance, no procedure is provided thereby and so it is an application which may be made by summons. By Rule 53 (b) of the Rules of Court (Matrimonial Causes), 1921, such an application is required to be made to a judge in chambers. Whatever be the scope of section 2 of the Matrimonial Causes Ordinance, cap. 143, (see *McDavid v. McDavid* (1941) L. R. B. G. 7, 8), its operation is always subject to any Rules of Court made under the Matrimonial Causes Ordinance, cap. 143, and under the Supreme Court of Judicature Ordinance, cap. 10, and in the present case its operation is specially subject to, among other rules, rule 53 (b) of the Rules of Court (Matrimonial Causes) 1921, and rule 13 (1) (h) of the Order XL (C) of the Rules of Court, 1900. By those rules the procedure by way of petition is neither authorised, “prescribed or permitted” (see rule 1 of Order 2 of the Rules of Court, 1900, as enacted by Rules of Court, 1910), while by those rules the procedure by way of summons is authorised, “prescribed or permitted” (and see section 3 (1) B (e) of the Legal Practitioners (Definition of Functions) Ordinance, 1931). The procedure by way of summons must therefore be followed.

For the above reasons I am of opinion that an application made under the authority of paragraph (a) of the proviso to subsection (2) of section 14 of the Matrimonial Causes Ordinance, cap. 143, may not be made by way of petition but must be made by way of summons. An application under section 14 of the Matrimonial Causes Ordinance, cap. 143, for permanent maintenance must be made in the proceedings in which the decree *nisi* for dissolution (or nullity) of marriage was made: *Luke v. Luke* (1942) L.R.B.G. 198. An application under proviso (a) to section 14 (2) to discharge or modify an order made under that subsection must necessarily be made in the proceedings in which the order was made.

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As the application of William Alfred Phang was made by petition and not by summons it must be dismissed with costs. The petitioner William Alfred Phang is given leave to bring a fresh application by way of summons.

In this proceeding, it is unnecessary for me to express an opinion on the further objection raised by counsel for Christian Beatrice Phang, namely, that as the order of the 21st March, 1938, was made by consent, no application can be made for its variation even if the income of the applicant has fallen.

Petition dismissed.

Solicitors: *R. S. Persaud*, for petitioner;

J. Edward deFreitas, for respondent.

Re PERCIVAL JAMES AND ANDREW JAMES, Insolvents.

[INSOLVENCY NO 7 OF 1933.]

BEFORE DUKE, J. (Acting):

1943. JULY 19, 26.

Insolvency—Discharge from—Application for—Assets of Insolvent not of a value equal to fifty cents in the dollar on amount of unsecured liabilities—If that fact arose from circumstances for which insolvent cannot justly be held responsible—Absolute discharge—Court not prohibited from granting—Discretion to grant or refuse—To be exercised judicially—Insolvency Ordinance, cap. 180, s. 29 (2) proviso, s. 29 (3) (a).

Insolvency—Estate of insolvent—Due care in realisation—Property sold at public auction—Presumption that due care exercised—Insolvency Ordinance, cap. 180, s. 29 (4).

Insolvency—Cannot justly be held responsible—Low prices realised for immovable property—Collision between insolvent's motor-car and a motor-bus—Lawsuit which insolvent was advised by counsel to bring—Unsuccessful—Insolvency Ordinance, cap. 180, s. 29 (3) (a).

By section 29 (3) (a) of, and the proviso to, section 29 (2) of the Insolvency Ordinance, cap. 180, the Court, on proof that the insolvent has not assets of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities, is prohibited from granting an absolute discharge to an insolvent unless the insolvent satisfies the Court that the fact that they are not of that value has arisen from circumstances for which he cannot justly be held responsible. If the insolvent so satisfies the Court the Court under section 29 (3), then has a discretion, which will be exercised judicially and not capriciously, as to whether it will “grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent or with respect to his after-acquired property.”

There is a presumption that the Official Receiver exercised within the meaning of section 29 (4) of the Insolvency Ordinance, cap. 180, “due care in the realisation” of the estate of an insolvent, where he has sold the property of the insolvent by public auction.

The Court was satisfied that the fact that an insolvent had not assets of a value equal to 50 cents in the dollar on the amount of his unsecured liabilities arose from circumstances for which the insolvent could not justly be held responsible, where the circumstances were;

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- (a) a collision between the insolvent's motor-car and a motor-bus, and a consequential unsuccessful lawsuit which the insolvent's counsel had advised him to bring; and
- (b) the sale of part of the immovable property of the insolvent at a price far below its true value.

APPLICATION by the insolvent Andrew James for his discharge.

C. Vibart Wight, for the applicant.

Vivian C. Dias, acting Official Receiver, in person.

Cur. adv. vult.

DUKE, J. (Acting): Under the provisions of section 29 of the Insolvency Ordinance cap. 180, the insolvent Andrew James has made application to the Court for his discharge. Andrew James and his brother Percival James used to carry on business in partnership as grocers and as letters of motor cars for hire. On the 1st May, 1933, a receiving order was made against them in respect of a partnership debt and they were both adjudged insolvent on the 22nd May, 1933.

The Official Receiver has reported to the Court that the insolvent Andrew James had not assets of value equal to fifty cents in the dollar on the amount of his unsecured liabilities. By section 29 (4) an insolvent's assets shall be deemed of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities when the Court is satisfied that the property of the insolvent...with due care in realisation might have realised an amount equal to that value. By section 29 (3) (a) of, and the proviso to, section 29 (2) of the Ordinance, the Court, on proof that the insolvent has not assets of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities, is prohibited from granting an absolute discharge to an insolvent unless the insolvent satisfies the Court that the fact that they are not of that value has arisen from circumstances for which he cannot justly be held responsible. If the insolvent so satisfies the Court the Court then, under section 29 (2), has a discretion, which will be exercised judicially and not capriciously, as to whether it will "grant or refuse an absolute order of discharge or suspend the operation of the order for "a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the "insolvent or with respect to his after-acquired property".

The report of the Official Receiver discloses that the sum of \$1,242.03 was available for distribution among the unsecured creditors and that dividends amounting to 24¼ per centum had been paid to them. If the sum so available had been \$1,318.86 more, that is to say, \$2,260.89 dividends amounting to 50 per centum would have been paid to the unsecured creditors.

In their Statement of Affairs filed in these insolvency proceedings the insolvents Percival James and Andrew James stated their

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opinion as to what the various items of their property were estimated to produce. The insolvent has stated on oath that there would have been more than sufficient to pay the unsecured creditors 50 per centum had fair and reasonable prices been realised at the sale of the following items by the Official Receiver:

	ESTIMATED TO PRODUCE	SALE PRICE
(1) Motor car No. 2721	..\$ 300	\$ 50
(2) Motor car No. 2840	... 500	210
(3) E½ lot 99, Alberttown	...3,000	3,100
(4) W½ lot 80, Queenstown	... <u>4,000</u>	<u>2,910</u>
Total	.. <u>\$7,800</u>	<u>\$6,270</u>

However that may be, the question for determination under section 29 (4) is whether the Court is satisfied that, with due care in realisation, the property of the insolvents might have realised an amount equal to fifty cents in the dollar on the amount of his unsecured liabilities. The various items of property were sold by the Official Receiver by public auction and that raises a presumption in his favour that he did exercise due care in the realisation of the assets of the insolvent. That presumption has not been rebutted by the insolvent Andrew James. Due care was exercised in the realisation of the assets and the insolvent did not have assets of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities.

From the notes of evidence taken at the public examination of Andrew James, on the 10th June, 1933, and from his evidence given on the hearing of this application, I am satisfied that motorcar No. 2721 was severely damaged in a collision with motor-bus No. 3106, the property of A. P. Camisuli; that the insolvents instituted an action, No. 258 of 1931, against Camisuli claiming the sum of \$1,200 as damages for negligence; that Camisuli made an offer of settlement to the legal advisers of the insolvents; that the legal advisers did not communicate that offer to the insolvents; that the action went on for trial and that on the 4th April, 1932, judgment was given for the defendant with costs: see *James v. Camisuli* (1931-37) L.R.B.G. 81. As a direct consequence of the judgment the insolvents had to pay their own legal costs and expenses, the expenses of repairing their motor-car No. 2721 and the costs of the defendant: the total expenditure was \$3,200. The insolvents did not know until after judgment had been given that an offer had been made by Camisuli to settle the action. After the action had been concluded the insolvents had no money wherewith they could properly finance their partnership business. The insolvency of Percival James and of Andrew James was, in a great measure, due to the collision between motor-car No. 2721 and motor-bus No. 3106 and to the consequent unsuccessful lawsuit.

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The west half of lot 80, Queenstown, was acquired by Percival James and Andrew James by transport dated 9th November, 1927, No. 993, for the sum of \$4,550 and on the same day they passed a mortgage No. 268 of 1927, for the sum of \$2,500 in favour of the Hand-in-Hand Mutual Guarantee Fire Insurance Co., Ltd. The insolvent Andrew James, deposed on oath that within a year after the purchase, his brother and himself effected repairs and improvements at the cost of \$2,700. At the time of the sale by the Official Receiver, the appraised value in the Town Books was \$5,300 but it only realised the sum of \$2,910. Had it realised \$4,228.86 the unsecured creditors would have been paid a dividend of 50 per centum.

The fact that the insolvent Andrew James had not assets of a value equal to 50 cents in the dollar on the amount of his unsecured liabilities arose from the following circumstances:

- (a) the collision between motor car No. 2721 and motor bus No. 3106 and the consequential unsuccessful law suit. The total expenditure was \$1,200 which would have provided, in addition to the dividend of 24¼ per centum which was in fact declared, a dividend of 23¼ per centum to the unsecured creditors. The insolvents had consulted eminent counsel who advised that the owner of motor-bus No. 3106 washable to them for the damages suffered as a result of the collision; and so confident were they of the accuracy of their opinion that they summarily rejected an offer of settlement made by the owner of the motor bus; the trial judge was however of a contrary opinion;
- (b) the west half of lot 80, Queenstown cost the insolvents the sum of \$7,250 and at the Official Receiver's sale it only realised the sum of \$2,910. Had it been sold for the sum of \$4,000 the unsecured creditors would have received a further dividend of 21¼ per centum. It was a misfortune for the unsecured creditors that at the Official Receiver's sale, which was by public auction, bidding for the west half of lot 80, Queenstown was dull and that there were not persons present who were willing to acquire that property.

I am satisfied that for these circumstances the insolvent Andrew James cannot justly be held responsible.

The Court is therefore not prohibited from granting an absolute discharge to the insolvent Andrew James.

The report of the Official Receiver discloses that the insolvent Andrew James has not committed any felony or misdemeanour in connection with his insolvency and that his conduct has been satisfactory. Ten years have already passed since he was adjudged insolvent and, in the exercise of my discretion, I grant him an absolute discharge from his insolvency.

Absolute discharge granted.

Solicitor for applicant: *A. G. King.*

EVANGELOS COUNTOURARIS, Plaintiff,

v.

THE SHIP "HYDROUSSA", Defendant.

[1943. No. 82.—DEMERARA].

BEFORE DUKE, J. (Acting):

1943. JULY 29; AUGUST 3.

Admiralty—Seaman's wages—Action in rem for—Against foreign ship—By seaman, British or foreign—Jurisdiction of Court to entertain—Nature of jurisdiction—Discretionary only—Where action allowed to proceed—Justice not to be denied to seaman.

Admiralty—Foreign ship—Action in rem against—For seaman's wages—Notice of intention to institute—To be served upon consular officer of state to which ship belongs—If notice not served Court will not exercise jurisdiction—If no such consular officer resident in the Colony, notice not required to be served—Protest of consular officer—Not ipso facto a bar to prosecution of suit—Answer to protest will be considered by Court—Judicial discretion of Court.

The Supreme Court of British Guiana in the exercise of its admiralty jurisdiction has jurisdiction to entertain an action *in rem* for wages by a seaman, whether British or foreign, against a foreign ship in respect of service on board of that ship.

The jurisdiction of the Court is discretionary only.

The Golubchick (1840) 1.W. Rob. 143, 154; *The Herzogin Marie* (1861) Lushington 292; 117 E.R. 126; *The Octavie* (1863) Browning & Lushington 215; 117 E.R. 342, and *The Nina* (1868) L.R. 2 B.C. 38, 48, applied.

An action by a Greek seaman against a Greek ship for wages was allowed to proceed where:

(a) there was no evidence that the seaman had agreed that in case of dispute between the seaman and the master of the ship the Greek Consul in or near the port at which the ship might chance to be shall have exclusive jurisdiction to try and determine the dispute;

(b) Greece was under enemy occupation, and the Greek Government, which was functioning outside of Greek territory, had not set up a Greek maritime court outside Greece; and

(c) there was no Greek consul resident in or near the Colony.

By rule 31 (a) of the Vice-Admiralty Court Rules, 1883 notice of intention to institute proceedings *in rem* for wages against a foreign ship is required to be served, upon the consular officer of the State to which the ship proceeded against, belongs: and if such notice is not served, the Court will not exercise its jurisdiction to allow the action to proceed.

The Golubchick (1840) 1.W. Rob. 143, 154, and *The Nina* (1868) L.R. 2 P.C. 38, 48, applied.

However, if no such consular office is resident in the Colony, notice is not required to be served upon any consular officer.

If no protest be made by the consular officer, the action would proceed, as of course.

The Octavie (1863) Browning and Lushington 215; 117 E.R. 342, applied.

The protest of the foreign consul does not, *ipso facto*, operate as a bar to the prosecution of the suit.

The Octavie (1863) Browning and Lushington 215; 117 E. R. 342, and

The Nina (1868) L.R. 2 P. C. 38, applied.

If the consul advances reasons why the suit should be stayed, the judge will exercise his discretion, and determine whether, having regard to those reasons and to the plaintiff's answers thereto, it is fit and proper that the suit should proceed or be stayed. This discretion exists even though the plaintiff is a British subject. It is not an arbitrary or capricious discretion but is regulated upon grounds which will make it judicial.

The Golubchick (1840) 1 W. Rob, 143, 154, and *The Nina* (1868) L.R. 2 P. C. 38, applied.

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ACTION brought in the Admiralty jurisdiction of the Supreme Court by Evangelos Countouraris against the ship "Hydroussa" for wages as a seaman. The defendant took a preliminary objection to the action being allowed to proceed.

C. A. Burton, for the plaintiff.

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

Cur. adv. vult.

DUKE, J. (Acting): This is an action brought in the Admiralty jurisdiction of the Supreme Court by Evangelos Countouraris against the ship "Hydroussa" for wages as a seaman. The plaintiff is a citizen of Greece, and the defendant is a Greek ship. No Greek consul is resident within the jurisdiction of this Court, and notice of these proceedings has not been given to any Greek consul.

Upon the action coming on for hearing, counsel for the defendant submitted that the action should not be allowed to proceed because:

(a) the Court had no jurisdiction to try an action by a foreign seaman against a foreign ship for wages, where notice of the proceedings has not been given to a consular representative of the country to which the ship belongs; and

(b) the Court has a discretion as to whether it will, or will not, try an action by a foreign seaman against a foreign ship for wages, and the Court should exercise its discretion by declining to try this action.

In order to deal satisfactorily with the preliminary objection it will be necessary first to consider the law of England on the subject, and the reasons for, and the history of, that law.

Prior to the year 1859, where an action was brought by a seaman against a foreign ship for wages, it was the practice of the Court of Admiralty in England to require notice of the intended proceedings to be served upon the consular officer of the State to which the ship proceeded against belongs, and of allowing the cause to proceed as of course if no protest be made: see *The Golubchick* (1840) 1. W. Robinson's Admiralty Reports 143, 154, and *The Octavie* (1863) Browning & Lushington 215.

In the former case, Dr. Stephen Lushington, the Judge of the Court of Admiralty said:

I do not mean to intimate that the Court would feel imperatively bound to act in accordance with the views that might be entertained by such (consular) representative; but I consider it is expedient that such intimation be given in order that, if any objection should be taken against the prosecution of the proceedings in this Court, the court being informed of the grounds upon which such objection is taken, might be enabled to form its own judgment of the sufficiency of such objection, and adopt such a course as may be most conducive to the furtherance of justice in the cause.

In *The Herzogin Marie* (1861) Lushington 292, Dr. Lushington said:

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Suits by foreign seamen were not formerly encouraged in this (Admiralty) Court; they are now allowed upon a principle of comity, and with a view to prevent injustice to seamen. The jurisdiction of the court is discretionary only.

The practice of the Admiralty Court previously referred to was incorporated in rule 10 of the Admiralty Court Rules, 1859 which prescribed that "in a wages cause against a foreign vessel notice of the institution of the cause shall be given to the consul of the state to which the vessel belongs, if there be one resident in London; and a copy of the notice shall be annexed to the affidavit" leading to the warrant for the arrest of the ship proceeded against. The notice to the consul was given in accordance with the comity of nations, and in order to afford the consul the opportunity of objecting, if he thought fit, to the action being entertained in the English Court of Admiralty and of stating his reasons therefor. A court of Admiralty in England would, ordinarily, not entertain a suit by a seaman, whether British or foreign; see *The Golubchick*, supra, at page 150 and *The Nina* (1868) L.R. 2 P.C. 38 at page 48, where it was decided that: "it is the nationality of the vessel and not the nationality of the individual seaman suing for his wages, that must regulate the course of procedure" against a foreign ship for wages, where by the articles of agreement the seaman had expressly contracted to submit to the laws of the State to which the ship belonged, and it was provided that in the case of dispute between the seaman and the master of the ship the consul of the state in or near the port at which the ship might chance to be, should have exclusive jurisdiction to try and determine such dispute according to the laws of the State to which the ship belonged: *The Nina*, supra.

In that case Lord Romilly, delivering the judgment of the Judicial Committee of the Privy Council, held:

- (1) that the Court of Admiralty has inherent and statutory jurisdiction in the case of claim for wages by seamen for service on board of a foreign ship;
- (2) that rule 10 of the Admiralty Court Rules, 1859, which prescribed that "in a wages cause against a foreign vessel notice of the institution of the cause shall be given to the consul of the state to which the vessel belongs, if there be one resident in London", has the force of statute, and is obligatory and must be complied with, before the Court will exercise its jurisdiction.

Lord Romilly considered the case where the consul intervenes and protests against the exercise of jurisdiction by the English Court of Admiralty, and said:

The protest of the Foreign Consul does not, *ipso facto*, operate as a bar to the prosecution of the suit. The Foreign Consul has not the power to put a veto on the exercise of its jurisdiction by the Court of Admiralty. It is well observed by Dr. Lushington, in the case of *The Golubchick*, that the jurisdiction of the Court of Admiralty cannot depend upon the will of a

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Foreign Consul; that as he cannot confer the jurisdiction, so he cannot take it away. If the Consul protests, but advances no reason, the suit will proceed. If he advances reasons for staying the suit, the plaintiff must be at liberty to dispute the facts and answer the reasons put forward by the Consul; and then the Judge of the Court of Admiralty is to exercise his discretion, and determine whether, having regard to those reasons, with the answers thereto, it is fit and proper that the suit should proceed or be stayed. By discretion is meant, to use the words of Lord Eldon in *White v. Damon*, 7 Ves 35, not an arbitrary, capricious discretion, but one that is regulated upon grounds that will make it judicial. That the exercise of this jurisdiction by the Court of Admiralty lies in the discretion of the Court in the sense before stated, is established by a long line of authorities, from the time of Lord Stowell down to the present. They are all one way, and they are, in the opinion of their Lordships, conclusive on this subject. And their Lordships concur in the decision of the late learned judge of the Court of Admiralty (Dr. Lushington) in the case of *The Octavie*, that this discretion is not taken away by the 10th section of the Admiralty Jurisdiction Act, 1861", 24 Vict. c. 10.

In *The Nina*, supra, the words "if there be one resident in London" in rule 10 of the Admiralty Court Rules, 1859, were not in issue: in that case there was in fact a consul of the state to which the ship proceeded against belonged, resident in London, The Judicial Committee held that rule 10 has the force of a Statute and that means the whole of rule 10. The words "in the case of a suit for wages by seamen for service on board of a foreign vessel, the Court of Admiralty has jurisdiction, but it will not exercise it without first giving notice to the Consul of the nation to which the foreign vessel belongs" appearing at page 48 of the judgment must therefore be construed as if the words "if there be one resident in London" appeared at the end thereof.

Under the Admiralty Court Rules, 1859, no notice was required to be given to any consul of the state to which the ship proceeded against belonged, if there was no such consul resident in London.

Rule 10 of the Admiralty Court Rules, 1859, has been replaced by rule 16 (b) of Order 5 of the Rules of the Supreme Court, 1883; and the new rule is in substance, the same as the former rule.

The Vice-Admiralty Courts Rules, 1883, made under the Vice-Admiralty Courts Act, 1863 (26 & 27 Vict. c. 24) have, by section 16 (3) of the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), the force of a statute. By rule 31 (a) of those Rules, it is provided that in an action *in rem* for wages against a ship, the affidavit leading to the warrant for the arrest of the ship must state "the national character of the ship, and if the ship is foreign, that notice of the action has been served upon a consular officer of the State to which the ship belongs, if there is one resident in the Possession."

There being no consular officer of Greece, to which the ship "Hydroussa" belongs, resident in this Colony no notice of these proceedings is required to be given to any consular officer of Greece.

Greece is an ally of the British Empire in the present war. Greece is presently completely occupied by armed forces of the enemy. Its Government does indeed function outside the terri-

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tory of Greece, but I am not aware that any maritime court has been set up by the Greek Government in any other part of the world, since Greece was occupied by the enemy. The Netherlands and Norway have set up maritime courts (with limited jurisdiction), in England under the authority of the Allied Powers (Maritime Courts) Act, 1941, (4&5 Geo. 6,c 21) but it does not appear that up to the present, Greece has acted likewise: see "Law Quarterly Review," vol. 58, pages 41, 50. It therefore follows that, until Greece is cleared of the enemy, it will not be possible for the plaintiff to prosecute his claim in a Greek maritime court: and, when the war is over, the defendant ship, if still afloat, may never return to Greece. It is not suggested by the defendant that there was an agreement with the plaintiff in any way similar to the one in the case of *The Nina*, supra: and, even if there were such an agreement, there is no Greek consul within reasonable access to the plaintiff who is a seaman in a strange country.

The Supreme Court of British Guiana sitting in its admiralty jurisdiction conferred by the Colonial Courts of Admiralty Act, 1890, has a discretion as to whether it will, or will not, allow an action by a seaman against a foreign ship for wages, to proceed. But, exercising that discretion judicially and not capriciously, I am satisfied that I must exercise it in this case by allowing the action to proceed. To act otherwise would be a denial of justice to the plaintiff.

The preliminary objection taken by the defendant therefore fails, and the action will proceed. The plaintiff's costs of and incidental to the hearing on the 29th July, 1943, and on this day, and of and incidental to this order must be paid by the defendant in any event.

Preliminary objection overruled.

Solicitors: *N. C. Janki*, for the plaintiff;
A. G. King, for the defendant ship.

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JOEL GOMBERG, Plaintiff,

v.

G. BETTENCOURT AND COMPANY, LIMITED, Defendants.

[1943. No. 1.—DEMERARA.]

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

1943. AUGUST 9, 12.

Evidence—By affidavit—Application to lead—Production of deponents for cross-examination—Bona fide desire of opposite party—Rules of Court, 1900 Order 34, rule 1—English Order 30, rule 2 (3).

Evidence—Special examiner—Appointment of—To examine plaintiff and witnesses—In Canada—When granted—Costs of defendant before special examiner—Not provided for—Where evidence to be led both relevant and material.

Application made under rule 1 of Order 34 of the Rules of Court, 1900, for an order that certain facts may be proved by affidavit at the hearing of the action was refused as there was nothing to indicate that the desire of the opposite party that the deponents to the affidavits should be produced for cross-examination was not *bona fide*.

Rule 2 (3) of the English Order 30, distinguished.

Application made by the plaintiff for the appointment of a special examiner to examine, in Montreal, Quebec, Canada, the plaintiff and his witnesses was granted, because:

- (1) the application was *bona fide*, and without any delay whatever;
- (2) the issue in respect of which the evidence was required was one which the Court had to try;
- (3) the plaintiff and the witnesses who were to be examined could give evidence material to the issue;
- (4) there was good reason why the plaintiff and his witnesses could not be examined here;
- (5) the examination could properly take place in the Province of Quebec which is part of the British Empire;
- (6) every effort was made by the plaintiff to avoid the necessity of an order by trying to obtain from the defendants admissions which they might be willing to make;
- (7) the defendants deliberately refrained from seeking to make enquiries with the object of ascertaining whether the evidence which the plaintiff and his witnesses proposed to give in Canada, was true or not;
- (8) in commercial cases (and this being an action for goods sold and delivered was a commercial case; the parties should admit all such facts as, on enquiry, might properly be admitted;
- (9) the circumstances of the present case were not such as to make it apparent that the evidence proposed to be given should be subject to the test of strict cross-examination and that for that purpose the presence in Court of the plaintiff and his witnesses was necessary;
- (10) there was not likely to be any serious conflict between the witnesses for the plaintiff and the witnesses for the defendant so far as the evidence which the plaintiff and his witnesses proposed to give, was concerned;
- (11) to grant the plaintiff's application would not be oppressive or unfair to the defendants, whereas to refuse that application would be to deny to the plaintiff reasonable facilities for making out his case;
- (12) to refuse the plaintiff's application would be to compel him to give up his case as it was not likely that his witnesses and himself would be permitted to travel from Canada to this Colony, during the present war, for the purpose of giving evidence in this action;
- (13) even if such permission could be obtained, the expense of bringing the plaintiff and his witnesses to the Colony would be far in excess

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of the cost of an examination in Canada before a special examiner; and (14) to refuse the plaintiff's application would amount to oppression of the plaintiff, while to grant it would not prevent the defendants from presenting their case fairly at the trial.

Coch v. Allcock & Co. (1888) 21 Q.B.D. 1,178, and *Ross v. Woodford* (1894) 1 Ch. 38, 42, applied.

The evidence which the plaintiff proposed to lead before the special examiner in Canada was both relevant and material.

Held that an order would not be made that the plaintiff pay the defendants' costs before the special examiner, whatever the result of the action might be.

Langen v. Tate (1883) 24 Ch. D. 530, C.A. per Cotton, L.J., distinguished

SUMMONS taken out by the plaintiff for an order that certain facts (stated in the judgment) may be proved by affidavit at the hearing of the action; alternatively, for an order for the appointment of a special examiner for the purpose of taking the examination, cross-examination and re-examination *viva voce*, on oath or affirmation, of the plaintiff and Lucien Cholette, the plaintiff's manager, as witnesses on the part of the plaintiff at Montreal, Quebec, Dominion of Canada, on the usual terms, and that the action be not set down for hearing until the filing of the depositions to be taken on such examination.

H. C. Humphrys, K.C., for the applicant (plaintiff).

J. A. Luckhoo, K.C., for the respondents (defendants).

Cur. adv. vult.

DUKE, J. (Acting): This is a summons taken out by the plaintiff:

- (a) for an order that certain facts may be proved by affidavit at the hearing of this action; and
- (b) alternatively, for an order for the appointment of a special examiner for the purpose of taking the examination, cross-examination and re-examination *viva voce*, on oath or affirmation, of the plaintiff and Lucien Cholette, the plaintiff's manager, as witnesses on the part of the plaintiff at Montreal, Quebec, Dominion of Canada, on the usual terms, and that the action be not set down for hearing until the filing of the depositions to be taken on such examination.

The plaintiff Joel Gomberg, a manufacturer of hats and caps, carries on business in the Dominion of Canada; and he claims from the defendants G. Bettencourt and Company, Limited, who are incorporated, and carry on business in this Colony, the sum of \$452 for hats sold and delivered. In his statement of claim the plaintiff alleges:

3. The defendants by written orders numbers C 45 and C 91 dated respectively the 20th August, 1941 and 25th September, 1941, ordered certain goods from the plaintiff through Mr. Dallas V. Kidman, a Commission Agent of Georgetown, and these orders were duly accepted by the plaintiff.

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4. On or about the 14th day of February, 1942, the plaintiff delivered the said goods to the defendant by posting the same at the Post Office, Montreal, and in due course drew a Sight Draft on the defendants which was dishonoured.

From the defence it would appear that, at the trial of this action, there will be two main questions for determination:

- (1) whether the goods were in fact posted on the 14th, February, 1942, or at all, at the Post Office at Montreal, Quebec, Canada, by the plaintiff to the defendants; and
- (2) whether there was, by the act of posting, delivery of the goods by the plaintiff to the defendants.

From the proceedings in this action, it would appear that the plaintiff will seek to prove the following facts, and will submit that the facts raised a *prima facie* liability on the defendants to pay him for the goods:

- (1) that, by the terms of the contract of sale between the plaintiff and the defendants, the plaintiff was under no obligation to insure the goods against war risk;
- (2) that the goods ordered by the defendants from the plaintiff were posted on the 14th February, 1942, at the Post Office at Montreal, Quebec, by the plaintiff to the defendants;
- (3) that the plaintiff effected postal insurance on the goods;
- (4) that, during the present war, the defendants ordered from the plaintiff hats and caps (other than the hats the subject-matter of this action); that, in respect of all the orders filled by the plaintiff prior to the 14th February, 1942, the goods ordered were sent by the plaintiff to the defendants by parcel post; and that the only insurance effected by the plaintiff on those goods was postal insurance;
- (5) that postal insurance did not cover war risk: and
- (6) that the goods were lost at sea, as the result of enemy action.

It appears that these allegations are substantially denied, or not admitted, by the defendants; and, as I understand the case for the defence, the defendants will, at the trial of the action, submit that, on proof by them of some or all of the following facts, the Court must necessarily hold that the defendants are not liable to pay the plaintiff for the goods. Those facts appear to be as follows:

- (1) that the goods were sent by the plaintiff to the defendant "by a route involving sea transit in circumstances in which it was usual to insure" against war risks as well as ordinary marine risks; see Sale of Goods Ordinance, cap. 65, s. 34 (3);
- (2) that the defendants were not, before shipment, informed by the plaintiff of the time when or place where the shipment would be made in order to give the defendants an opportunity to effect insurance, and the plaintiff failed to inform the defendants by what ship the goods were to be conveyed to Georgetown or about what time the said goods were to be shipped. The defendants had no knowledge of any of these facts;
- (3) that, due to the neglect to supply such information to the defendants, they had no opportunity of effecting any insurance of any kind on the said goods, or to give instructions to enable them to effect any insurance;
- (4) that the defendants could not have effected insurance on the goods ordered by them from the plaintiff, against losses of every nature including war risks in times of war, inasmuch as they did not know the name of the ship by which the goods were to be conveyed to this Colony, or the date of the departure of the ship from Canada;

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- (5) that between the 20th August, 1941, (the date of the first order for goods) and the 14th February, 1942, (the date of posting of the goods at Montreal, Canada) there was a custom in commercial contracts such as contracts of sale between a Canadian exporter (or the plaintiff) and a British Guiana importer (or the defendants) for the seller to insure the goods ordered, against losses of every nature including war risks in times of war and for the Canadian exporter (or the plaintiff) to charge any costs so incurred to the British Guiana importer (or the defendants);
- (6) that it was an implied term of the contract of sale between the plaintiff and the defendants for the plaintiff to insure the goods ordered against losses of every nature including war risks in times of war and for the plaintiff to charge any costs so incurred to the defendants;
- (7) that, it being an implied term of the contract between the plaintiff and the defendants, and also, according to the custom in such commercial contracts, for the plaintiff to insure the goods ordered against losses of every nature including war risks in times of war, the plaintiff undertook to insure the goods ordered by the defendants against losses of every nature including war risks in times of war;
- (8) that the plaintiff represented to the defendants by the statement "insurance carried" appearing on the invoice, that he had insured the goods ordered by the defendants, against losses of every nature including war risk in times of war;
- (9) that the plaintiff is estopped from denying that he had undertaken to insure the goods ordered by the defendants, against losses of every nature including war risks in times of war," such estoppel arising from the undertaking by the plaintiff to insure and from the representation by the plaintiff that he had done so.

In short, the case set up by the defendants is that (assuming that the goods were, as alleged by the plaintiff, posted to the defendants, not insured against war risk, and lost at sea by enemy action), the defendants are not liable to the plaintiff for the price of the goods, because:

- (a) the plaintiff was under an obligation to insure the goods against war risk, such obligation arising—
 - (i) under an implied term in the contract of sale; or
 - (ii) according to the custom in such commercial contracts; or
 - (iii) under section 34 (3) of the Sale of Goods Ordinance, cap. 65;
- (b) the goods were, by section 34 (3) of the Sale of Goods Ordinance, cap. 65, at the risk of the plaintiff during their sea transit;
- (c) the plaintiff undertook, by reason of the implied term in the contract of sale, and of the custom in such commercial contracts, to insure the goods against war risk;
- (d) the plaintiff represented to the defendants, by the statement "insurance carried" appearing on the invoice, that he had insured the goods against war risk; and
- (e) that the plaintiff, by reason of the undertaking and of the representation, is estopped from denying that he had insured the goods against war risk.

The plaintiff has applied that, at the trial of this action, the following facts may be proved by affidavit:

- (1) that the goods, the subject-matter of this action, were posted to the defendant by parcel post, at Montreal;
- (2) that all previous shipments of hats ordered by the defendants were sent by the plaintiff to the defendants by parcel post;
- (3) that the only insurance effected on all the aforesaid shipments was postal insurance;
- (4) that postal insurance does not cover loss by enemy action;
- (5) that the shipment, the subject-matter of this action, was, to the best of the plaintiff's knowledge information and belief, lost as the result of enemy action, such information having been obtained from the Canadian Postal Authorities by letter dated 27th April, 1942;

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- (6) that the defendants have never requested the plaintiff to insure any goods ordered by them against war risk; and
- (7) that the shipment, the subject-matter of this action, was not insured by the plaintiff against war risk.

The plaintiff has further applied that the affidavit of Lucien Cholette, the manager of the plaintiff firm, sworn to on the 20th day of January, 1943, and the affidavit of the plaintiff sworn to on the 22nd day of February, 1943, proving the above mentioned facts may be filed and read at the hearing on such conditions as the Court may think reasonable.

By rule 1 of Order 34 of the Rules of the Court, 1900, the Court may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing on such conditions as the Court may think reasonable provided that where it appears to the Court that the other party *bona fide* desires the production of a witness for cross-examination and that such witness can be produced within such time as the Court deems reasonable, an order shall not be made authorising the evidence of such witness to be given by affidavit. Counsel for the defendants has stated that his clients desire the production of the plaintiff and his witnesses for cross-examination. Such cross-examination may be directed not only to the facts deposed to by the plaintiff and his witnesses, but also to establishing the facts upon which the defendants rely. At this stage of the proceedings, I am therefore bound to assume that the desire of the defendants that the plaintiff and his witnesses be produced for cross-examination is *bona fide*. The plaintiff's application for leave to lead evidence by affidavit must therefore be refused.

It may be interesting to point out that, by rule 2 (3) of the English Order 30, it is provided that where it appears to the Court or judge that any party *reasonably* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit, but the *expenses of such witness at the trial shall be especially reserved*. This sub-rule was substituted in 1937 and 1938 for a previous rule, which was substantially the same as rule 1 of Order 34 of our Rules of Court, 1900. A party may be acting perfectly *bona fide* in expressing a desire that the opposite party and his witnesses be produced for cross-examination, but he may, nevertheless, be acting in a most unreasonable manner: in other words, a person can, at one and the same time and in the same transaction, be acting both honestly and unreasonably.

There now remains for consideration the application made, in the alternative, by the plaintiff for an order for the appointment of a special examiner to examine the plaintiff and his witnesses at Montreal, Quebec, Canada.

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Counsel for the defendants has strenuously urged that such an order should not be made, because the plaintiff has chosen the Supreme Court of this Colony as his forum, and he and his witnesses should therefore come here to prove his case.

The main witnesses for the plaintiff are permanently resident in Canada. The transactions connected with the posting and insurance of the goods, if they were indeed posted and insured, took place in Canada, and they can be proved only by persons there resident: the plaintiff alleges that he received a letter dated the 27th April, 1942, from the Canadian Postal Authorities stating that the goods posted to the defendants on the 14th February, 1942, were lost by enemy action, but it does not appear that the defendants have ever requested inspection of that document.

There is no certainty that, if the plaintiff and his witnesses do travel to this Colony, they would have the opportunity, and the advantage, of giving evidence before the trial judge. Through pressure of work, the trial judge might not be able to take the case on the day fixed for the hearing: and even if the judge is ready and willing to try the case on the appointed day, an application may be made which, if granted, would prevent the action from being tried on that day. The plaintiff and his witnesses could not remain in this Colony for an indefinite period. In such circumstances, the evidence of the plaintiff and his witnesses would necessarily have to be taken, within the jurisdiction, by a special examiner: and the expense of travel to and from the Colony would be thrown away.

The witnesses for the defendants are permanently resident in this Colony. Had the plaintiff chosen the Supreme Court of the Province of Quebec as his *forum*, the plaintiff, if the action was cognizable by that Court, would have been able to give evidence in the Quebec Court of the few short facts necessary to establish a *prima facie* case of liability in the defendants: and the defendants would either have had to take their witnesses at considerable expense, and with much difficulty, to Quebec to prove the facts alleged by them, or they would have had to apply for the appointment of a special examiner to examine their witnesses in the Colony.

The plaintiff has, however, brought his action in the Supreme Court of this Colony. The defendants will, therefore, not have the expense and difficulty of taking their witnesses to Canada; and their witnesses will not, in pursuance of an order of the Quebec Supreme Court, be examined before a special examiner in this Colony. The evidence of the defendants' witnesses will be taken and tested, before the Court itself. The trial judge will be able to observe their demeanour, and he will be able to form a more accurate opinion of the value, and weight, of their testi-

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mony than of any evidence which may be taken before a special examiner.

In *Coch v. Allcock & Co.* (1888) 21 Q.B.D. 1,178, the plaintiff, who was a Norwegian merchant, carrying on business in Norway, sued the defendants for the price of ice shipped in Norway for a port in England and there delivered to the defendants. The defence claimed a reduction of the price for breach of contract in respect of alleged deficiency in weight and inferior quality of the ice delivered. An application was made at Chambers on behalf of the plaintiff, under rule 5 of Order 37 of the English Rules of the Supreme Court, for an order for a commission to Norway to examine the plaintiff and his foreman and other witnesses. The plaintiff's affidavits showed that the evidence of the witnesses to be examined on the commission was material with regard to the weight, size and condition of the blocks of ice when shipped, and when delivered; and it was stated that the witnesses were resident in Norway out of the jurisdiction some of them not being in the plaintiff's employment. It was also stated that the expense of bringing the witnesses to England, including their loss of time, would be £10 per head, and would probably amount to more than £100, whereas the expense of examining them on commission in Norway would probably only be about £25. The defendants' affidavits asserted that the witnesses who loaded the ice on board the ship and unloaded it, and whose evidence would be material as to its condition, etc. were in the employment of the plaintiff. The Master made an order for the commission, and this order was reversed by Denman, J. The Divisional Court (Field and Wills, JJ.) reversed the order of Denman, J., and granted the application for a commission as asked for. The defendants appealed to the Court of Appeal who dismissed the appeal.

In the Court of Appeal, Lord Esher, M. R. said:

It is clear that, according to the established practice it is a matter of judicial discretion, and the commission ought only to be granted on reasonable grounds being shewn for its issue. The matter being one of discretion, it is impossible to lay down any general rule as to when a commission will be granted. It must depend on the circumstances of the particular case. The Court must take care on the one hand that it is not granted when it would be oppressive or unfair to the opposite party; and on the other hand, that a party has reasonable facilities for making out his case, when from the circumstances there is a difficulty in the way of witnesses attending at the trial. All the circumstances of each particular case must be taken into consideration. With regard to the case of a plaintiff asking for a commission to examine himself, that also appears to me to be a matter of discretion, but the discretion will be exercised in a stricter manner, and the Court ought to require to be more clearly satisfied that the order for a commission ought to be made.

In the Divisional Court, Field, J. said:

If the party himself wants to be examined (on commission) and the circumstances are such as to make it apparent that it is important that the evidence proposed to be given should be subject to the test of strict cross-examination, and for that purpose his presence in Court is necessary, that, in the discretion of the Judge, may be a ground for refusing an order for a commission.

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In Ross v. Woodford (1894) 1 Ch. 38, 42, Chitty, J. stated that “no doubt it is a matter of great importance to see the demeanour of the witnesses in open Court, where there is likely to be a considerable conflict of testimony”, and continued:

There are many cases where the Court has been very reluctant to accede to applications by a plaintiff to take evidence abroad, because the tribunal has been chosen by the plaintiff himself; so too with regard to the case of a plaintiff asking for a commission to examine himself, the Court has full discretion but it exercises that discretion strictly, and does not grant the application unless a very strong case is made out.

The plaintiff’s application for an order for the examination of witnesses out of the jurisdiction is made *bona fide* and there was no delay in making it. The plaintiff and his witnesses are permanently resident out of the Colony, they have not left this Colony with the object of avoiding examination in Court. The pleadings were closed on the 4th March, 1943, and the application was tiled on the same day.

The issue which the Court has to try is whether the defendants are liable to pay to the plaintiff the sum of \$452 for goods sold and delivered. The evidence which the plaintiff wishes to be given out of the jurisdiction is required by the plaintiff to support his claim for goods sold and delivered, and is material to that claim.

There is good reason why the witnesses cannot be examined in this Colony. A war is in progress, and that war is, at present, global in its extent. In this war, travel except for the war effort or in the national interest must be discouraged, and at times be prevented, by all the Allied nations. If the plaintiff and his witnesses were to travel to this Colony from the Dominion of Canada, they would ordinarily have to travel through the United States of America to Miami, Florida, to take an aeroplane there. It does not appear to me to be likely that the Canadian authorities would permit the plaintiff and his witnesses to be furnished with currency to enable them to take a trip to this Colony for the purpose of giving evidence in a lawsuit which is not of national importance. I accept the statement in paragraph 10 of the affidavit of the plaintiff’s solicitor filed herein on the 4th March, 1943, that he is informed and verily believes that “owing to the restrictions on travel imposed as the result of present hostilities, it would be very difficult, if not impossible, to obtain permission for the plaintiff and/or the said Lucien Cholette to travel to this Colony and/or to obtain a passage for them or him”. It is true, as counsel for the defendants has pointed out, that the sources of the information were not disclosed; but the defendants have not even attempted to say that the statement is not probably true: and, in the time of war, a judge cannot be entirely oblivious, or unmindful, of the conditions which have necessarily flowed therefrom.

Every effort has been made by the plaintiff to obtain from the

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defendants admission of the facts which the plaintiff and his witnesses propose to prove, but without success. In a letter written by Messrs. Dias & Dias, the solicitors for the defendants, on the 11th September, 1942, they informed Messrs. Cameron & Shepherd, the solicitors for the plaintiff, that the plaintiff would have to furnish proof that the goods were in fact shipped. On the 9th day of October, 1942, the solicitors for the plaintiff replied, *inter alia*, as follows: “. . . details of this amount can be had from an inspection of the postal receipts which are in our possession. As stated above, postal insurance was effected by our clients on this shipment and inspection of the postal receipts will disclose this to you. These postal receipts are satisfactory proof of delivery . . .” The defendants have refrained from asking for inspection of the postal receipts. On the 27th January, 1943, the plaintiff’s solicitor, Joseph Edward DeFreitas, wrote to the defendant’s solicitor, Vivian Charles Dias, as follows:

I am directed by counsel to enquire —

- (1) —(a) Whether the defendants will admit that 60 parcels each containing ½ (half) dozen Hats in fulfilment of Order C. 45 and as to 18 (eighteen) dozen of Order C, 91 were posted to the defendants on 14th February, 1942, at the Canadian Post Office at Montreal, by parcel post, subject to the production of Post Office Receipts, or
- (b) Whether the defendants will consent to proof of the foregoing facts by affidavit;
- (2) Whether the defendants will admit—
 - (a) That previous shipments to them were sent by parcel post.
 - (b) That the only insurance effected on such previous shipments was postal insurance.
 - (c) That postal insurance does not cover loss by enemy action.
 - (d) That the defendants have never requested the plaintiff to insure any goods offered by them against war risk.

On the 6th February, 1943, the defendants’ solicitor wrote to the plaintiff’s solicitors as follows:

I beg to acknowledge the receipt of your letter of the 27th January in connection with the above named action relative to certain enquiries, and to inform you that Counsel acting with me for the defendants has advised that the defendants cannot and/or are not in a position to make the admissions asked for in your said letter.

The question of the manner of proof is entirely one for determination by Counsel instructing you.

On the 4th March, 1943, the plaintiff applied for leave to deliver interrogatories to the defendants, and an order was made therefor on the 10th May, 1943. In answer to the interrogatories the defendants admitted on the 3rd June, 1943, that previous shipments to them were sent by parcel post; they have not admitted that the insurance effected on these shipments was postal insurance, nor that postal insurance did not cover war risk; it would seem that they have indicated that they never requested the plaintiff to insure any goods ordered by them against war risk but they have not answered the specific question.

The Court has a judicial discretion, which will be very strictly exercised, as to whether it will, in any particular case, make an order for examination, out of the jurisdiction of the plaintiff or

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of his witnesses, and, in the case of the plaintiff, an order will not be made unless a very strong case is made out. The discretion of the Court will be exercised according to the circumstances of the case, including the nature of the proposed evidence: see *Yearly Practice*, 1940, pages 646, 647, 650 and *Annual Practice*, 1943, pages 671, 674, 675.

The nature of the proposed evidence is disclosed in the application for leave to adduce evidence by affidavit and need not be repeated. It seems to be that it ought to be a simple matter for the defendants to ascertain from the Canadian Postal Authorities, either directly or through the medium of a solicitor in Montreal:

- (a) whether parcels were posted to the defendants by the plaintiff on the 14th February, 1942, at the Montreal Post Office;
- (b) whether the plaintiff effected postal insurance on those parcels;
- (c) what postal insurance covers, and whether it covers loss by enemy action; and
- (d) whether those parcels were lost by enemy action, at sea, while on their way from Canada to this Colony.

The proceedings disclose that the defendants have declined to inspect the postal receipts which are in the possession of the plaintiff's solicitor. The proceedings do not disclose that any inquiries have been made of the Canadian Postal Authorities, or, if made, with what result.

In actions for breach of commercial contracts (and in paragraph 7 of their defence the defendants admit that the contract sued upon is a commercial contract) the weight of modern opinion leans to the view that the parties should admit all such facts as, on enquiry, may properly be admitted, and that the Court should only be asked to determine the real issues between the parties. The reason for this is that the time of merchants and traders will be saved; and there would be a saving of expense to those who are unsuccessful in litigation. It is not in the general interest of the legal profession that a merchant, in considering whether he should go to trial on a nice point of law, should also have to take into consideration that if he perchance loses on that point of law, he would in addition to the costs on that issue, also have to pay the costs of proving matters which might well have been admitted. Such a merchant might decide not to go to trial, and this would result in pecuniary loss to those members of the legal profession whose services he would have engaged. If the defendants have made enquiries of the Canadian Postal Authorities (as they ought to have done if they do indeed doubt that the plaintiff did in fact post and effect postal insurance on the goods, or if they do indeed doubt that the plaintiff received a letter dated the 27th April, 1942, from the Canadian Postal Authorities stating that the goods were lost by enemy action), and if those enquiries disclosed:

- (1) that parcels were posted to the defendants by the plaintiff on the 14th February, 1942, at the Montreal Post Office;
- (2) that the plaintiff effected postal insurance on those parcels;
- (3) what postal insurance covers, and that it does not cover loss by enemy action; and

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(4) that those parcels were lost by enemy action, at sea, while on their way from Canada to this Colony,—

then as this is a commercial case, the defendants should have admitted the facts vouched for by the Canadian Postal Authorities.

Counsel for the defendants has stressed that the plaintiff must affirmatively establish that the parcels alleged to have been posted by the plaintiff to the defendants on the 14th February, 1942, contained hats and hats of the description as ordered by the defendants on the 20th August, 1941, and the 25th September, 1941. And he has urged that the evidence of the plaintiff and his witnesses,—

- (a) that the parcels contained hats and hats as ordered;
- (b) that the only insurance effected by the plaintiff on previous shipments to the defendants was postal insurance; and
- (c) that postal insurance does not cover loss by enemy action,—

should be taken, and tested before, the trial judge. He further submitted that the presence of the plaintiff and his witnesses is desired before the Court in order that they might be cross-examined as to the meaning of the words “insurance carried” appearing on the invoice for the goods the subject matter of the present action.

There is not likely to be any conflict between the witnesses for the plaintiff and witnesses for the defendants as to whether the parcels contained hats and hats as ordered. If the insurance effected by the plaintiff on previous shipments to the defendants was other than postal insurance, the defendants ought to be able to establish that fact affirmatively,—

- (a) by production of correspondence between the plaintiff and the defendants; and
- (b) by production of the insurance policies or of the certificates of insurance.

The determination of that issue ought to present no difficulty to the Court, whatever evidence the plaintiff and his witnesses may give. If postal insurance does indeed cover loss by enemy action, the defendants can easily prove this by obtaining from the Canadian Postal Authorities a copy of the terms and conditions of postal insurance as they existed on the 14th February, 1942, when, it is alleged, the hats were insured by the plaintiff. The plaintiff can be cross-examined in Canada, as effectively as in British Guiana, as to what he meant by the words “insurance carried” appearing on the invoice for the hats, the subject matter of this action, which were sent by the plaintiff to the defendants by insured parcel post.

If I may paraphrase the language of Field, J. in *Coch v. Allcock & Co.*, *supra* I am satisfied that the circumstances of this case are not such as to make it apparent that it is important that the evidence proposed to be given should be subject to the test of strict cross-examination and that for that purpose the presence in Court of the plaintiff and his witnesses is necessary. If an

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order for the appointment of a special examiner is made, the defendants would be at liberty to engage counsel in Montreal to cross-examine the plaintiff and his witnesses.

In *Ross v. Woodford, supra*, it was said by Chitty, J.:

The point is whether by refusing the defendants' application I am to compel them either to give up their case or come over here at great expense and inconvenience to attend the trial.

And in the notes to the *Annual Practice*, 1943, at pages 674, 675 it is stated that:

It must be seen that the party applying is not oppressed and that the other party is not prevented from presenting his case fairly at the trial.

On the balance of convenience and inconvenience, and in the exercise of my judicial discretion, I think it right to allow the plaintiff's application for an order for the appointment of a special examiner for the purpose of taking the examination, cross-examination and re-examination *viva voce* on oath or affirmation of the plaintiff and of witnesses on behalf of the plaintiff at Montreal, Quebec, Dominion of Canada on the usual terms, and that the action be not set down for hearing until the filing of the depositions to be taken on such examination, because:

- (1) the application is made *bona fide*, and without any delay whatever;
- (2) the issue in respect of which the evidence is required is one which the Court has to try;
- (3) the plaintiff and the witnesses who are to be examined can give evidence material to the issue;
- (4) there is good reason why the plaintiff and his witnesses cannot be examined here;
- (5) the examination can properly take place in the Province of Quebec which is part of the British Empire;
- (6) every effort has been made by the plaintiff to avoid the necessity of an order by trying to obtain from the defendants admissions or statements which they might be willing to make;
- (7) the defendants have deliberately refrained from seeking to make enquiries with the object of ascertaining whether the evidence which the plaintiff and his witnesses propose to give in Canada, is true or not;
- (8) in commercial cases (and this is a commercial case) the parties should admit all such facts as, on enquiry, may properly be admitted;
- (9) the circumstances of this case are not such as to make it apparent that the evidence proposed to be given should be subject to the test of strict cross examination, and that for that purpose the presence in Court of the plaintiff and his witnesses is necessary;
- (10) there is not likely to be any serious conflict between the witnesses for the plaintiff and the witnesses for the defendant so far as the evidence which the plaintiff and his witnesses propose to give is concerned;
- (11) to grant the plaintiff's application would not be oppressive or unfair to the defendants, whereas to refuse that application would be to deny to the plaintiff reasonable facilities for making out his case;
- (12) to refuse the plaintiff's application would be to compel him to give up his case as it is not likely that his witnesses and himself would be permitted to travel from Canada to this Colony, during the present war, for the purpose of giving evidence in this action;
- (13) even if such permission could be obtained, the expense of bringing the plaintiff and his witnesses to the Colony would be far in excess of the cost of an examination in Canada before a special examiner; and
- (14) to refuse the plaintiff's application would amount to oppression of the plaintiff, while to grant it would not prevent the defendants from presenting their case fairly at the trial.

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In *Langen v. Tate* (1883) 24 Ch. D., 522, 530, C.A., Cotton, L. J. delivering the judgment of the Court said:

There is this further consideration; it may be that the plaintiff may succeed in his action, but that nevertheless the Court may at the hearing be satisfied that this evidence (the evidence proposed to be given on commission on the application of the plaintiff) was not material even if it was relevant. We are of opinion, therefore, that if the commission goes there ought to be this further term, that the plaintiff is to give security, to be settled by the judge in chambers if the parties differ, to pay to the defendants all such costs of and occasioned by the commission as the judge at the trial may think he ought to pay whatever the result of the action may be.

In that case considerable doubt was expressed as to whether the evidence which the plaintiff proposed to lead on commission, was material. In the present case there is no doubt as to the materiality of the evidence which the plaintiff proposes to lead before the special examiner in Canada. Counsel for the defendants submitted that I should make the same order as was indicated in *Langen v. Tate*, but the circumstances are entirely different and I make no order as to security for the defendants' costs of the examination in Canada.

The costs of and incidental to the application made by way of summons on the 4th March, 1943 will be costs in the cause and I certify for counsel.

Order for appointment of special examiner.

Solicitors: *J. Edward de Freitas*, for applicant (plaintiff);
Vivian C. Dias, for respondents (defendants).

M. THOMAS v. SUE KIM AND ANR.

MILDRED THOMAS, Appellant.

v.

SUE KIM, Respondent.

[1942. No. 271—DEMERARA].

MILDRED THOMAS, Appellant,

v.

W. FRANCIS DUESBURY, Respondent.

[1942. No. 272—DEMERARA],

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

1943. AUGUST 17.

Appeal—From magistrate's Court—Record of appeal—Parties not satisfied with—Submitted to magistrate by order of Full Court—Record corrected—Parties still not satisfied—No agreement as to what actually took place in magistrate's court—Judgment set aside—Matter remitted to magistrate's court for rehearing.

Upon the appeals coming on for hearing it was ordered, with the consent of all parties, that the records of appeal be submitted to the magistrate and that, if in his opinion they needed correction, they be corrected by him. The records of appeal were so submitted, and they were corrected by the magistrate. The parties were not satisfied with the accuracy of the corrected records, and the appellant was unable to say that the recollection of the respondents as to what had actually taken place in the magistrate's court, was correct.

Held, that the judgments in the magistrate's court must be set aside, and the matters remitted for rehearing.

APPEALS from decisions of a Magistrate of the Georgetown Judicial District.

L. A. Hopkinson, for the appellant, Mildred Thomas.

S. L. van B. Stafford, K.C. for the respondent, Duesbury.

E. D. Clarke, solicitor, for the respondent, Sue Kim.

No written judgment was delivered, but the effect is as stated in the head note.

Solicitor: *R. G. Sharples*, for the respondent, W. Francis Duesbury.

GOOLCHARAN v. HAMID.

GOOLCHARAN, Appellant (Defendant),

v.

HAMID, Rural Constable, Respondent (Complainant).

[1942. No. 424.—DEMERARA].

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

1943. AUGUST 17.

Criminal law and procedure—Stealing growing crops—No evidence that offence took place in proclaimed district—Whipping or flogging cannot be ordered—Summary Jurisdiction (Offences) Ordinance, cap. 13, s. 76, as amended by the Defence (Praedial Larceny) Regulations, 1942.

Where a person has been convicted of an offence under section 76 (1) of the Summary Jurisdiction (Offences) Ordinance, cap. 13, as amended by the Defence (Praedial Larceny) Regulations, 1942, a whipping or flogging cannot be ordered where there is no evidence that the offence took place in a proclaimed district as declared under section 76 (2) of cap. 13

APPEAL by the defendant Harricharan for variation of a sentence imposed upon by the magistrate of the Berbice Judicial District. The appellant was convicted of stealing a bunch of plantains growing in open land at Kilcoy, Corentyne, Berbice, in the Berbice Judicial District, contrary to section 76 (1) of the Summary Jurisdiction (Offences) Ordinance, chapter 13, as amended by the Defence (Praedial Larceny) Regulations, 1942. He was sentenced to imprisonment for 3 months with hard labour, and it was ordered that he receive a flogging of six strokes with the approved instrument. By section 76 (1) (a) of chapter 13, if the offence was committed in a proclaimed district, the appellant was liable to a penalty not exceeding \$150 or to imprisonment not exceeding six months with or without whipping or flogging as the Court orders: and by section 76 (1) (b), if the offence was committed elsewhere than in a proclaimed district, the appellant was liable to a penalty not exceeding \$150 or to imprisonment not exceeding six months. By proclamation No. 5 of 1942, dated 5th July, 1942, and made under section 76 (2) of Chapter 13, only that portion of the Berbice judicial district “situate north of imaginary straight lines between the Epira mission on the Courantyne River and the confluence of the Puruni and Mazaruni Rivers and between that confluence and the confluence of the Akarabisi and Cuyuni Rivers” was declared to be a proclaimed district. After the defendant was convicted, he did not admit that Kilcoy was within the limits of the proclaimed district which was part of the Berbice Judicial District: and no evidence was called to prove that such was the case. In his reasons for decision, the magistrate stated that he satisfied himself that Kilcoy was in the proclaimed district

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The appellant asked that the sentence be varied by deleting therefrom the provision as to a flogging.

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

S. E. Gomes, A.A.G., for the respondent.

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

In this case the Magistrate imposed a sentence of flogging which is only provided for by law when the offence of which the appellant was convicted has been committed within a certain area. It may be taken as a general principle that when the measure or nature of sentence depends upon the existence of a fact as, for example, the age of the accused, his antecedents or the time or place of his offence, it is essential before sentence that this fact be proved or admitted in the same manner as any other fact unless there is statutory provision to the contrary or it be a fact of which the Court may take judicial notice.

In the present case the fact that a certain place is within an area proclaimed by the Governor for the purposes of the section under which the appellant was charged is not one of which a court may take judicial notice and due proof thereof should have been made before the learned magistrate imposed the special sentence dependent upon its existence. The appeal is therefore allowed with costs and the sentence of the lower Court varied by the deletion therefrom of that part which adjudges the appellant to receive a flogging of six strokes with the approved instrument.

Appeal allowed; sentence varied.

BHAGWANDIN v. COMMISSIONER OF POLICE.

BHAGWANDIN, Appellant, (Applicant),

v.

COMMISSIONER OF POLICE, Respondent (Opposer).

[1943. No. 46.—DEMERARA].

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

1943. AUGUST 18.

Liquor Licensing—District Licensing Board—Decision of—Appeal from—Ground of—Extraneous matter taken into consideration by Board—What is not extraneous matter—Intoxicating Liquor Licensing Ordinance, cap. 107, s. 25 (3) (d).

The question as to what extraneous matter within the meaning of section 25 (3) (d) of the Intoxicating Liquor Licensing Ordinance, cap. 107, does not include, considered.

APPEAL by BHAGWANDIN from a decision of the District Licensing Board for the county of Demerara refusing his application for a certificate for the grant of a hotel licence under the Intoxicating Liquor Licensing Ordinance, cap. 107. At the annual general licensing meeting in November 1941, Bhagwandin was granted a certificate for a hotel licence in respect of the year 1942. On the 9th October 1942 he applied for a renewal, and on the 31st October 1942 his application was opposed by the Commissioner of Police, on the following grounds:

1. that the premises have within the preceding twelve months been so conducted as to be a nuisance in the neighbourhood.
2. that the history of the applicant is such that in the interest of the good order of the community the application should be refused.

The Board considered the application, and the objections thereto, and on the 16th December 1942, refused to grant the application for the renewal on the ground that the character and history of the applicant did not justify the granting of a certificate for the renewal of the hotel licence held by the applicant during the year 1942. In arriving at that conclusion the Board took into consideration the following facts, *inter alia*:

- (a) the applicant was convicted by the Magistrate's Court on the 6th July, 1939, for selling rum without a licence on the premises for which a certificate for a hotel licence was sought and was fined \$50 and costs \$4.48 in default two months' hard labour;
- (b) the applicant was convicted at the same time for selling cigarettes without a licence on the said premises and was fined \$4 and ordered to take out a licence for \$5;
- (c) the applicant was convicted on the 9th March, 1942, for permitting disorderly behaviour in his licensed hotel premises on the night of the 25th January, 1942, and fined \$50 and costs \$1.68 in default 60 days' hard labour;
- (d) the applicant was convicted on the 22nd August, 1942, for selling rum without a licence on the 6th September, 1941, on the said premises and was fined \$150 and costs \$6 in default 90 days' hard labour;

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- (e) the applicant was convicted on the 14th October, 1942, for keeping a common bawdy house in his licensed hotel on the said premises between the months of February and April, 1942, from which conviction he entered an appeal.

The Board also stated that they were satisfied that the applicant's premises which were during the year 1942 a licensed hotel, were the resort of drunken and brawling sailors and women of no regular employment: and that in the exercise of, its discretion the Board considered that on this ground also, the application should be refused in view of the condition and circumstances of the said premises. The applicant Bhagwandin appealed on the ground that the Board had taken extraneous matters under consideration in arriving at their decision. The matters alleged to be extraneous were:

1. the conviction of the 9th March, 1942, was not of such a nature as to justify the Board in not granting a renewal of the applicant's licence, and the Board should not have been influenced by the convictions of the 6th July, 1939, the premises of the applicant having not been licensed at the date of the occurrences which were the subject-matter of the convictions.
2. the Board took into consideration a conviction of the applicant on the 22nd August, 1942, and the Board also took into consideration a conviction of the applicant on the 14th October, 1942, both of which convictions are now *sub judice*, there being now pending appeals from the decisions of two of the Justices who were members of the Board when the applicant's application was considered and were aware of the steps that had been taken by the applicant to have their said decisions reversed.
3. there is no reference in the Board's decision to Mr. Millard's evidence which the Justice Mr. C. R. Browne who delivered the Board's decision said the Board would not be influenced by, and did not consider of sufficient weight to justify the refusal of the application.

J. A. Luckhoo, K.C., 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 from a decision of the District Licensing Board for the County of Demerara refusing the appellant's application for the renewal of his licence under section 12 of the Intoxicating Liquor Licensing Ordinance, Cap. 107. The appellant's sole ground of appeal is that the Board took extraneous matters into consideration in arriving at its decision,

The record does not, in the opinion of this Court, disclose that the Board did take extraneous matter into consideration and the appeal therefore fails and is dismissed with costs.

Appeal dismissed.

C. SHING AND ORS. v. A. C. KANG AND ORS.

CHIN SHING, CHIN LUN AND CHO CHU, Appellants
(Applicants),

v.

ALFRED CHOO KANG, SUE TANG AND SUE LOY,
Respondents (Opposers).

[1943. No. 62—DEMERARA].

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

1943. AUGUST 18.

Liquor Licensing—District Licensing Board—Decision of—Appeal from—Ground of—Extraneous matter taken into consideration by Board—What is not extraneous matter—Intoxicating Liquor Licensing Ordinance, cap. 107, s. 25 (3) (d).

The question as to what extraneous matter within the meaning of section 25 (3) (d) of the Intoxicating Liquor Licensing Ordinance, cap. 107, does not include, considered.

APPEAL by Chin Shing, Chin Lun and Cho Chu from a decision of the District Licensing Board for the county of Demerara refusing to grant to them a certificate for the grant of a retail spirit shop licence for premises situate at lot 10, section B, Wismar, west bank, Demerara. The Board's reasons for decision were as follows:

1. The Board was of opinion after considering all the evidence given upon the application and in support of the opposition thereto that there was a sufficient number of premises already licensed to meet the needs of the neighbourhood.
2. The Board was of opinion—
 - (a) that the increase of population in the district alleged by the applicants did not materially affect the liquor trade at Wismar, Christianburg and the surrounding district because it was a merely floating population employed during the working period principally about the mines of the Demerara Bauxite Company a great distance from the Wismar-Christianburg centre where the two existing shops are located and thus probably consumed liquor only on pay-days.
 - (b) that the alleged congestion of the two existing shops at Wismar-Christianburg was due not to the presence of persons desiring to purchase liquor, but to the fact that the two spirit shops were used as pay-offices on pay-nights, no doubt to attract customers.
 - (c) that the evidence of the quantities of liquor of various brands from Georgetown spirit dealers dispatched to the existing shops at Wismar was not conclusive evidence that those shops were unable to supply sufficient liquor for the District, but merely indicated that various brands were stocked to meet the needs of discriminating consumers.

The applicant appealed on the ground that the Board had taken extraneous matter into consideration in arriving at their decision, when they purported to express the opinions which they did. There was another ground of appeal, but it was not argued.

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

J. A. Luckhoo, K.C., for the respondent Choo Kang.

C. SHING AND ORS. v. A. C. KANG AND ORS.

A. G. King, solicitor, for the respondents Sue Tang and Sue Loy.

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

This is an appeal from a decision of the District Licensing Board for the County of Demerara refusing the appellant's application for the grant of a licence under section 12 of the Intoxicating Liquor Licensing Ordinance, Cap. 107. The appellant's sole ground of appeal is that the Board took extraneous matter into consideration in arriving at its decision.

The record does not, in the opinion of this Court, disclose that the Board did take extraneous matter into consideration and the appeal must therefore fail and is dismissed with costs.

Appeal dismissed.

Solicitor for respondent Choo Kang: *F. Dias*, O.B.E.

JOEL GOMBERG, Plaintiff,
G. BETTENCOURT AND COMPANY, LIMITED, Defendants.

[1943. No. 1.—DEMERARA.]

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

1943. AUGUST 12, 13, 19.

Interrogatories—Answer to—Question put must be answered—If not, answer insufficient—Irrelevant matter in answer—Answer not capable of being used—Answer insufficient—Rules of Court, 1900, Order 27, rule 22.

Interrogatories—Answerable by “Yes”, “No” or “We do not know”—Not oppressive—Requiring reasons to be stated for lack of knowledge—Oppressive—As to evidence which a party intends to adduce in support of his case or as to names of his witnesses—Oppressive.

Interrogatories—For purpose of impeaching or destroying adversary’s case—To obtain admissions—Allowed.

Interrogatories—Delivered to a company—Duty of secretary—To inquire of agents and servants of company—Before answering.

The answer to an interrogatory must be confined to answering the question put. Any necessary or reasonable explanation without which the answer would be unfair or incomplete or misleading may be added.

When an answer is couched in a form which makes it embarrassing, that is to say, which prevents the person who asks for it from using it without having thrust upon him irrelevant matter as part of it, the answer is insufficient, and the proper course to pursue is to ask that a further answer shall be made. An answer is not sufficient which is so involved and so un-sufficient in the particular statement as not to be capable of being used *Lyell v. Kennedy* (1884) 27 Ch. D. 28, C.A., per Bowen, L. J. applied.

The plaintiff delivered an interrogatory to the defendants as follows for answer: “Is it not a fact that insurance against war risk on goods coming from North or Central or South America or the West Indies to British

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Guiana, or *vice versa*, can be effected in the Colony through one or more of the Insurance Companies doing business in this Colony?" The answer given was: "As far as we know, no Insurance Company doing business in this Colony would effect a comprehensive cover. There is the difficulty of knowing the value of the shipment, time of shipment and the name of the ship. In such circumstances insurance should always be effected by the suppliers who are in possession of all necessary information and charged to the buyers."

Held, that the question put had not been categorically answered, and that the defendants must make an answer, or a further answer.

The defendants were delivered an interrogatory for answer as follows: "Have you ever requested the plaintiff firm to insure any goods ordered by you against war risk? If so, give particulars." The answer was: "We have never at any time requested the plaintiff to effect any kind of insurance on any goods shipped by him to us, but the plaintiff has always led us to believe and impliedly undertook that he will do so." It was part of the case for the defence that by reason of an implied undertaking on the part of the plaintiff to insure the goods ordered against war risk, it was immaterial that there was no specific request by the defendants to insure. On a summons by the plaintiff for a further answer to the interrogatory.

Held, (1) that the answer to the interrogatory was in the nature of a confession and avoidance, and was not embarrassing within the meaning of the practice relating to Discovery.

(2) that, at the trial of the action, it will be determined by the trial judge whether, having regard to rule 22 of Order 27 of the Rules of Court 1900, the whole answer, or only the first portion, is to be admitted in evidence.

An interrogatory has not been answered where it related to the present knowledge, and the answer given was as to past knowledge at some unspecified time, of the person making the answer.

In answering an interrogatory, a secretary of a company is required to make enquiry from persons who were agents or servants of the company at the time of the answer.

An interrogatory is not oppressive where it can be answered by "Yes," "No," or "We do not know."

An interrogatory is oppressive, within the meaning of the rules relating to Discovery, where it requires the person to whom it is delivered for answer, to state reasons for his lack of knowledge.

On a summons in which the sufficiency or otherwise of an answer to interrogatories is being determined, the Court is not justified, where there is a case of mere suspicion, in disregarding the oath of the part interrogated.

Lyell v. Kennedy (1884) 27 Ch. D. 17, C.A. per Cotton, L.J. applied.

It would be contrary to the rules regulating the practice of Discovery, to require the person to whom an interrogatory is delivered for answer, to state why in his view, what was stated to be a fact by the opposite party is not indeed a fact at all.

Interrogatories as to the evidence which a party intends to adduce in support of his case, or as to the names of his witnesses will not be allowed. A party is entitled to interrogate for the purpose of impeaching or destroying his adversary's case, even where his own case upon the point may be a mere general traverse.

The object of interrogatories is not to learn what the issues are, but to see whether the party who interrogates cannot obtain an admission from his opponent which will make the burden of proof easier than it otherwise would have been. *Attorney-General v. Gaskill* (1882) 20 Ch D. 528, per Cotton, L.J. applied One of the issues in the action was whether the defendants, without knowing the name of the ship by which the goods were to be conveyed to this Colony or the date of the departure of the ship from Canada, could have effected insurance against war risk on the goods ordered by them in this Colony from the plaintiff who was a manufacturer in Canada. The defendants pleaded that, in those circumstances, insurance could not have been effected by them The object of interrogatory 5 (1) was to obtain an admission from the defendants that insurance against war risks on goods coming from North or Central or South America or the West Indies to British Guiana, or *vice versa*, can be effected in the Colony through one or

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more of the Insurance Companies doing business in this Colony; and the object of interrogatory numbered 5 (2) was to obtain an admission from the defendants that insurance against war risk can be effected without having knowledge of the ship by which the goods are to be sent and the time of shipment. The action was for goods sold and delivered, and it appeared that they were lost at sea by enemy action. They were not insured against war risk.

Held (1) that if the former admission is made by the defendants the case for the defendants would be impeached to a considerable extent, and if the latter admission is made by them that case, (on the particular issue would be destroyed;

(2) that the interrogatories are therefore neither fishing nor irrelevant to the matters in question in the action; they are not oppressive merely because they seek to make the defendants admit that their case is unfounded; the interrogatories are intimately related to a main issue in the action; and not only may the defendants' witnesses be cross-examined at the trial on the subject-matter of the interrogatories, but interrogatories may also be put on that subject-matter by the plaintiff to the defendants.

(3) that if the admissions are made, the plaintiff would be saved the expense of bringing witnesses to prove the facts which they wish to be admitted, and that is a legitimate use of interrogatories.

SUMMONS by the plaintiff for an order that the defendants make and file a further affidavit in answer to and/or fully and sufficiently answering interrogatories, and that the sufficiency or otherwise of the answers given thereto be generally determined, if necessary.

H. C. Humphrys, K.C., for the applicant (plaintiff).

J. A. Luckhoo, K.C., for the respondents (defendants).

Cur. adv. vult.

DUKE, J. (Acting): This is a summons taken out by the plaintiff for an order, *inter alia*, for a further answer to interrogatories. The interrogatories were delivered to the defendants under the authority of an order of Court dated the 10th May, 1943. The defendants filed an answer to the interrogatories on the 3rd June 1943; and on the 4th June, 1943, the plaintiff, being dissatisfied with the answers to interrogatories numbered 2, 3, 4, 5 (1), 5 (2) and 6 (2) filed the summons herein.

This is an action for the price of goods sold and delivered. The plaintiff is a Canadian manufacturer and he carries on business at Montreal, Quebec, in the Dominion of Canada. The defendants, who are merchants in this Colony, ordered certain hats from the plaintiff. The plaintiff alleges that he executed the orders; that he posted the hats to the defendants and effected postal insurance thereon; that in respect of all previous shipments of hats ordered by the defendants from the plaintiff, the only insurance effected by the plaintiff was postal insurance; that postal insurance covered sea transit but not war risk; and that the goods, the subject-matter of the action, were lost at sea by enemy action. These allegations are not admitted by the defendants. In their defence, the defendants plead that the plaintiff was under an obligation to the defendants to insure the goods against war risk, such obligation arising under an implied term in the contract of sale, custom in such commercial contracts,

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and section 34 (3) of the Sale of Goods Ordinance, cap. 65: that the goods were at the risk of the plaintiff during their sea transit, under section 34 (3) of the Sale of Goods Ordinance cap 65; that the plaintiff undertook to insure the goods against war risk; that the plaintiff represented to the defendants that he had so insured the goods; and that the plaintiff is estopped, by reason of the undertaking and the representation from denying that he had insured the goods against war risk.

It was in these circumstances that the plaintiff obtained leave from the Court to deliver interrogatories. The interrogatories, and the defendants' answers thereto, are as follows:

Q. 1 (1). Have you not, on one or more occasions, during the present War ordered hats or caps other than the hats, the subject-matter of this action, from the plaintiff firm? If so, give particulars of these orders including date of order and date of receipt of the goods.

A. 1 (1) Yes, as follows:—

ORDERED	SHIPMENT	RECEIVED.
30th October, 1940	A 496	31. 12.1940
17th January, 1941	A 555	3. 3.1941
9th May, 1941	A 107	20. 8.1941
13th September, 1941	A 192	17. 11.1941
4th November, 1941	A 291	6. 2.1942
20th November, 1941	A 369	15. 5.1942

Q. 1 (2). Were not all hats so ordered sent to you by insured parcel post? If not, how were they sent?

A. 1 (2). Yes, by parcel post and the invoices indicated that the goods were insured.

Q. 2. Have you ever requested the plaintiff firm to insure any goods ordered by you against war risk? If so, give particulars.

A. 2. We have never at any time requested the plaintiff to effect any kind of insurance on any goods shipped by him to us, but the plaintiff has always led us to believe and impliedly undertook that he will do so.

Q. 3. Is it not within your knowledge or the knowledge of one or more of your directors that postal insurance covers sea transit but does not cover war risk of any kind? If not, what risk does postal insurance cover.

A. 3. It was not within our knowledge that postal insurance did not cover war risk, nor were we informed by the plaintiff that it did not.

Q. 4. Is it not within your knowledge or the knowledge of one or more of your directors that prior to the entry of the United States of America into the present war all goods coming from North or Central or South America or the West Indies to British Guiana or *vice versa* were not invariably insured against war risk? If your answer is in the negative, please state your reasons for so answering.

A. 4. This interrogatory is oppressive and irrelevant to the matters in question.

Q. 5 (1). Is it not a fact that insurance against war risk on goods coming from North or Central or South America or the West Indies to British Guiana, or *vice versa*, can be effected in the Colony through one or more of the Insurance Companies doing business in this Colony? If your answer is in the negative please state the reasons for your answer.

A. 5 (1). As far as we know no Insurance Company doing business in this Colony would effect a comprehensive cover. There is the difficulty of knowing the value of the shipment, time of shipment and the name of the ship. In such circumstances insurance should always be effected by the suppliers who are in possession of all necessary information and charged to the buyers.

Q. 5 (2). Is it not a fact that insurance against war risk can be effected without having knowledge of the ship by which the goods are to be

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sent and the time of shipment? If your answer is in the negative, please state the reasons for your answer.

A. 5 (2). See answer to interrogatory 5 (1).

Q. 6 (1). How, in what manner and to what extent did the plaintiff undertake to insure the goods ordered by the defendants against loss as alleged in paragraph 8 of the Defence.

A. 6 (1). It was an implied term of the contract between the plaintiff and the defendants and also according to the custom in such commercial contracts, for the plaintiff to insure the goods ordered against losses of every nature including war risks in times of war.

Q. 6 (2) How, and in what manner did the plaintiff represent to the defendants that he insured or had insured such goods as alleged in paragraph 8 of the Defence and what was the nature and extent of the representation?

A. 6 (2) The plaintiff represented to the defendants that he insured or had insured the said goods by the statement "insurance carried" on the Invoice.

Under rules 10 and 11 of Order 27 of the Rules of Court, 1900 (which correspond with rules 10 and 11 of Order 31 of the English Rules of the Supreme Court) the plaintiff has applied for an order:

(a) that the defendants make and file a further affidavit in answer to and/or fully and sufficiently answering the interrogatories numbered 2, 3, 4, 5(1), 5(2); and 6(1); and

(b) that the sufficiency or otherwise of the answers given to the above numbered interrogatories be generally determined, if necessary.

Interrogatory numbered 4 contains the supplementary question: "If your answer is in the negative, please state your reasons for so answering". Interrogatories numbered 5 (1) and 5 (2) contain the supplementary question: "If your answer is in the negative, please state the reasons for your answer". If interrogatories numbered 4, 5 (1) and 5 (2) are answered in the negative, the defendants would be saying:

4. It is not within the knowledge of the defendants or of any one or more of the directors that prior to the entry of the United States of America into the present war all goods coming from North or Central or South America or the West Indies to British Guiana or *vice versa* were not invariably insured against war risk.

5 (1) It is not a fact, (or, we do now know it to be facts, *as the case may be*), that insurance against war risk on goods coming from North or Central or South America or the West Indies to British Guiana, or *vice versa*, can be effected in the Colony through one or more of the Insurance Companies doing business in this Colony.

5 (2) It is not a fact (or, we do not know it to be a fact, *as the case may be*), that insurance against war risk can be effected without having knowledge of the ship by which the goods are to be sent and the time of shipment.

With respect to interrogatory numbered 4, and with respect to interrogatories numbered 5 (1) and 5 (2) if the answers thereto are: "We do not know", in my opinion, it would be oppressive, within the meaning of the rules relating to Discovery, to require the defendants to state reasons for their lack of knowledge. The answer of the secretary of the company will be presumed by the Court to have been made by him, after making all enquiries from

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such persons as he is required by the practice of Discovery to enquire; that answer is given on oath. On a summons in which the sufficiency or otherwise of an answer to interrogatories is being determined, the Court is not justified, as was stated by Cotton, L.J. in *Lyell v. Kennedy* (1884) 27 Ch. D. 17, where there is a case of mere suspicion, in disregarding the oath of the party interrogated: but it is hardly necessary for me to point out that a party interrogated might be placed in a very awkward situation if it were ascertained, at the trial or otherwise, that he made his answer to an interrogatory before making such inquiries as he ought to have made. If, at the trial, it be ascertained that the facts are as alleged by the plaintiff, the inference can then be drawn that, prior to the making of the answer, the defendants did not consider it to be necessary in their interests to make enquiry, or sufficient enquiry, from persons who were not their agents or servants at the time of the answer. It will be presumed that such enquiry was in fact made of persons who were agents or servants of the defendants at the time of the answer: see *Annual Practice*, 1943, page 542, and *Yearly Practice*, 1940, page 489, notes to English Order 31, rule 5, "Answer by member or officer". The defendants cannot state their reasons for their lack of knowledge of a fact, until that fact has been established; they would be quite entitled to state in answer: "We cannot answer this question as we do not know it to be a fact. If it be proved at the trial to be a fact, we will then know why, at the present moment, we do not know it to be a fact". With respect to interrogatories numbered 5 (1) and 5 (2) if the answers thereto are "No", in my opinion it would be contrary to the rules regulating the practice of Discovery, to require the defendants to state why, in their view, what was stated to be a fact by the plaintiff is not indeed a fact at all. In giving those reasons, the defendants would have to disclose their evidence. With respect to interrogatory numbered 5(1) that might consist of conversations or interviews with responsible officers of insurance companies doing business in this Colony, and of the results of written applications made to those companies. With respect to interrogatory numbered 5 (2), the reasons for a negative answer might, in addition, necessitate the mention of the names of persons who have unsuccessfully tried to effect insurance in the circumstances stated, persons who might be called as witnesses at the trial. It is the settled practice of the Court that interrogatories as to the evidence which a party intends to adduce in support of his case, or as to the names of his witnesses will not be allowed: see *Yearly Practice*, 1940, page 477 and *Annual Practice*, 1943, page 525. The defendants are therefore not required to answer the supplementary questions in interrogatories numbered 4, 5 (1) and 5 (2).

In their answer to interrogatory numbered 6 (1) the defendants

have made it clear that, at the trial of this action, their case will be that the plaintiff had undertaken to insure the goods against war risk because it was an implied term of the contract between the plaintiff and the defendants, and also according to the custom in such commercial contracts, for the plaintiff to insure the goods ordered against war risk. This answer is sufficient in the circumstances of this case, and no further answer will be ordered.

As to interrogatory numbered 2, no objection has been taken to the words in the answer: "We have never at any time requested the plaintiff to effect any kind of insurance on any goods shipped by him to us", but counsel for the plaintiff has objected to the words, "but the plaintiff has always led us to believe and impliedly undertook that he will do so", and has submitted that the addition of those words made the answer insufficient and that the defendants should be ordered to answer properly and sufficiently. Counsel for the defendants submitted that the interrogatory had been answered: that the answer was sufficient; and that, even if there was surplusage in the answer, the surplusage would be struck out, after argument, at the trial.

In *Peyton v. Harting* (1873) L.R. 9 C.P. 9, 11, Keating, J. stated:

It is said that this is not a case within the meaning of the (fifty-third) section (of the Common Law Procedure Act, 1854), because the judge has only jurisdiction where there is an omission to answer the interrogatories, and that no excess by way of supplement to the answers given can give jurisdiction. In my opinion, where there is impertinent excess (using the term "impertinent" in the sense in which it is applied in Chancery proceedings) in an answer, there is an omission to answer sufficiently and satisfactorily within the section. Therefore, if the judge is satisfied that the answers contain matter which is improper or impertinent, as destroying the effect of the answers or introducing irrelevant topics, all which is matter for his discretion, he has jurisdiction, *i. e.* to require a further answer.

And Brett, J. said:

It is said that the affidavit categorically answered the interrogatories, and that where that is so, no matter of supererogation, of whatever kind or to whatever extent, can make the answers in sufficient within the section... The objection taken is that no such matter can vitiate a categorical answer. I do not think that the objection can be supported. I think there *must* be some matter of supererogation which would make an answer insufficient. Whether in any particular case there is such matter as to render the answer insufficient which, without it, would be sufficient is a question for the discretion of the judge at chambers.

In that case Denman, J. said:

Without saying that it is in every case the duty of the party merely to answer an interrogatory categorically even though such answer might in reality in some cases fail to convey the truth, I think that there may be such excess as may constitute insufficiency in the answer. The answer may be insufficient by reason of impertinency. Again, it may be insufficient by reason of its being so framed as to be an unfair attempt to prevent the other party from making any use of it. I think, in such a case; the judge's duty is to exercise his discretion as to whether the answer is sufficient or not.

The above quoted observations of Keating, J. and Brett, J. were cited with approval by Bowen, L.J. in *Lyell v. Kennedy* (1884) 27 Ch. D. 28, C.A. And Bowen, L.J. stated:

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I think myself when an answer is couched in a form which makes it embarrassing, that is to say, which prevents the person who asks for it from using it without having thrust upon him irrelevant matter as part of it, that the answer is insufficient, and that the proper course to pursue is to ask that a further answer shall be made . . . I think an answer is not sufficient which is so involved and so insufficient in the particular statement as not to be capable of being used.

Order 27, rule 22 of the Rules of Court corresponds with English Order 31, rule 24, which is as follows:

Any party may at the trial of a cause, matter or issue use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last mentioned answers ought not to be used without them, he may direct them to be put in.

This rule was substituted for Order 31, rule 23 of the Rules of 1875, and prior to the Rules of 1875 there was no rule in existence similar to Order 31, rule 23 of the Rules of 1875.

In *Lyell v. Kennedy* (1884) 27 Ch. D. 28, 29, Bowen, L. J. continued as follows:

In this case I should have thought that a further answer ought to be made but for one consideration, which appears to me to be conclusive. What is the object of interrogatories? Why it is, of course, to get discovery of matter which can be used for the purpose for which the statute intended it to be used. If indeed, the defendant had framed his answers in such a way as to prevent the plaintiff from using them at the trial, I should say he must answer further: but he cannot do that now, however much he may desire it, because by Order 31, rule 24 "Any party may at the trial . . . use in evidence any one or more of the answers, or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer". Accordingly, the Judge at the trial will know perfectly well how to deal with this if there is any unfairness with regard to using the residue of the answer which the defendant has sought to put upon the plaintiff, and he will only allow such parts of the answer to be used as contain a direct answer to the interrogatories.

And Cotton, L. J. said (at page 15):

Under the new Rules (Rules of the Supreme Court, 1883, Order 31, rule 24) he (the plaintiff) can read one passage without referring to the whole even of the same paragraph, and I think no Judge would allow a defendant where he had made an admission to read with it a passage which was not connected in sense or substance with that admission even if he had put in a statement submitting that he was entitled to do so and claiming to do so. Of course, when an admission is read, everything ought to be read which is fairly connected with that admission; but I think it would be wrong for the defendant, and he would not be allowed, to try to bring in matter which was not in any way connected with the matter admitted. These paragraphs, therefore, especially having regard to the new Rules, would not impede or embarrass the plaintiff, and I do not consider that on the true reading of them such was the object and intention.

This passage from the judgment of Cotton, L. J. is cited in *Bray*, Digest of the Law of Discovery, 1904, page 69 and in *Yearly Practice*, 1940, pages 535 and 536. At page 493 of the latter work in the notes to "Contents of the answer" it is stated:

The answer must be confined to answering the question put. Any necessary or reasonable explanation without which the answer would be unfair or incomplete or misleading may be aided.

If rule 22 of Order 27 of the Rules of Court, 1900, was not in

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force in this Colony, the question would have been, as stated by Brett, J. and Bowen, L. J. *supra*, whether the addition of the words "but the plaintiff has always led us to believe and impliedly undertook that he will do so," to the answer "we have never at any time requested the plaintiff to effect any kind of insurance on any goods shipped by him to us." would prevent the plaintiff from using the answer without having thrust upon him irrelevant matter as a part of it. It is impossible for the Court, at this stage of the proceedings, to say that the additional matter is irrelevant, or that the said additional matter is not in any way connected with the matter admitted. It is clear from the proceeding in this action that it is part of the case for the defence that by reason of the implied undertaking, as explained in the answer to interrogatory numbered 6 (1), on the part of the plaintiff to insure the goods ordered against war risk, it is immaterial that there was no specific request by the defendants to the plaintiff to insure. The answer to the interrogatory numbered 2 is therefore in the nature of a confession and avoidance, and I could not deem the answer embarrassing within the meaning of the practice relating to Discovery, although of course, it is in a way always embarrassing to a plaintiff to have a defendant putting up a defence which the plaintiff believes to be unfounded.

The defendants are therefore not required to make a further answer to interrogatory numbered 2. At the trial of this action, it will be determined by the trial judge, whether, having regard to the provisions of rule 22 of Order 27 of the Rules of Court 1900, the whole answer, or only the first portion, is to be admitted in evidence.

The first part of the interrogatory numbered 3 has not been answered. The question put relates to the present knowledge of the defendants as to postal insurance covering sea transit but not covering war risk of any kind: the answer relates to the knowledge of the defendants at some unspecified time and such unspecified time might turn out to be a date prior to the date of the first order for goods sent by the defendants to the plaintiff. With respect to the second part of the interrogatory numbered 3, counsel for the defendants has submitted that it is oppressive; that the defendants who are not carrying on insurance business could not answer questions as to Canadian postal insurance without seeking information outside; that the question as to postal insurance was of a general nature and was not confined to the postal insurance in this case; and that the interrogatory exceeded the legitimate requirements of the particular occasion. It is unnecessary for me to examine these arguments in detail, or the cases cited thereon by learned counsel, for there is a simple answer to all these submissions, and it is that, if at the time of making the answer, the defendants do not know what risk postal insurance covers, they will reply to the second part of interrogatory numbered 3: "We

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do not know”: the secretary of the company will, of course, before making such answer, make enquiries from such persons as, according to the practice relating to Discovery, he is required to ask. The defendants are required to make an answer, or a further answer to the whole of interrogatory numbered 3.

The defendants have raised the issues that the goods were sent by the plaintiff to the defendants by a route involving sea transit in which it was usual to insure against war risk: and that according to the custom in commercial contracts of sale made prior to the 14th February, 1942, between a Canadian exporter (like the plaintiff) and a British Guiana importer (like the defendants), it was for the plaintiff (the Canadian exporter) to insure the goods ordered against war risk and for the plaintiff (the Canadian exporter) to charge any costs so incurred to the defendants (the British Guiana importer). The object of the interrogatory numbered 4, which is described by counsel for the defendants as oppressive and irrelevant to the matters in question in the action, is to obtain an admission from the defendants that, prior to the entry on the 7th December, 1941, of the United States of America into this present war which commenced on the 3rd September, 1939, goods exported from North or Central or South America or the West Indies to British Guiana, or *vice versa*, were not invariably insured against war risk. The subject-matter of the interrogatory is not irrelevant, as, if the admissions were made, it would impair, to some extent, the case which the defendants propose to establish on the above named two issues. It is a well settled rule of procedure that a party is entitled to interrogate for the purpose of impeaching or destroying his adversary's case, even where his own case upon the point may be a mere general traverse: see *Annual Practice* (1943), page 527, and *Yearly Practice* (1940), page 475, notes to English Order 31, rule 1. The interrogatory is not oppressive. If, at the time of making their answer, the defendants have not the knowledge referred to in the interrogatory, or in any part of it, they will simply answer: “We do not know”. The defendants are therefore required to make an answer to interrogatory numbered 4, save and except the portion: “If your answer is in the negative, please state your reasons for so answering”.

One of the issues in this action is whether the defendants, without knowing the name of the ship by which the goods were to be conveyed to this Colony or the date of the departure of the ship from Canada, could have effected insurance against war risk on the goods ordered by them from the plaintiff. The defendants have pleaded that, in those circumstances, insurance could not have been effected by them. The object of interrogatory numbered 5 (1) is to obtain an admission from the defendants that insurance against war risk on goods coming from North or Central or South America or the West Indies to British Guiana,

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or *vice versa*, can be effected in the Colony through one or more of the Insurance Companies doing business in this Colony: and the object of interrogatory numbered 5 (2) is to obtain an admission from the defendants that insurance against war risk can be effected without having knowledge of the ship by which the goods are to be sent and the time of shipment. If the former admission is made by the defendants the case for the defendants would be impeached to a considerable extent: and if the latter admission is made by them that case would be destroyed. It therefore follows that interrogatories number 5 (1) and 5 (2) are neither fishing nor irrelevant to the matters in question in the action; they are not oppressive merely because they seek to make the defendants admit that their case is unfounded; the interrogatories are intimately related to a main issue in the action; and so not only may the defendants' witnesses be cross-examined at the trial on the subject matter of the interrogatories, but interrogatories may also be put on that subject matter by the plaintiff to the defendants. In *Attorney-General v. Gaskill* (1882) 20 Ch. D. 528, Cotton, L.J. said:

The object of the pleadings is to ascertain what the issues are, the object of interrogatories is not to learn what the issues are, but to see whether the party who interrogates cannot obtain an admission from his opponent which will make the burden of proof easier than it otherwise would have been.

If the admissions asked for interrogatories numbered 5 (1) and 5 (2) are made by the defendants, the plaintiff would be saved the expense of bringing witnesses to prove the facts which they wish to be admitted: and that is a legitimate use of interrogatories. The first part of interrogatory numbered 5 (1) can easily be answered. If the answer is "No", or "We do not know" the defendants can say so; and if in the answer the defendants wish to differentiate, for example, between North America (or some part thereof) on the one hand, and Central America, South America and the West Indies on the other hand, they can do so. The interrogatory is not oppressive. The first part of interrogatory numbered 5 (2) can easily be answered. It can be answered by "Yes", "No", or "We do not know". Counsel for the defendants has submitted that subject to his objections to interrogatory numbered 5 (1), the answer given is sufficient. The answer introduces the words "comprehensive cover" which are not used in the interrogatory. The answer speaks of difficulty in effecting insurance, but, although there may be difficulty in effecting insurance, it may be that insurance can still be effected. The question put has not been categorically answered. The answer to interrogatory numbered 5 (2) is the same as the answer to interrogatory numbered 5 (1). That answer is no answer whatever to interrogatory numbered 5 (2), and the question put in the first part thereof has not been categorically answered. The defendants are therefore required to answer,

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or make a further answer to, interrogatories numbered 5 (1) and 5 (2) save and except the portions thereof "If your answer is in the negative please state the reasons for your answer".

The interrogatory numbered 3 and, with the deletion of the supplementary questions therein, the interrogatories numbered 4, 5 (1) and 5 (2) are to be re-delivered (if the plaintiff so desires) to the defendants for answer by them within 10 days from the date of such delivery or within such further time as may be agreed upon by the parties.

On this summons the plaintiff has succeeded with respect to interrogatory numbered 3, and, save and except the supplementary questions therein, with respect to interrogatories numbered 4, 5 (1) and 5 (2). The defendants have succeeded with reference to interrogatory numbered 2, the supplementary questions in interrogatories numbered 4, 5 (1) and 5 (2), and interrogatory numbered 6 (1). I certify for counsel, but as the success of both parties on this summons is evenly divided, each party must bear his own costs of and incidental to this summons.

Application granted in part; refused in part.

Solicitors: *J. Edward De Freitas*, for the plaintiff (applicant);
Vivian C. Dias, for the defendants (respondents).

GEORGE EDWIN HANOMAN in his capacity as residuary legatee under the will of HUNOOMAN, deceased, and RAGHUNANDAN also known as and called HENRY HUGH HUNOOMAN, in his capacity as one of the legatees under the will of HUNOOMAN, deceased, (Plaintiffs),

v.

HARNANDAN also called JOSEPH GORDON HANOMAN as executor of the estate of the said HUNOOMAN, deceased, and KATIE KUNOOMAN, (Defendants).

[1943. No. 131.—DEMERARA].

BEFORE DUKE, J (Acting): IN CHAMBERS.

1943. AUGUST 10, 11; SEPTEMBER 2.

Will—Construction—Conditions—Restraint on alienation—To persons other than eight specified persons—Void.

Will—Construction—In the event of legatee remaining unmarried—Bequest of life-interest—Previous bequest of life-interest to another legatee as long as she remained a widow—Words of limitation only—Construction of later bequest—Condition in general restraint of marriage—Void—Legatee takes bequest free of condition—May marry as often as she likes and yet retain her life-interest.

Will—Construction—Bequests of life-interests to two persons—Survivorship.

Will—Construction—Bequest of entire interest—Cut down to life-interest by subsequent words in will—Desire—Importing testamentary disposition—Not a precatory trust.

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In clause 1 of his will a testator made certain specific pecuniary bequests among them being one of \$400 to his unmarried daughter Katie "after her marriage". Clauses 2 and 3 were as follows:

2. I devise to my wife Sookary Hunooman a life-interest in my estate as long as she remained my widow, such interest to cease at her death. In the event of my daughter Katie remains unmarried she, also to have a life-interest in my estate.
3. All the residue of my property, real and personal, movable and immovable, whatsoever and wheresoever, I devise and bequeath to my nine (9) sons, namely Raghunandan, Harnandan, Seenanan, Hanwant Harbanjan, Robert Ranjeetsingh, Jacob Ramsaroop, George Edwin. Cecil Raghbir and Milton Mahabir for their sole benefit, providing that at no time during the lifetime of one or all of my sons my immovable property shall not be sold or transferred to any other person excepting to any one of my sons named herein. In the event of the death or lifetime of either of my sons who may desire to withdraw his interest or dispose of his portion in the said immovable property, he shall only claim \$500.00 (Five hundred dollars) as his share, and shall not have any further claim, such withdrawal or disposal not to take effect until my last child has attained the age of 21 years. I further desire that my son Raghunandan, interest in my estate shall cease at his death.

Held, (1) that to the gift of the life-interest in favour of Katie there was attached a condition in general restraint of marriage, that the condition was void and of no effect, and that Katie would be able to marry as often as she likes, and yet retain her life-interest:

Heath v. Lewis (1853) 3 De G. M. & G. 954, 43 E.R. 374; *Potter v. Richards* (1855) 24 L.J.N.S. Ch. 489; and *Bellairs v. Bellairs* (1874) L.R. 18 Eq. 510, applied.

(2) that to the devise of the immovable property to the sons of the testator there was attached a restriction on alienation, on alienation to a person or persons other than one or more of 8 particular persons and at a price specified in the will, that the restraint on alienation was void, and that any one of the devisees named in clause 3 of the will is entitled to sell the interest in the immovable property bequeathed to him to any persons whomsoever and not only to the other devisees named in clause 3 of the will; *Re Cockerell, Mackaness v. Percival* (1929) 2 Ch. 131, applied.

- (3) that during the lifetime of Raghunandan, he is entitled to a life-interest in one-ninth of the residue under clause 3 of the will, and that his 8 brothers (named in clause 3) are entitled to the remaining eight-ninths of the income from the residue; and that, on the death of Raghunandan, his said 8 brothers are entitled to the residue under clause 3 of the will;

Cock v. Cooke (1866) L.R. 1.P. & D. 241 applied;

Re Johnson, Public Trustee v. Calvert (1939) 3 All E.R. 458 distinguished.

- (4) that the life-interest of Raghunandan in one-ninth of the residue of the estate under clause 3 of the will is not held by him in common, or jointly, with Sookary Hunooman and/or Katie, and can only be enjoyed by him in possession, when the life-interests bequeathed to Sookary Hunooman and Katie under clause 2 of the will have ceased or determined;

- (5) that, on the death of the testator, Sookary Hunooman so long as she remained a widow together with Katie acquired life-interests in the estate of the testator: and that, on the death of Sookary Hunooman (which took place after the death of the testator) Katie became solely possessed of and entitled to a life-interest in the estate of the testator.

Originating summons taken out for the determination of questions arising under the will of Hunooman, deceased. The facts sufficiently appear from the judgment.

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

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

Cur. adv. vult.

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DUKE J. (acting): By this originating summons the plaintiffs George Edwin Hanoman and Raghunandan also known as and called Henry Hugh Hunooman, who are legatees under the will of their father Hunooman, male East Indian, No. 3730 *ex Mufussilite* 1873, deceased, have made Harnandan also called Joseph Gordon Hanoman, in his capacity as executor of the estate of the said Hunooman, deceased, and Kate Hunooman, defendants to an application by them to have determined certain points which have arisen as to the interpretation of the will.

Hunooman (hereinafter referred to as “the testator”) was only once married and then to Sookary Ramdehul, on the 15th May, 1907. Of that union there were 18 children, five of whom died in infancy, unmarried and without issue. The other children of the testator, 10 sons and 3 daughters, were as follows:

- (1) Henry Hugh or Johnnie Hanoman or Hunooman, or Raghunandan, the second named plaintiff;
- (2) Joseph Gordon Hanoman or Harnandan, the first named defendant;
- (3) Susan Jane Hardyal, or Jeanie, born July 1, 1898, a married woman who married in the lifetime of the testator;
- (4) Julia Rampersaud or Rajhoo, born November 23, 1899, a married woman who married in the lifetime of the testator;
- (5) James Edwin Hanoman or Seenanan;
- (6) Harry Hanoman or Hanwant Harbanjan;
- (7) Robert Stanley Hanoman or Robert Ranjeetsingh;
- (8) Katie Hanoman or Katie, born about 1908, spinster, the second named defendant;
- (9) Jacob Lancelot Hanoman or Jacob Ramsaroop;
- (10) George Edwin Hanoman, the first named plaintiff;
- (11) Cecil Hanoman or Cecil Raghbir;
- (12) Milton Hanoman or Milton Mahabir; and
- (13) David Hanoman or Ramjeet.

David Hanoman was only once married and then to Irene Mungal; he died on the 27th June, 1925; and the only child of the marriage, Ralph Hanoman, was born in August, 1925.

The testator died on the 2nd February, 1935. By his will dated the 12th January, 1933, he appointed his sons Harnandan, also called Joseph Gordon Hanoman, the first named defendant, and Robert Ranjeetsingh as the executors of his will and guardians of his minor children. On the 21st May, 1935, the first named defendant filed in the Deeds Registry an estate duty declaration and inventory in respect of the estate of the testator. In that declaration and inventory (No. 30 of 1935, Berbice), the net value of the estate was stated to be \$12,206.54. The assets and liabilities were stated to be as follows:

ASSETS.

(1) Cash on deposit with Royal Bank of Canada, New Amsterdam ...	... \$	6 91
(2) Household goods (\$100), Pictures (\$10), China (\$10). Linen (\$10) and Apparel (\$20) ...		150 00
(3) Cattle, 280 head large and small at \$8 per head	2,240 00
(4) Immovable property...	<u>10,205 00</u>
	Total...	<u>\$12,601 91</u>

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LIABILITIES.

(1) Rates on landed property in East Coast				
Berbice 70 74
(2) Town taxes on property in New Amsterdam	...			174 63
(3) Funeral expenses	...	...	...	... <u>150 00</u>

Total... \$395 37

Probate of the testator's will was granted by the Court on the 30th May, 1935 (No. 29 of 1935, Berbice) to the defendant Harnandan also known as and called Joseph Gordon Hunooman, power being reserved by the Court to grant probate to Robert Ranjeetsingh, the other executor named in the said will whenever he shall duly apply for the same.

The testator's will was as follows:

IMMIGRANT'S WILL.

I, Hunooman, male, No. 3730 *ex Mufussilte*, 1873, hereby revoke all for (*sic*, wills and codicils made by me and declare that this is my Last Will.

1. I bequeath to my daughters Jeanie born 1.7.98 and Rajhoo born 23.11.99 at Cumberland the sum of three hundred dollars (\$300.00) each, to Katie born about 1908, at Cumberland the sum of four hundred dollars (\$400.00) after her marriage, to my sons Cecil Raghbir and Milton Mahabir the sum of five hundred dollars (\$500.00) each and to my grandson Ralph Hunooman the sum of three hundred dollars (\$300.00) on his attaining the age of 21 years.
2. I devise to my wife Sookary Hunooman a life-interest in my estate as long as she remained my widow, such interest to cease at her death. In the event of my daughter Katie remains unmarried she, also to have a life-interest in my Estate.
3. All the residue of my property, real and personal, movable and immovable whatsoever and wheresoever, I devise and bequeath to my nine (9) sons, namely, Raghunandan, Harnandan Seenanan, Hanwant Harbanjan, Robert Ranjeetsingh, Jacob Ramsaroop, George Edwin, Cecil Raghbir and Milton Mahabir for their sole benefit providing that at no time during the lifetime of one or all of my sons my immovable property shall not be sold or transferred to any other person excepting to any one of my sons named herein. In the event of the death or lifetime (*sic*) of either of my sons who may desire to withdraw his interestor dispose of his portion in the said immovable property, he shall only claim 500.00 (five hundred dollars) as his share, and shall not have any further claim, such withdrawal or disposal not to take effect until my last child has attained the age of 21 years. I further desire that my son Raghunandan, interest in my Estate shall cease at his death.
4. I appoint my sons Harnandan, *alias* Joseph Gordon Hunooman and Robert Ranjeetsingh as executors of this my Will and guardian (*sic*) of my minor children, and as such executors I give them the power of assumption.

In witness whereof I have hereunto set my hand this twelfth day of January, One thousand nine hundred and thirty-three.

Hunooman his x mark Testator.

The plaintiffs have applied to the Court that the following questions be determined on this summons:

- (a) that the conditions namely, "providing that at no time during the lifetime of one or all of my sons my immovable property shall not be sold or transferred to any other person excepting to any one of my sons named herein. In the event of the death or lifetime of either of my sons who may desire to withdraw his interest or dispose of his

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portion in the said immovable property, he shall only claim \$500.00 (Five hundred dollars) as his share, and shall not have any further claim, such withdrawal or disposal not to take effect until my last child has attained the age of 21 years. I further desire that my son Raghunandan, interest in my Estate shall cease at his death” mentioned in paragraph 3 of the will Hunooman, deceased, be struck out, as being repugnant to the absolute gift of the residuary estate by the testator to his nine sons, namely, Raghunandan, Harnandan, Seenanan, Hanwant Harbajan, Robert Ranjeetsingh, Jacob Ramsaroop, George Edwin, Cecil Raghbir and Milton Mahabir, contained in the said paragraph 3 of the said will;

- (b) if the said directions are not bad in law, for a declaration that Raghunandan also was, and is entitled to a life-interest in the estate of the testator, and if so, whether as tenant in common, or joint tenant for life in the residue of the estate of the deceased, with Sookary Hunooman and Katie, mentioned in paragraph 2 of the said will;
- (c) whether Katie was tenant in common with the said Sookary Hunooman, or joint tenant for life in the residue of the estate of the deceased;
- (d) that the condition in restraint of marriage attached to the gift to. Katie of a life-interest in the estate is bad, and should be struck out;
- (e) for an account of the movable and immovable property of the deceased, and of the dealings and intromissions therewith by the defendants from the death of the deceased to the date of rendering the said account; and
- (f) in the alternative, administration of the real and personal estate of the deceased, with all necessary and proper accounts, enquiries and directions.

Counsel for the plaintiffs has submitted that on the true construction of the following words “All the residue of my property, real and personal, movable and immovable whatsoever and wheresoever, I devise and bequeath to my nine (9) sons, namely, Raghunandan, Harnandan, Seenanan, Hanwant Harbanjan, Robert Ranjeetsingh, Jacob Ramsaroop, George Edwin, Cecil Raghbir and Milton Mahabir for their sole benefit, providing that at no time during the lifetime of one or all of my sons my immovable property shall not be sold or transferred to any other person excepting to any one of my sons named herein. In the event of the death or lifetime of either of my sons who may desire to withdraw his interest or dispose of his portion in the said immovable property he shall only claim \$500.00 (Five hundred dollars) as his share, and shall not have any further claim, such withdrawal or disposal not to take effect until my last child has attained the age of 21 years” in clause 3 of the testator’s will, it ought

to be declared that the words from “providing” to “age of 21 years” amount to a condition operating as a restraint on alienation in respect of the immovable property devised to the 9 sons; that it is void for repugnancy, and that anyone of the devisees above named is entitled to sell his interest in the immovable property bequeathed to him, to any persons whomsoever and not only to the other devisees named in clause 3 of the will.

It was held by Eve, J. *In re Cockerell, Mackaness v. Percival* (1929) 2 Ch. 131, that where to a devise of land there was attached a condition which was in restraint of alienation except to a particular person, the condition was void for repugnancy and not binding upon the devisees. In the course of his judgment, the learned judge said:

That the condition operates as a restriction on alienation cannot be questioned, and *prima facie* it is void on that ground; but in as much as there are cases in which partial restrictions have been held not to avoid the condition (*Doe d. Gill v. Pearson* (1805) 6 East, 173 and *In re Macleay* (1875) L.R. 20 Eq. 186), it is necessary to examine the condition carefully and to appreciate its effect. It is limited in this case in its operation to a period of twenty years from the testator’s death, and it operates only against alienation by sale, but it imposes a limit on the price which, in substance, compels the devisee during the period of restriction to sell to one purchaser only. . . The devisee in this case is not restrained from selling to a particular person, but from selling it to anybody but a particular person, and this, in my opinion, creates a state of facts not to be found in any reported case in which a condition imposing partial restraint has been treated as an exception to the general rule that “the owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his own benefit”: see per Chitty, J. in *In re Elliot* (1896) 2 Ch. 353, 356.

In clause 3 of the testator’s will there is a restraint on alienation during the lives of the testator’s nine sons mentioned in that clause. During that period, the immovable property of the testator, devised to those 9 sons, is not to be sold or transferred to any other person excepting to any one of those sons: the share of any one son is to be disposed of for the sum of \$500 and no more, and not until the testator’s last child has attained the age of 21 years. It cannot be questioned that these provisions operate as a restriction on alienation. That being so, they are *prima facie* void on that ground. The restraint is limited in this case in its operation to a period extending over the lives of the 9 devisees named in clause 3 of the will. It operates only against alienation by sale, and it compels a devisee during the period of restriction to sell to his brother devisees only. A devisee under clause 3 of the will is not restrained from selling to a particular person, but from selling his interest to a person or persons other than one or more of 8 particular persons, and at a price specified in the will. On the authority of *In re Cockerell, supra*, I hold that these circumstances do not create an exception to the general rule that a condition operating as a restriction on alienation (infringing, as it does, the general rule that the owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his benefit) is

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altogether void for repugnancy. With respect to the first part of paragraph (a) of the originating summons herein, I therefore make a declaration that the words in clause 3 of the will “providing that at no time during the lifetime of one or all of my sons my immovable property shall not be sold or transferred to any other person excepting to any one of my sons named herein. In the event of the death or lifetime of either of my sons who may desire to withdraw his interest or dispose of his portion in the said immovable property, he shall only claim \$500.00 (Five hundred dollars) as his share, and shall not have any further claim, such withdrawal or disposal not to take effect until my last child has attained the age of 21 years”, attached to the devise of immovable property to the devisees named in clause 3 of the testator’s will, being a condition operating as a restriction on alienation, are void, and that any one of the devisees therein named is entitled to sell the interest in the immovable property bequeathed to him, to any persons whomsoever and not only to the other devisees named in clause 3 of the will.

Counsel for the plaintiff Raghunandan has submitted that on the true construction of the following words “All the residue of my property, real and personal, movable and immovable whatsoever and wheresoever, I devise and bequeath to my nine (9) sons, namely Raghunandan, Harnandan, Seenanan, Hanwant Harbanjan, Robert Ranjeetsingh, Jacob Ramsaroop, George Edwin, Cecil Raghbir and Milton Mahabir for their sole benefit. I further desire that my son Raghunandan, interest in my Estate shall cease at his death”, in clause 3 of the testator’s will it ought to be declared that the words. “I further desire that my son Raghunandan, interest in my Estate shall cease at his death”, are void, and that the plaintiff Raghunandan takes the same interest under the will of the testator as any one of his 8 brothers: Harnandan, Seenanan, Hanwant Harbanjan, Robert Ranjeetsingh, Jacob Ramsaroop, George Edwin, Cecil Raghbir and Milton Mahabir.

In Halsbury’s Laws of England, 2nd (Hailsham) edition, para. 377, pages 328, 329, it is stated that:

An interest apparently in fee simple in real estate, or an interest in personal estate ... may, on the context of the whole will, be cut down to a life interest ... an absolute interest is not cut down by a precatory trust unless the trust creates an imperative obligation.

In the opening words of clause 3 of the will “All the residue of my property, real and personal, movable and immovable whatsoever and wheresoever, I devise and bequeath to my nine (9) sons namely Raghunandan, Harnandan, Seenanan, Hanwant Harbanjan, Robert Ranjeetsingh, Jacob Ramsaroop, George Edwin, Cecil Raghbir and Milton Mahabir, for their sole benefit,” there is a clear bequest to Raghunandan and his 8 brothers of the residue of the estate. In the latter part of the said clause 3 there appear the following words “I further desire that my son Raghunandan, interest in my estate shall cease at his death”. Do these words cut down

the interest of Raghunandan in the residue, to a life interest? I think that they do. A will is a record of the testamentary desires of the testator, desires which will not take effect before his death. The words "I further desire that my son Raghunandan, interest in my estate shall cease at his death," are in a document which is in testamentary form, and they operate as a testamentary disposition; see *Cock v. Cooke* (1866) L.R. 1 P. & D. 241. In those words of the will the testator does not purport, in any way, to impose a precatory trust upon a legatee to whom an absolute interest has been bequeathed, that the legatee will, in turn, bequeath the property, on his death, in some particular manner according to the "desire" of the testator: see *Re Johnson, Public Trustee v. Calvert* (1939) 3 All E.R. 458. The question here, for determination, is whether Raghunandan takes an interest in the residue along with his 8 eight brothers, or whether his interest therein is only for his life: not whether the interest taken by Raghunandan (whatever its nature and extent) is sought by the testator to be limited by a trust precatory in its nature. In my judgment the latter words of clause 3 are in the nature of a proviso to the opening words, and Raghunandan only takes a life interest in one-ninth of the residue under clause 3 of the will. With respect to the second part of paragraph (a) of the originating summons herein I therefore make a declaration that the words in clause 3 of the will "All the residue of my property, real and personal, movable and immovable whatsoever and wheresoever, I devise and bequeath to my nine (9) sons, namely Raghunandan, Harnandan, Seenanan, Hanwant Harbanjan, Robert Ranjeetsingh, Jacob Ramsaroop, George Edwin. Cecil Raghbir and Milton Mahabir for their sole benefit I further desire that my son Raghunandan, interest in my Estate shall cease at his death" are to be construed as meaning that during the lifetime of Raghunandan, he is entitled to a life-interest in one-ninth of the residue under clause 3 of the will, and that his 8 brothers (named in clause 3) are entitled to the remaining eight-ninths of the income from the residue; and that, on the death of Raghunandan, his said 8 brothers are entitled to the residue under clause 3 of the will. By clause 2 of his will the testator made provision for his wife Sookary during her lifetime so long as she remained a widow, and for his unmarried daughter during her lifetime in the event of her remaining unmarried. From a reading of the will it does not appear that the testator intended that any one of his 9 sons named in clause 3 of his will should derive any benefit from the income of his estate until both of those life-interests had ceased or determined. In *Theobald on Wills*, (1927) 8th edition, page 580, it is stated that "a devise to A. and B. for their lives is equivalent to a devise to them and the survivor of them". The form of the bequest and devise in clause 2 of the will is, it is true, not exactly in the form indicated in that treatise: but I have not been able

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to find any rule of construction which would prevent me from ascribing to clause 2 of the will the meaning thereto which I have ascertained from a perusal of the whole will. In my opinion, therefore, the answer to paragraph (c) of the originating summons herein is that, on the death of the testator, Sookary Hunooman so long as she remained a widow together with Katie Hanoman acquired life-interests in the estate of the testator, and that, on the death of Sookary Hunooman on the 9th June, 1940, Katie Hanoman became solely possessed of and entitled to a life-interest in the estate of the testator. From the arguments adduced, it did not seem that it was necessary, if I held that Katie was presently entitled solely to a life-interest in the estate of testator, for me to determine whether, during the lifetime of Sookary, Sookary and Katie were joint tenants, or tenants in common, of life-interests held by them: but if the determination of this point is desired, the summons can be reinstated in the list for further argument thereon.

Counsel for the plaintiff Raghunandan has submitted that the life-interest of Raghunandan in the residue of the estate under clause 3 of the will is to be enjoyed by him along with or jointly with, Sookary Hunooman and Katie. Under clause 3 of the will, Raghunandan takes a lesser, and not a greater, interest than his 8 brothers: and during his life-interest he does not take the income from the residue of the estate to the exclusion of his 8 brothers named in clause 3 of the will. If, therefore, the claim of Raghunandan is a good one, it is a right which must equally be enjoyed by his 8 brothers. I have already held that, on the true construction of the will and in the circumstances which have happened, Katie is solely possessed of, and entitled, to a life-interest in the estate of the testator. Such being the case, no one of the 9 sons of the testator named in clause 3 of the will is entitled to share in the income of the estate until the life-interest of Katie has ceased or determined. The answer to paragraph (b) of the originating summons must therefore be that, on the true construction of the will, the life interest of Raghunandan in one-ninth of the residue of the estate under clause 3 of the will is not held by him in common, or jointly, with Sookary Hunooman and/or Katie and can only be enjoyed by him in possession, when the life-interests bequeathed to Sookary Hunooman and Katie under clause 2 of the will have ceased or determined.

I shall now consider the question raised in paragraph (d) of the plaintiffs' application, namely, "that the condition in restraint of marriage attached to the gift to Katie of a life-interest in the estate is bad, and should be struck out."

By clause 2 of the will Katie, in the event of her remaining unmarried, is bequeathed a life-interest in the estate, but by clause 1 she is bequeathed \$400 "after her marriage," so that if

she remains unmarried she will continue to enjoy the life-interest while if she marries she will cease to enjoy the life interest, and she will be entitled to receive the fixed sum of \$400, which sum is considerably less than the value of the life-interest for even one year.

In *Heath v. Lewis* (1853) 3 DeG. M. & G. 954, 43 E.R. 374 there was a bequest of an annuity to an unmarried woman (if living and unmarried at the death of a prior annuitant) for the term of her natural life, if she should so long remain unmarried: and it was held by the Lords Justices, to be a limitation, and not a bequest upon a condition subsequent, and therefore determinable upon marriage. Knight Bruce, L.J. in his judgment said:

It must be agreed on all hands that it is, by the English law, competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that if such a legatee shall marry, the annuity will thereupon cease. But this proposition has been advanced—a proposition which, if true (and I do not deny its truth) is perhaps not creditable to the English law—that if a man give an annuity to a woman who has never married for life, and afterwards declare that, if she shall marry, the annuity shall be forfeited the condition is void, and she may yet marry as often as she will, and retain her annuity. Such is the state of our English law on this subject said, and perhaps truly, to be; and the question argued before us has been, to which of these two classes the gift of this will belongs, being a gift of an annuity to a single lady “during the term of her natural life, if she shall so long remain unmarried,”—this language being the technical and proper language of limitation as distinguished from condition, long known to the English law and familiar to us all. Both upon precedent and reason, upon principle and authority, I am of opinion that this is a limitation as distinguished from a condition, and that the annuity ceased when the lady married.

And Turner, L.J. said:

This testator has given to a legatee “an annuity of £30 during the term of her natural life, if she shall so long remain unmarried.” There are two constructions which may be put upon these words—it may either be a gift to her for life, defeated by a condition, or it may be a gift to her so long as she remains unmarried, that is, for life, if she be so long unmarried and the question, therefore, is purely one of intention, in which of the two senses the words were used.

In *Potter v. Richards* (1855) 24 L.J.N.S. Ch. 499, Kindersley, V.C. said:

The policy of the law is as much violated by saying that a woman shall only retain an annuity so long as she remains single, as by saying that it shall cease upon that woman being married. The law as to a restriction upon marriage is as much violated in one case as the other. However, the rule is no doubt, that if there is first an absolute gift and then in derogation of that gift a proviso in restriction of marriage, that proviso would be bad as being a restraint upon marriage, and therefore against the policy of the law; but if the proviso is incorporated in the gift then it is not void. I cannot myself see why there should be this distinction.

In *Bellairs v. Bellairs* (1874) L.R. 18 Eq. 510 it was held that a condition subsequent in restraint of marriage is void if annexed to a gift of the income arising from a mixed fund consisting of the proceeds of sale of real estate and pure personal estate. In the course of his judgment Sir George Jessel, M.R. said (at pages 513, 516, 517);

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It is no part of my duty to make new law simply because I think the old law unreasonable; that is the province of the Legislature and not of a Judge. Where I find a point decided, however I may lament the result. I think I am bound to follow the decision, and to construe it fairly, and not seek to evade it or fritter it away by introducing distinctions only invented for the purpose of pronouncing another decision, which in my opinion would be more in conformity with reason. In the present case the law is settled thus far, that a general condition prohibiting marriage, by which a legacy is cut down, is void. I consider that to be the law of the Courts of Equity. . . Is the rule one of policy or one of construction? . . . Now if the rule were really one of policy you never could evade it by a change in the form of words. But it is admitted you can so evade it; that if you put it in the form of limitation—if, for example, you had given this life interest to this young lady until she married, and then upon marriage had given it over—it is not disputed that that would have been good. Therefore, it seems to be a rule of construction. The reason of the rule may have been policy; but the actual question the Court has to decide is whether, according to the construction, it is a condition or limitation, and if it is found to be a condition, then the reason which made that condition *in terrorem* only may have been founded on policy or supposed policy; but it is the construction that decides that it is to be *in terrorem*, and therefore, strictly speaking, it is a question whether the testator has absolutely prohibited the marriage, or whether he has intended merely to threaten that which he knows cannot be carried into effect, because the Court construes it to be *in terrorem*. I think, therefore, the rule is rather to be considered an arbitrary rule of construction than to be founded on public policy, and I should hold, if it were merely a gift of money arising from the sale of real estate, that it is governed by the rules applicable to personal legacies.

But there is another ground upon which I am again bound by authority. This is a mixed fund; the proceeds of realty and personally directed to be converted are thrown together as an entire fund. Now the rules as to mixed funds are very different from the rules governing simple funds, arising from one or the other kind of property. The general rule in modern times has been to govern this mixed fund by the rules of personalty, and in some cases it has been carried so far that even where the only mixture so to say, was giving the funds to the same objects, that has been carried out... When we come to true mixed funds we find the law has been largely modified in favour of the rules regulating personal estate . . . Therefore, if it depended simply on this consideration, I should be bound to hold that, having a mixed fund, you are not to sever it into two, and say it is valid as to so much as arises from realty, and invalid as to so much as arises from personalty, but to hold that the two funds are to be kept together, and that the rules as to personal estate apply.

But I am not left to decide this upon any notion of my own. The exact point was decided by an eminent Judge, Vice-Chancellor Kindersley in *Lloyd v. Lloyd*, (1852), 2 SIM. (N.S.) 255 . . . It was argued exactly as if it were a pure gift of pure personalty, everybody admitting that was the law to govern. The Vice-Chancellor treats it in the same way, noticing in the judgment that there was realty and personalty, and he gives his judgment as to the conditions, and he held the condition to fail as regards the gift over on the marriage of the single woman. . .

As I have said before, whatever my opinion may be as to the law, finding it settled, as I do. I must decide contrary to the intention of this gentleman, which appears to me to be a very reasonable one, because he obviously wished to provide for his daughters while single an ample income, thinking when they married they would not require so much. I regret not being able to carry it out, but I must decide according to what I consider the law is, that this condition is *in terrorem* and void.

From these authorities it is clear that the question is whether the words “in the event of my daughter Katie remains unmarried” in the terms of the testator’s bequest to her “In the event of my daughter Katie remains unmarried she, also to have a life-interest in my Estate” constituted a limitation or a condition: whether they must be construed as meaning that the bequest to Katie was

“During the term of her natural life if she shall so long remain unmarried”, or as “During the term of her natural life but if she marries the life-interest is to cease”.

It will be observed that, in the bequest to his wife Sookary Hanoman of a life-interest, the testator used the words “as long as she remained my widow”. These words, as was pointed out by Knight Bruce, L.J. and Jessel, M. R. in the above quoted judgments, are words of limitation only. However, in bequeathing a life-interest to his daughter, the testator did not use the same sort of language; he adopted different words of expression. He did not say “as long as my daughter Katie remains unmarried”: he said “in the event of my daughter Katie remains unmarried she, also to have a life-interest”. It is perfectly true, as was said by Vice-Chancellor Kindersley, that the policy of the law is as much violated by saying that a woman shall only retain an annuity so long as she remains single, (whereby a limitation is constituted), as by saying that it shall cease upon that woman being married (whereby a condition is constituted): and to the non-legal mind there is no real or apparent difference. In law, however, the consequences are very different. If the words “in the event of my daughter Katie remains unmarried” are construed as words of limitation, Katie gets a life interest until she gets married: whereas, if they are construed as words constituting a condition, the condition being in restraint of marriage would be void and Katie would get a life-interest free of the condition and she would be able to marry as often as she likes and yet retain the life-interest.

The words “in the event of my daughter Katie remains unmarried” mean “if my daughter remains unmarried”. By a rule of construction which binds this Court those words are presumed to constitute a condition. In *Bellairs v. Bellairs*, *supra*, Sir George Jessel, M.R., pointed out that this rule of construction can be evaded if the words used by the testator are, according to judicial precedent, words of limitation. I am of the opinion that the words “in the event of my daughter Katie remains unmarried” cannot be construed as words of limitation. The testator used words of limitation in making the bequest to his wife Sookary Hunooman; but, immediately after and in the same clause of the will) he used different words, and words which are not, in their ordinary judicial meaning, words of limitation. The words “in the event of my daughter Katie remains unmarried” must therefore be construed as constituting a condition. That condition is in general restraint of marriage and it is therefore void. The answer to the question raised in paragraph (d) of the originating summons herein is that the condition in restraint of marriage attached to the gift to Katie of a life interest in the estate is void and of no effect.

As Katie is the sole life tenant in possession, the application for

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an account under paragraph (e) of the originating summons cannot be granted. No case has been made out for the making of an order for administration of the estate.

The costs of all parties will be taxed as between solicitor and client and paid out of the estate of the deceased. I certify for counsel.

There will be liberty to apply.

Solicitors: *Carlos Gomes; J. Edward de Freitas.*

EDITOR'S NOTE.—The plaintiffs appealed to the West Indian Court of Appeal. On the 24th February, 1944, the appeal was dismissed with costs, but the formal order was varied.

LEWIS ROBEIRO, Appellant (Defendant),
 v.
 DAVID N. E. HUGHES, L.S.M. of Police No. 2952,
 Respondent (Complainant).

[1943. No. 78.—DEMERARA.]

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

1943. AUGUST 18; SEPTEMBER 3.

*Defence Regulations—Price-controlled article—Condensed milk—When controlled—
 Order No. 1275 of 8th October, 1942.*

Under order dated the 8th October, 1942, (published in the *Gazette* of the 9th October, 1942, as Notice No. 1275) a tin of condensed milk is not a price-controlled article unless it forms part of the contents of a case containing 48 14oz. tins.

APPEAL by the defendant Lewis Robeiro from a decision of the Magistrate of the Essequibo Judicial District. The facts sufficiently appear from the judgment.

J. A. Luckhoo, K.C., 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 for selling a price-controlled article at a price higher than that fixed by an order made by the competent authority under the Defence Regulations, 1939.

The learned Magistrate found that the appellant sold by retail one 14-oz. tin of sweetened condensed milk for twenty cents, and holding that Order No. 1275 of the 8th of October, 1942, fixed the price of this article at seventeen cents he convicted the appellant and imposed a fine of \$100.

It is contended on behalf of the appellant that there was no proof that the article sold is a price-controlled article because by

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the terms of the First Schedule to the Order the article controlled is a case of 48 14-oz. tins. It was not argued before us that one tin was not a price-controlled article but that one tin is only so controlled if it forms part of the contents of a case containing 48 14-oz. tins.

It may appear entirely irrational that the price of a certain article should be controlled if it comes from a case of a certain size and not controlled if it comes from a case of any other size, but nevertheless the proposition cannot be dismissed without further consideration in view of the precise terms of the Schedule.

The form of the Schedule contains a number of columns, in the second appears the article the price of which is controlled; in the third appears the maximum price at the rate of which the article is to be sold by wholesale in the Georgetown area; and in the fourth, fifth and sixth columns appear maximum retail prices in various localities. Item 19 is that which relates to condensed milk, and in Column II there appear the words "Milk"—Condensed (sweetened)—Per case of 48 14-oz. tins." In Column III appear the figures "\$7.25." It may well be that taking these two columns together \$7.25 is the maximum wholesale price in the Georgetown area for a case containing 48 14-oz. tins of sweetened condensed milk, The wholesale price elsewhere is indicated in a footnote to which attention is directed by an asterisk in each column. In Columns IV, V and VI appear the retail prices in different areas: 16 cents, 17 cents, and 17 cents per tin, respectively, and by reference again to Column II it appears that the article the retail price of which is set out in the last three columns is "Milk—Condensed (Sweetened;—Per case of 48 14-oz. tins." Construed literally, it would appear plain that the words in Column II describe the nature of the price-controlled article, while the remaining columns indicate the price at which articles of that description are to be sold in varying circumstances. It is upon that construction that the appellant relies. The effect of such a construction appears to us so extraordinary, however, that we have examined the rest of the Schedule in order that, if possible, some light may be thrown upon the intentions of the authority responsible for its production and the effect which should be given thereto. We find that Column II does appear in every other case to confine itself to the description of the article named. The article is described either by its name alone (*e.g.* Item 16 "Mackerel"); or there are added qualifying words specifying the method of packing or importation (*e.g.* Item 3 "Arrowroot—In packets" and Item 4 "Arrowroot—In bulk"); or its quality (*e.g.* Item 6 "Butter (cooking)"); or its brand (*e.g.*, Item 27 "Salmon—Libby's Red Alaska"); or its place of origin (*e.g.* Item 15 "Lard substitute (Manufactured in the Colony)") or Item 17 "Margarine—(Imported)"). This would lead one to the conclusion that the words "Per case of 48 14-ozs. tins"

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were intended to be and are in fact descriptive of the nature of the article the price of which is controlled. Further examination of the Schedule reveals moreover that in every other case in which reference is made to quantity or size of the tins in which goods of this kind are packed in cases this reference appears in Column III in relation to the wholesale price of the article and not to the description of the article itself; for example Item 27, Column II "Salmon—Libby's Red Alaska," Column III "\$18.50 per case of 48—1 lb. tins." We cannot assume that this distinction is the result of accident or inadvertence. On the contrary we must conclude that the distinction is the result of deliberation on the part of the competent authority and that by this distinction in form a distinction in effect was intended.

The learned Magistrate has construed Item 19 as if it were identical in form with, for example, Item 27, that is to say, he has construed it as though the article controlled were "Milk—Condensed (Sweetened)" without reference to the words and figures which follow in the same column. He has therefore in effect transferred the words "Per case of 48 14 oz. tins" to Column III. However reasonable this construction may appear to those who are unversed in the science of price control, it is not a mode of construction open to courts of law which are bound to give effect, if it be possible, to the terms used by the competent authority and to the distinctions which that authority has itself drawn.

The only effect which can be given to this distinction in relation to Item 19 is to interpret it literally as having reference to such condensed milk only as can be brought within the qualifying words, that is to say, milk per case of 48—14oz. tins. No milk which failed to fall within this description is price controlled, for milk which was packed in cases of 24 14-oz. tins, for instance, could not be brought within the description prescribed by authority.

It follows that before the appellant could properly have been convicted of selling an article above the controlled price it must be established that the article is one the price of which is controlled. It was necessary therefore that the prosecution should have proved that the tin of milk sold by the appellant fell within the description of the article controlled as it appears in Column II of the First Schedule to the Order No. 1,275. There was no evidence in proof of this fact and the appellant was therefore wrongly convicted.

The appeal is allowed with costs and the conviction and sentence are set aside.

While this Court is not concerned with the effect of its decision which must be based upon the terms of the Order and not upon any considerations of policy, each of us feels personally concerned with the thought that it may be difficult, perhaps impossible, for

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any individual purchaser to avail himself of the protection which the last three columns of the schedule purport to afford him in relation to this item. Unless therefore there is some vital necessity for the distinction drawn by the authority of which we have no knowledge we trust that by some future order condensed milk may be placed upon the same footing as canned corned beef, salmon or even sardines.

If however the distinction which has been brought to our notice in this case is not the result of deliberate intention but arises from accident or indifference, we would express the view that such inadvertence repeated in every such order is hardly justified or excused even by the pressure of work which undoubtedly rests upon the shoulders of those responsible. This Court has in the past deprecated the exercise of that ingenuity on the part of traders which enables them to evade the spirit of regulations designed for the public good in times of war. We would again draw attention to the extreme care which should be exercised by the competent authority in its efforts to combat such evasion.

Appeal allowed.

SOOKNANAN, Appellant (Defendant),
 v.
 OSCAR HOBBS, P.C. 4582, Respondent (Complainant).

[1943. No. 110.—DEMERARA].

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

1943. AUGUST 20; SEPTEMBER 3.

Appeal—Finding of fact—Decision of magistrate—Influenced by unproved statement—Statement an admission of guilt—Conviction set aside.

Evidence—Cross-examination of witness—Previous statements made by witness—Procedure—Evidence Ordinance, Cap. 25, s. 80 (1).

The appellant was convicted before a magistrate. In arriving at his decision the magistrate took into consideration a statement which it was alleged, was made by the appellant to a policeman and reduced by the policeman into writing. This statement purported to be an admission of guilt on the part of the appellant. There was no evidence before the magistrate to prove that the statement was in fact made to the policeman.

Held, that in view of the nature of the unproved statement, it could not be said that, if the magistrate did not take it into consideration, he would necessarily have found the appellant guilty, and that the conviction must therefore be quashed.

The rules of procedure which are required by section 80 (1) of the Evidence Ordinance, cap. 25, to be followed when it is proposed to cross-examine a witness on previous statements made by him in writing or reduced into writing, and to contradict him by proof of those previous statements, must be complied with.

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APPEAL by the defendant Sooknanan from a decision of the Magistrate of the Berbice Judicial District convicting him of the offence of possessing a quantity of spirits contrary to section 93 (1) of the Spirits Ordinance, Cap. 110, as re-enacted by section 2 (1) of Ordinance 22 of 1931.

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 Duke, J. (Acting) as follows:

This is an appeal by the defendant Sooknanan from a decision of the Magistrate of the Berbice Judicial District convicting him of the offence of possessing a quantity of spirits, to wit. bush rum, contrary to section 93 (1) of the Spirits Ordinance, Cap. 110, as re-enacted by section 2 (1) of Ordinance 22 of 1931.

The case for the defendant, as presented before the Magistrate, was that he and one Alfred Pellew had joined in the purchase of a half bottle of rum, each of them contributing the sum of 28 cents, while the case for the prosecution was that the appellant had purchased a half bottle of rum from Alfred Pellew for 24 cents and that the appellant knew that the price of a half bottle of rum at the local licensed retail spirit shop was 52 cents. The Magistrate believed that the appellant had indeed purchased the half bottle of rum from Pellew: and, in arriving at that conclusion he took into consideration, among other circumstances as appears from his reasons for decision, a statement which, it was alleged, was made by the appellant to a policeman and reduced by the policeman into writing.

In that statement the appellant is alleged to have told the policeman that he (the appellant) had purchased the half bottle of rum from Alfred Pellew, and that he knew it to be bush rum before he purchased it.

The appellant signs his name in Hindi characters; no evidence was given in the Magistrate's Court that the statement was read over to the appellant before he signed it; in the Magistrate's Court the appellant did not admit, he denied, that he had told the policeman anything about bush rum; and the policeman was not called as a witness to prove that the appellant did tell him what the statement contained.

In these circumstances there was no evidence before the Magistrate that the appellant had made a previous statement admitting that he had purchased the half bottle of rum from Pellew, or that he knew that it was bush rum.

In view of the nature of the unproved statement which purported to be an admission of guilt on the part of the appellant, we cannot say that, if the Magistrate did not take that statement

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into consideration, he would necessarily have found the appellant guilty; he might have believed the appellant or, on the whole evidence, he might not have been satisfied that the prosecution had proved its case.

The appeal is therefore allowed and the conviction is quashed with costs.

We have observed that, in this case, the rules of procedure which are required by section 80 (1) of the Evidence Ordinance, Cap. 25, to be followed when it is proposed to cross-examine a witness on previous statements made by him in writing or reduced into writing, and to contradict him by proof of those previous statements, were not complied with.

The statement (which we have found not to have been proved) was tendered and admitted in evidence before and not after, the attention of the appellant was called to those parts of the writing which the prosecution proposed to use for the purpose of contradicting him. If the salutary provisions of the subsection had been observed it is not likely that the Magistrate would have fallen into the error which he made in this case.

Appeal allowed.

JULES PEREIRA, Appellant (Defendant),
 v.
 BEHARRY SINGH, Corporal of Police No. 4241, Respondent
 (Complainant).
 [1943. No. 172.—DEMERARA.]
 BEFORE FULL COURT: SIR JOHN VERITY, C.J., AND DUKE. J.,
 (Acting.)

1943. AUGUST 24; SEPTEMBER 3.

Defence Regulations—Price control order—Sell—To be interpreted in ordinary meaning which word conveys to man in street—Delivery of goods and payment of purchase price—Sale constituted—Misapprehension of seller as to identity of purchaser immaterial—Bread (Price Control) Order, 1942.

Criminal law and procedure—Detection of offences—Police trap—What means permissible—What not permissible—Defendant induced to commit offence—By deliberate false representation—Made at instance of police—By means of false document—Manufactured by prosecuting corporal—Conviction obtained where police have overstepped their bounds—Cannot be set aside—But if in particular circumstances of case conduct of police constitutes extenuating circumstances—Complaint may be dismissed—Under Probation of Offenders Ordinance, cap. 21, s. 2.

On a Thursday afternoon a boy employed at the Brickdam Presbytery handed to the appellant a document purporting to be an order from the Presbytery for eight loaves of bread. The document did not emanate from the Presbytery but had been written, without authority from the Presbytery, by a police corporal who was the prosecutor. On the following morn-

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ing the boy returned to the appellant's shop stating that he had come for the Presbytery bread, whereupon the appellant delivered eight loaves to him, and the boy handed the appellant two one-dollar notes. The appellant told the boy that he would receive eight cents change later. The bread was seized by the police, and was weighed some hours later. If the fullest allowance be made for evaporation, the bread could not at the time of delivery have weighed more than 142½ ounces. The price of \$1.92 charged the appellant was far in excess of the maximum rate, of one cent for two ounces, prescribed by paragraph 3 of the Bread (Price Control) Order, 1942 made on the 15th August, 1942, under regulation 44 of the Defence Regulations, 1939; and the appellant was convicted by the magistrate of the offence of selling bread at a price above the rate fixed by the order,

On the hearing of the appeal, it was submitted on behalf of the appellant, that there was no contract of sale enforceable either by common law or by statute as there was a misapprehension in the mind of the appellant as to the identity of the purchaser; and that the decision of the magistrate is erroneous in law because the police exceeded what may be permissible as a trap when they forged an order purporting to come from the Presbytery.

Held, (1) that the word "sell" as used in the Bread (Price Control) Order, 1942, is to be given the ordinary meaning which that word conveys to the man in the street, that the appellant made delivery of the bread and received the price for which he asked, that there was a sale within the meaning of the Order and that the misapprehension of the appellant as to the identity of the person to whom he sold was immaterial to the issue in this case;

Cundy v Lindsay 3 A.C. 459 and *Mischeff v. Prickett* (1942) 2 All E.R. 349 distinguished; *Ho and Luch v. Octive* (1942) L.R.B.G. 384 applied.

(2) that, though the police exceeded what might be permissible as a police trap, there was no authority for setting aside the conviction, and there was nothing in the particular facts of the case to show that the conduct of the police constituted such extenuating circumstances as would have justified the magistrate in dismissing the charge under section 2 of the Probation of Offenders Ordinance, cap. 21, although in certain cases such conduct might constitute sufficient extenuation.

per curiam: We are concerned with the fact that the appellant was induced to make this particular sale and therefore to commit this particular offence by a deliberate false representation made at the instance of the police by means of a false document manufactured by the prosecuting corporal. We cannot too strongly insist that while the police are at liberty to use any fair and honest means in order to detect crime even though this may entail concealment of the true identity of their agent, they are not at liberty by falsehood or dishonest subterfuge to tempt or induce persons to commit breaches of the law. In the present case detection by means of the ordinary "police trap" may have been rendered more difficult by reason of the fact that the appellant would sell to no one but his regular customers, but this did not justify the police in seeking by a false document to persuade the appellant to sell to what must have seemed to him an eminently respectable and secure, if somewhat surprising, customer, and by this special inducement lead him to commit the particular offence of which he has been convicted. It has been said that extreme cases require extreme measures, and it may be that the persons concerned had no thought but the discharge of their duty in the detection and suppression of crime. The same may be said, perhaps, of those who in other countries are responsible for the most abominable practices but it can neither justify nor excuse them. It may be that the appellant in this particular case was willing and anxious to break the law in this way should a suitable opportunity arise. There is indeed evidence to support this view, evidence to which no exception was taken in the court below nor by way of appeal, and which may have been admissible to negative the defence of honest mistake set up by the appellant in regard to the money he received from the boy. There is, moreover, no direct incitement to sell at an excessive price. It is apparent, however, what mischief might be wrought by the application of this method to an honestly intentioned trader whose human frailty was not proof against the temptation presented by the suggestion that he was being induced to commit a similar offence by persons whose integrity should be a model for his own.

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APPEAL from a decision of Mr. A. V. Crane, Senior Magistrate of the Georgetown Judicial District. The facts sufficiently appear from the judgment.

L. M. F. Cabral, 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 for selling bread at a price above the rate fixed by an Order made by a competent authority under the Defence Regulations.

By section 3 of the Bread (Price Control) Order, 1942 made on 15th August, 1942, under Regulation 44 of the Defence Regulations, 1939, the price of bread was fixed at one cent for two ounces. The learned magistrate found that on the date charged the appellant sold a quantity of bread at a price exceeding the controlled price. The alleged sale appears to have been transacted in the following circumstances: On a Thursday afternoon a boy employed at the Brickdam Presbytery handed to the appellant a document purporting to be an order from the Presbytery for eight loaves of bread. In fact the document did not emanate from the Presbytery but had been written without authority from the Presbytery by a police corporal who is the prosecutor in this case. On the following morning the boy returned to the appellant's shop stating that he had come for the Presbytery bread, whereupon the appellant delivered eight loaves to him, and the boy handed the appellant two one-dollar notes. The appellant told the boy he would receive eight cents change later. The bread was then seized by the police and upon being weighed some hours later was found to aggregate 122½ ounces. The magistrate, making the fullest allowance for loss of weight by evaporation, found that the bread could not at the time of delivery have weighed more than 142½ ounces and that the price of \$1.92 charged by the appellant was far in excess of the prescribed rate.

There are three grounds of appeal and it will be convenient to deal firstly with that which appears to allege that there was no evidence upon which the magistrate could reasonably conclude that the appellant knowingly took and kept two one-dollar notes or demanded the sum of \$1.92 from the boy or charged any sum in excess of the maximum price prescribed. It is sufficient to say that there is ample evidence upon which the magistrate could reasonably have come to that conclusion and that although there was a conflict of evidence we see no reason to find that he was wrong in doing so.

We would deal next with the ground of appeal that there was both by common law and statute no purchase of the bread

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alleged to have been sold. As developed in the course of argument it appeared that this ground means that because there was a misapprehension in the mind of the appellant as to the identity of the purchaser there was no contract of sale enforceable by common law or statute. The case cited by counsel in support of this contention, *Cundy v. Lindsay* (3 A.C. 459) may be conclusive but it is not apt to the issue before the magistrate, which was not whether there was such a contract but whether the appellant had sold bread within the meaning of the Order. This Court has already decided in *Ho and Luck v. Octive* (1942, L.R.B.G. p. 384) that the word "sell" as used in an Order of this kind expressed in identical terms is to be given the ordinary meaning which that word conveys to the man in the street. We are invited by Counsel, in effect to reverse our former decision by giving effect to an English decision in *Mischeff v. Prickett* (1942, 2 A.E.R. 349). In declining to do so it will suffice to draw attention to the distinction between the phraseology, purpose and circumstances of the respective Orders under consideration in the two cases. Interpreting the present Order in the light of the earlier decision of this Court and applying that interpretation to the facts of the present case there can be no doubt that there was a sale in the present case within the meaning of the Order. The appellant made delivery of the bread and received the price for which he asked. His misapprehension as to the identity of the person to whom he sold is immaterial to the issue of this prosecution.

We would turn now to a matter which gives us cause for grave concern. It is a ground of appeal that the decision of the learned magistrate is erroneous in law because "the Police exceeded what may be permissible as a trap when they forged an order purporting to come from the Presbytery." The effect of the Police having done so is stated in the ground of appeal to be the destruction of an essential element in the contract of sale but we are not of the opinion that any such consideration can be held to invalidate the conviction, which is based upon the commission of a wrongful act of sale and not upon any technical conception of the nature of a contract. We are concerned, however, with the fact that the appellant was induced to make this particular sale and therefore to commit this particular offence by a deliberate false representation made at the instance of the police by means of a false document manufactured by the prosecuting corporal.

We are not unmindful of the many difficulties which the police experience in detecting breaches of Orders made in protection of the public from the hardships threatened by these present times nor are we unaware that these difficulties are added to by the complete absence in many instances of that elementary decency which should preclude traders from

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seeking to draw profit from the misfortunes of others. It is true that in many cases purchasers are reluctant to deprive themselves of opportunities of securing by illicit means goods of which there is a scarcity, although we would not have it thought that any such motive is attributable to the Reverend Fathers at the Presbytery who might well decline to take steps which might result in the commission of a wrongful act otherwise left undone.

Nevertheless we cannot too strongly insist that while the police are at liberty to use any fair and honest means in order to detect crime even though this may entail concealment of the true identity of their agent, they are not at liberty by falsehood or dishonest subterfuge to tempt or induce persons to commit breaches of the law. In the present case detection by means of the ordinary "police trap" may have been rendered more difficult by reason of the fact that the appellant would sell to no one but his regular customers but this did not justify the police in seeking by a false document to persuade the appellant to sell to what must have seemed to him an eminently respectable and secure, if somewhat surprising, customer, and by this special inducement lead him to commit the particular offence of which he has been convicted. It has been said that extreme cases require extreme measures and it may be that the persons concerned had no thought but the discharge of their duty in the detection and suppression of crime. The same may be said, perhaps, of those who in other countries are responsible for the most abominable practices but it can neither justify nor excuse them.

It may be that the appellant in this particular case was willing and anxious to break the law in this way should a suitable opportunity arise. There is indeed evidence to support this view, evidence to which no exception was taken in the court below nor by way of appeal and which may have been admissible to negative the defence of honest mistake set up by the appellant in regard to the money he received from the boy. There is moreover no direct incitement to sell at an excessive price. It is apparent, however, what mischief might be wrought by the application of this method to an honestly intentioned trader whose human frailty was not proof against the temptation presented by the suggestion that he was being induced to commit a similar offence by persons whose integrity should be a model for his own.

We can find no authority for setting aside a conviction for an offence committed in these circumstances nor can we find on the particular facts of this case that the conduct of the police constitutes such extenuating circumstances as would have justified the magistrate in dismissing the charge under section 2 of the Probation of Offenders Ordinance, Cap. 21, although in certain cases such conduct might constitute sufficient extenuation.

While affirming both conviction and sentence, however, we

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can do no other than express our profound disapproval of the conduct of those concerned and our hope that those responsible for the conduct and discipline of the Force will take whatever steps may be necessary to ensure that in the detection of crime there shall in future be no such departure from those principles of fair dealing which have been laid down by the Courts of this Colony and of England in this regard.

As a formal but quite inadequate expression of our disapproval the sentence of the lower court will be varied by deleting therefrom the order for payment of the costs of the prosecution and there will be no order for the payment by the appellant of the costs of this appeal. As far as the latter is concerned we intend no reflection whatever upon the learned Assistant Attorney-General who represented the respondent to this appeal with his customary fairness and moderation.

Appeal dismissed.

RAMDAI SINGH, Appellant (Defendant),
v.
CECIL SAMPSON, Police Constable No. 4207, Respondent
(Complainant).

[1943. No. 173.—DEMERARA].

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

1943. AUGUST 24; SEPTEMBER 3.

Defence Regulations—Order made by competent authority under reg. 44—Copy certified by competent authority—Admitted in evidence—Effect of—Prima facie evidence—That order made by competent authority—Emergency Powers (Defence) Act, 1939, s. 7; Emergency Powers (Colonial Defence) Order in Council, 1939.

Defence Regulations—Order made by competent authority under reg. 44—Publication in Gazette under reg. 74—Gazette admitted in evidence—Effect of.

Defence Regulations—Competent authority under reg. 44—Controller of Prices—Office of—Public office—Acting in—Prima facie evidence of appointment thereto.

Defence Regulations—Competent authority under reg. 44—Controller of Prices—Powers of—Extend throughout the Colony—Control of prices—May be exercised—In one part of Colony and not in another—Price control order with respect to the city of Georgetown—May be made.

Defence Regulations—Competent authority under reg. 44—Controller of Prices—Powers of—Extend to articles of every description—Including potatoes—Regulation 44 (1) (a); Price Control Order (Notice No. 130) of the 27th January, 1948.

A copy of an order made by the competent authority under regulation 44 of the Defence Regulations, 1939, such copy being certified by the competent authority, is *prima facie* evidence of the instrument made or issued by the competent authority, and is evidence, until the contrary is proved, that the original of such copy was an instrument made or issued by the competent authority.

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The office of Competent Authority (Controller of Prices) under regulations 3 and 44 of the Defence Regulations, 1939, is a public office.

Acting in a public office is *prima facie* evidence of title thereto, even in favour of the party so acting, or even between strangers.

In a *Gazette Extraordinary* published on the 27th January, 1943, there appeared an Order purporting to have been made by the Controller of Prices, Competent Authority, under Regulation 44 of the Defence Regulations, 1939, with the consent of the Governor, to control the prices at which certain articles shall be sold.

Held, that, until the contrary be proved, it must be presumed that the person making the Order was duly appointed Controller of Prices and that on the 27th January, 1943 his appointment to that office had not been terminated.

The powers of a Competent Authority (Controller of Prices) under regulation 44 of the Defence Regulations, 1939, extend throughout the Colony, but the Competent Authority may, in his discretion, control prices in one part of the Colony and not in another part. The Controller of Prices therefore had power to make a price-control order with respect to the City of Georgetown.

From the Order of the 27th January, 1943, and from regulation 44 (1) (a) of the Defence Regulations, 1939, an inference can be drawn that the powers of the Controller of Prices on the 27th January, 1943, extended to "articles of any description" and therefore included potatoes: so that his powers included the power to make an order controlling the price at which potatoes may be sold.

APPEAL from a decision of Mr. A. V. Crane, Senior Magistrate Georgetown Judicial District. The facts sufficiently appear from the judgment.

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

S. E. Gomes, Assistant Attorney-General, 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 defendant Ramdai Singh from a decision of the Magistrate of the Georgetown Judicial District convicting her of the offence of imposing a condition on the sale of a price-controlled article, to wit, potatoes, contrary to paragraph 11 (2) of the Order made on the 8th October 1942 and published as Notice No. 1275 in a *Gazette Extraordinary* on the 9th October 1942, as amended by Order made on the 27th January, 1943 and published as Notice No. 130 in a *Gazette Extraordinary* on the 27th January, 1943.

The only ground of appeal which was argued, was that there was no evidence that potatoes were a price-controlled article; and, in support of that ground of appeal, counsel for the appellant pointed out that, prior to the order of the 27th January, 1943, potatoes were not price-controlled under the order of the 8th October 1942 or any amendment thereof, and he submitted that there was no evidence that on the 27th January, 1943, Percy W. King who signed the order of the 27th January, 1943 as "Controller of Prices, Competent Authority" was in fact appointed as "Controller of Prices" or as "Competent Authority"; or, in the alternative, there was no evidence that his terms of appointment

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included power to make an order controlling the prices at which potatoes shall be sold in Georgetown.

The effect of the Order of the 27th January, 1943 was to amend *inter alia*, the Order of the 8th October, 1942 by adding potatoes to the list of price-controlled articles contained in the Principal Order, and to prescribe the maximum prices at which they should be sold. The formal parts of the amending Order were as follows:

Order made by the Controller of Prices under Regulation 44 of the Defence Regulations, 1939, to control the prices at which certain articles shall be sold. With the consent of the Governor I do hereby Order as follows: . . .

2. This Order shall come into effect as from the hour of 6 o'clock a.m. on the 28th day of January, 1943.

3. Notice of the effect of this Order shall be given by publication of a copy in the *Gazette*.

Ordered this 27th day of January, 1943.

PERCY W. KING,
Controller of Prices,
Competent Authority.

In accordance with regulation 74 of the Defence Regulations, 1939, it was provided in the order that notice of its effect shall be given by publication of a copy of the Order in the *Gazette*. This was done, and a copy of the *Gazette* was admitted in evidence. A copy of the order certified by the competent authority to be a true copy was admitted in evidence; and by section 7 of the Emergency Powers (Defence) Act, 1939, as applied to the Colony by the Emergency Powers (Colonial Defence) Order in Council, 1939, the original of such copy shall, until the contrary be proved, be deemed to be an instrument made or issued by the Competent Authority (Controller of Prices) and the copy shall be *prima facie* evidence of the instrument made or issued by the Competent Authority (Controller of Prices).

The office of Competent Authority (Controller of Prices) under regulations 3 and 44 of the Defence Regulations, 1939 is a public office. In *Phipson on Evidence* (1930) 7th edition, pages 105, 106 it is stated;

Acting in a public office is *prima facie* evidence of title thereto, even in favour of the party so acting, or even between strangers. The admission of such evidence rests partly on the principle that the law presumes in favour of the regularity of acts and against misconduct and bad faith, and partly upon the consideration that the invalidity of an act or appointment is more liable to detection when of a public than when of a private nature. In making the order of the 27th January, 1943 Percy W. King acted as a Competent Authority under the name of Controller of Prices under Regulation 44 of the Defence Regulations, 1939, to control the prices at which certain articles shall be sold: and, until the contrary is proved, it must be presumed that he was duly appointed Controller of Prices and that on the 27th January,

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1943 his appointment to that office had not been terminated. There being no evidence to the contrary, the first submission made by counsel for the appellant therefore fails.

By regulation 44 (1) (a) of the Defence Regulations, 1939, it is provided *inter alia* as follows:

A competent authority, so far as appears to that authority to be necessary in the interests of defence or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community may by order provide for regulating or prohibiting the . . . distribution sale, purchase, use or consumption of *articles of any description*, and, in particular, *for controlling the prices at which such articles may be sold* . . . and an order made under this regulation . . . may be made . . . so as to have effect either throughout the Colony or in any particular area therein. The powers of a Competent Authority (Controller of Prices) under this regulation extend throughout the Colony, but the Competent Authority may, in his discretion, control prices in one part of the Colony and not in another part. The Controller of Prices therefore had power to make a price-control order with respect to the City of Georgetown.

From the Order of the 27th January, 1943 and from regulation 44 (1) (a) an inference can be drawn that the powers of the Controller of Prices on the 27th January, 1943 extended to “articles of any description” and therefore included potatoes: if this were not so, the appellant could easily have rebutted this presumption by producing the *Gazette* containing the terms of appointment of Percy W. King as a Competent Authority under regulation 44 of the Defence Regulations, 1939, under the title of “Controller of Prices,” this he has not done, and so the presumption remains that the powers of Percy W. King as Controller of Prices on the 27th January, 1943 included the power to make an order controlling the price at which potatoes may be sold. The second submission made by counsel for the appellant therefore fails.

The appeal is dismissed, and the conviction affirmed, with costs.

Appeal dismissed.

M. S. ALLI v. W. JOHNSON.

MOHAMED SHAKOOR ALLI, Appellant (Defendant),

v.

WALTER JOHNSON. Police Constable No. 4296,
Respondent (Complainant).

[1943. No. 222.—DEMERARA].

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

1943. AUGUST 26; SEPTEMBER 3.

Criminal law and procedure—Assault causing actual bodily harm—Summary conviction offence—Punishment prescribed by enactment creating offence—Imprisonment only—Summary Conviction (Offences) Ordinance, cap. 13, s. 34 (a)—Conviction—Where actual bodily harm is of so slight a nature as to be disregarded—Open to magistrate to convict of common assault—Under section 40 of the Summary Jurisdiction (Procedure) Ordinance, cap. 14—Where facts proved establish full offence and injury is such that it cannot be disregarded—Court ought not to convict of minor offence—Merely because it does not desire to inflict the penalty prescribed by law for the offence charged and proved.

Criminal law and procedure—Summary conviction offence—Assault causing actual bodily harm—Offence proved—Injury not of so trifling a nature that it can be disregarded—No power in magistrate or in Appeal Court to impose a fine—Defendant sentenced by magistrate to two months' imprisonment with hard labour—Punishment not unduly severe when measured in terms of imprisonment—Not a case for a bond—Sentence not interfered with by Appeal Court.

The punishment prescribed by section 34 (a) of the Summary Jurisdiction (Offences) Ordinance, cap. 13 in case of conviction thereunder, is imprisonment: the section does not provide for the imposition of a pecuniary penalty. The Ordinance makes no provision similar to section 23 of the Criminal Law (Offences) Ordinance, cap. 17, whereby the Supreme Court may in its discretion substitute for the prescribed punishment a different punishment in certain cases.

Where on a charge for assault causing actual bodily harm contrary to section 34 (a) of the Summary Jurisdiction (Offences) Ordinance, cap. 13, the magistrate is of the opinion that the actual bodily harm inflicted is of so slight a nature as to be disregarded, it is open to him to convict of common assault under the provisions of section 40 of the Summary Jurisdiction (Offences) Ordinance, cap. 14.

Where, however, the facts proved establish the full offence and the nature of the injury is such that it cannot be disregarded, the Court ought not to convict for the minor offence merely because it does not desire to inflict the penalty prescribed by law for the offence charged and proved.

Deane v. Franklin (1931-37) L.R.B.G. 253, *Mary v. Persaud* (1931-37) L.R.B.G. 131, and *Mafford v. Sarrabo*, 29.3. 1935, considered.

The appellant was convicted of assault causing actual bodily harm contrary to section 34 (a) of the Summary Jurisdiction (Offences) Ordinance, Cap. 13, and he was sentenced to imprisonment for two months with hard labour. The facts were that, as the result of a dispute over an impounded stray, the appellant struck a man on the head with a hammer inflicting an injury described as a lacerated scalp wound one inch in extent, and extending down to the underlying bone. On an appeal against sentence.

Held (1) that the injury, while neither dangerous nor permanent in its effects, was not of so trifling a nature that it might be disregarded;

(2) that it was not open to the Appeal Court to set aside a proper conviction for an offence charged and proved, and substitute a conviction for a lesser offence because, moved by consideration for the appellant's character and family responsibilities, the Court might be reluctant to inflict upon him that form of punishment which the law prescribes for the offence for which he has been properly convicted; and

(3) that in the particular circumstances of the case the punishment inflicted by the Magistrate was not unduly severe when measured in terms

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of imprisonment, the only standard by which the law permits it to be measured; and that the Court was not prepared to substitute for a sentence of imprisonment an order that the appellant should enter into a bond to secure his future good behaviour.

APPEAL from a decision of Mr. F. O. Low, Magistrate of the West Demerara Judicial District. The facts sufficiently appear from the judgment.

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 for an assault occasioning actual bodily harm and from a sentence of two months imprisonment with hard labour. The grounds of appeal against the conviction were abandoned at the hearing of the appeal but on the ground that the sentence was unduly severe this Court was invited to substitute therefor an order for the payment of a fine.

The facts are that as the result of a dispute over an impounded stray the appellant struck the complainant on the head with a hammer inflicting an injury described as "a lacerated scalp wound 1" in extent and extending down to the underlying bone."

The magistrate convicted the appellant of an offence under 34 (a) of the Summary Jurisdiction (Offences) Ordinance, cap. 13, which prescribes punishment by way of imprisonment but does not provide for the imposition of a pecuniary penalty. The Ordinance makes no provision similar to section 23 of the Criminal Law (Offences) Ordinance, cap. 17, whereby the Supreme Court may in its discretion substitute for the prescribed punishment a different punishment in certain cases.

Counsel for the appellant cited *Deane v. Franklin* (1931-7) L.R.B.G. p. 253 in support of his contention that it is not in modern times the tendency of the Courts to send first offenders to prison for offences of this kind. In that case the Appeal Court in view of the fact that the appellant was a first offender and had paid substantial compensation to the complainant set aside a sentence of imprisonment and placed the appellant under bond. In the case of *Mary v. Persaud* (1931-7) L.R.B.G. p. 131 in which the magistrate had convicted the appellant of this same offence and had reprimanded and discharged her, the Appeal Court held that the proper course was to convict of common assault and impose a fine, and itself followed that course. In *Mafford v. Sarrabo* referred to in an Editor's Note to the report of *Deane v. Franklin* the Appeal Court similarly substituted a conviction for common assault and imposed a fine.

It appears desirable to make clear the principle by which Courts should be guided in dealing with cases of this kind. Where the magistrate is of the opinion that the actual bodily harm inflicted is of so slight a nature as to be disregarded, it is

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open to him to convict of common assault under the provisions of section 40 of the Summary Jurisdiction (Procedure) Ordinance, cap. 14. Where however the facts proved establish the full offence and the nature of the injury is such that it cannot be disregarded the Court ought not to convict for the minor offence merely because it does not desire to inflict the penalty prescribed by law for the offence charged and proved.

It is to be observed that in the case of *Deane v. Franklin* in which the injury was obviously of a severe nature the Appeal Court did not reduce the conviction to one for common assault. In the case of *Mary v. Persaud* that the injury was trifling may be presumed from the fact that the magistrate in the first instance did no more than reprimand the offender. We are unaware of the reasons which moved the Court in *Mafford v. Sarrabo*, an unreported case in which no reasons for the judgment of the Appeal Court appear upon the record.

In the present case the learned magistrate convicted the appellant of the full offence in circumstances which justified his doing so and in which he was of the opinion that the appellant merited imprisonment for the space of two months. We cannot say that in this case the injury, while neither dangerous nor permanent in its effects, was of so trifling a nature that it might be disregarded. It is not open to this Court to set aside a proper conviction for an offence charged and proved and substitute a conviction for a lesser offence because moved by consideration for the appellant's character and family responsibilities we might be reluctant to inflict upon him that form of punishment which the law prescribes for the offence for which he has been properly convicted. The most that we could do if we were moved by such considerations would be to follow the course pursued in *Deane v. Franklin* or if we were of the opinion that the term of imprisonment imposed by the learned magistrate was unduly severe we might reduce the length of the term.

We see nothing in the particular circumstances of this case to lead us to the conclusion that the punishment inflicted by the learned magistrate is unduly severe when measured in terms of imprisonment, the only standard by which the law permits it to be measured, nor are we prepared to substitute for a sentence of imprisonment an order that the appellant should enter into a bond to secure his future good behaviour. The appeal is therefore dismissed with costs.

We would, however, express our dissatisfaction with the state of affairs in which in cases of this kind a court of summary jurisdiction is precluded from imposing a fine whereas in our view it is a class of case in which the imposition of a pecuniary penalty is in many instances an adequate and appropriate penalty and one more consistent with the modern tendency to avoid, when possible, sending to prison such offenders as the appellant in this case.

Appeal dismissed.

RAMDAI SINGH v. J. D. SINGH.

RAMDAI SINGH, Appellant (Defendant),

v.

JOHN DYAL SINGH, Police Constable No. 4268,
Respondent (Complainant).

[1943. No. 238.—DEMERARA.]

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

1943. AUGUST 26, SEPTEMBER 3.

Appeal—From magistrate's court—Specific illegality substantially affecting merits of case—What is not—Summary Jurisdiction (Appeals) Ordinance, cap. 16, s. 9 (k).

Defence Regulations—Defence (Commodity Control Board) Regulations, No. 14 of 1942—Not ultra vires—Emergency Powers (Defence) Acts, 1939 and 1940, section 1 (1)—Emergency Powers (Colonial Defence) Order in Council, 1939, as amended by the Emergency Powers (Colonial Defence) (Amendment) Order in Council, 1940.

Defence Regulations—Competent authority under reg. 44—Power to make orders—For purposes of regulations—Emergency Powers (Defence) Acts, 1939 and 1940, section 1 (3); Emergency Powers (Colonial Defence) Order in Council, 1939, as amended by the Emergency Powers (Colonial Defence) (Amendment) Order in Council, 1940—Defence Regulations, reg. 3.

Defence Regulations—Order made by competent authority under reg. 44—Price control order (Notice No. 1275) dated 8th October, 1942—Fixing maximum retail prices—Breach of order—Selling above prescribed price—Offence of—May be committed by any person—not necessarily by “retailer” as defined by the order.

The appellant was charged with selling on the 2nd January, 1943, by retail a certain price-controlled article, to wit, onions (other than Madeira onions) at a price which exceeded the maximum retail price of the said article prescribed by order made under the Defence Regulations, 1939.

The case was called before the magistrate on the 22nd January. It was adjourned to the 27th January, then to the 29th March, then to the 26th May and then to the 17th June on which last mentioned date the hearing was commenced and postponed to the 18th June when it was concluded.

The onions were examined, at the request of the police, on the 13th January, 1943, by a person who had 18 years' experience as a salesman of onions. On the 17th June he gave evidence in the magistrate's court that the onions were not Madeira onions. On the 18th June a witness called for the defence admitted in cross-examination that anyone who has experience can distinguish a Madeira onion from other kinds of onions.

On the 27th January, counsel for the appellant wrote the prosecuting officer of police pointing out that onions were perishable, and asking that they be kept in cold storage or otherwise be adequately preserved so as to be in their present condition at the time of the trial, as otherwise the appellant would be seriously prejudiced. No application was, however, made to the police by the appellant to have the onions examined by any person on her behalf.

The onions were not kept in cold storage. They were kept in the Store-room at the Brickdam police station. On the 17th June, when the respondent went to the store-room at the Brickdam police station for the purpose of producing them in evidence on that day, it was ascertained that the onions had been eaten almost completely by rats and that only the onion skins remained.

The appellant refrained from taking steps, before the trial commenced, to ascertain whether her contention that the onions were Madeira onions would be supported by expert testimony. She also refrained from giving evidence that the onions sold by her were Madeira onions or were so

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considered by her; or that she had purchased Madeira onions for sale by retail; or that she had Madeira onions in stock.

The appellant submitted, on the hearing of the appeal, that a specific illegality, substantially affecting the merits of the case, was committed in the course of the proceedings before the magistrate, the illegality being that the onions, the subject matter of the charge, were not preserved by the police, and, as a consequence, the appellant was unable, at the trial to call expert evidence to prove that the onions were Madeira onions, and that the appellant was therefore prejudiced in her defence that the onions were not price-controlled articles.

Held, that while it was true that the appellant could not (by reason of the onions having been eaten by rats before the 17th June; have called expert evidence to examine the onions at the trial, and to express an opinion as to whether they were Madeira onions or not, it was equally true that, if she had been able to call such expert evidence at the trial, she could not possibly have known beforehand, what evidence the experts would have given, as the onions were not examined, before the trial, by any person on her behalf; that the case for the prosecution that the onions were not Madeira onions was a strong one; that if the appellant's contention was correct, she could have given much evidence which was within her personal knowledge, but she declined to go into the witness-box to give any evidence which might in any way have weakened the force and effect of the case for the prosecution: that if the appellant was indeed prejudiced in her defence, she must blame herself and not the police; and that, even if there was an illegality within the meaning of section 9 (k) of the Summary Jurisdiction (Appeal) Ordinance cap. 16, the illegality in no way affected the merits of the case.

The Defence (Commodity Control Board) Regulations, 1942 (Regulations No. 14 of 1942) are not *ultra vires* of section 1 (1) of the Emergency Powers (Defence) Acts, 1939 and 1940, as applied to the Colony by Emergency Powers (Colonial Defence) Order in Council, 1939, as amended by the Emergency Powers (Colonial Defence) (Amendment) Order in Council, 1940, under which the Regulations purport to have been made.

A competent authority under regulation 44 of the Defence Regulations, 1939, may make orders for the purposes of those Regulations, by virtue of the powers conferred by section 1 (3) of the Emergency Powers (Defence) Acts, 1939 and 1940, as applied to the Colony, and by virtue of regulation 3 of the Defence Regulations, 1939.

The offence of selling a price-controlled article at a price exceeding the maximum retail price prescribed by order of the 8th October, 1942, (published in the *Gazette* as Notice No. 1275) made by the competent authority under regulation 44 of the Defence Regulations, 1939, can be committed by "any person", as stated in paragraph 11 (1) of the order, provided that the transaction is a sale by retail: the person charged need not be a "retailer" as defined by the Order.

APPEAL by the defendant Ramdai Singh from a decision of Mr. A. V. Crane, Senior Magistrate, Georgetown, Judicial District. The facts sufficiently appear from the judgment.

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

S. E. Gomes, Assistant Attorney-General 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 defendant Ramdai Singh from a decision of the Magistrate of the Georgetown Judicial District convicting her of selling by retail a certain price-controlled article, to wit, onions (other than Madeira onions) at a price which exceeded the maximum retail price of the said article

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prescribed by the First Schedule to an order made by the competent authority on the 8th October, 1942 under Regulation 44 of the Defence Regulations, 1939, and contrary to paragraph 11 (1) of that order.

Counsel for the appellant has urged that a specific illegality, substantially affecting the merits of the case, was committed in the course of the proceedings before the magistrate, the illegality being that the onions, the subject matter of the charge, were not preserved by the police, and, as a consequence, the appellant was unable, at the trial, to call expert evidence to prove that the onions were Madeira onions, and that the appellant was therefore prejudiced in her defence that the onions were not price-controlled articles.

The sale took place on the 2nd January, 1943, and, from the time of the sale, the onions were in the custody of the police. On that day, the respondent handed them to C.S.M. Hinds to keep. On the 13th January C.S.M. Hinds delivered the onions to the respondent who took them on the same day to Mr. Robert Arthur Dummett to be examined by him and to obtain his expert advice as to whether the onions were Madeira onions or not. After the onions were so examined, the respondent again handed them to C.S.M. Hinds who placed them in the store room at Brickdam police station. The complaint against the appellant was filed on the 13th January, and the summons thereon was returnable for 22nd January. On that day, the hearing was adjourned to the 27th January on which day the police were not ready to proceed, and the hearing was adjourned to the 29th March, 1943. There were further adjournments to the 26th May 1943 and to the 17th June, 1943, on which latter date the hearing was commenced and postponed to the 18th June when it was concluded.

On the 27th January counsel for the appellant wrote the prosecuting officer of Police pointing out that onions were perishable, and asking that they be kept in cold storage or otherwise be adequately preserved so as to be in their present condition at the time of the trial, as otherwise the appellant would be seriously prejudiced.

No application was made to the police by the appellant to have the onions examined by any person on her behalf.

The onions were not kept in cold storage. They continued to be kept in the store-room at the Brickdam police station. On the 17th June, when the respondent went to the store-room at the Brickdam police station for the purpose of producing them in evidence on that day, it was ascertained that the onions had been eaten almost completely by rats, and that only the onion skins remained.

Mr. Dummett, who has had 18 years' experience as a salesman of onions, gave evidence in the magistrate's court that the onions were not Madeira onions: and Mr. Amos Rangela, who was

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called by the defence, deposed that anyone who has experience can distinguish a Madeira onion from other kinds of onions.

It is true that the appellant could not have called expert witnesses to examine the onions at the trial, and to express an opinion as to whether they were Madeira onions or not: but it is equally true that if she had been able to call such expert evidence at the trial, she could not possibly have known before hand, what evidence the experts would have given, as the onions were not examined, before the trial, by any person on behalf of the appellant. The appellant refrained from taking steps, before the trial, to ascertain whether her contention that the onions were Madeira onions would be supported by expert testimony. She also refrained from giving evidence that the onions sold by her were Madeira onions or were so considered by her; or that she had purchased Madeira onions for sale by retail; or that she had Madeira onions in stock. If the appellant was indeed prejudiced in her defence, she must therefore blame herself and not the police. At the trial, the position adopted by the appellant was that the prosecution had not proved its case: that view was erroneous as the prosecution had established a strong case. The appellant did not give evidence before the magistrate; if her contention is correct she could have given much evidence which was within her personal knowledge, yet she submits that she has been prejudiced in her defence because she has not been able to place before the magistrate the evidence of expert witnesses who may or may not have supported her contention.

In our view, even if there was an illegality within the meaning of section 9 (k) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 16, the illegality in no way affected the merits of the case, as the evidence of Mr. Dummett and of Mr. Rangela clearly established that the onions were not Madeira onions, and the appellant declined to go into the witness-box to give any evidence which might in any way have weakened the force and effect of that evidence.

Counsel for the appellant has submitted that the Defence (Commodity Control Board) Regulations, 1942 (Regulations No. 14 of 1942) are *ultra vires* of the enactments under which they purport to have been made; and that the powers conferred upon the Governor by those enactments cannot be delegated.

Regulations No. 14 of 1942 purport to have been made under section 1 (1) of the Emergency Powers (Defence) Acts, 1939 and 1940, as applied to the Colony by the Emergency Powers (Colonial Defence) Order in Council, 1939, as amended by the Emergency Powers (Colonial Defence) (Amendment) Order in Council, 1940.

By those Regulations the Commodity Control Board was established on the 14th March, 1942, and it was provided by regulation 5 that, subject to the approval of the Governor, the

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Board was to exercise certain functions which included the control of maximum prices. On the 17th March, 1942, the Governor, under regulation 3 of the Defence Regulations, 1939, appointed the Commodity Control Board to be a Competent Authority for the purposes of regulation 44 of those Regulations.

Section 1 (1) of the Emergency Powers (Defence) Acts, 1939 and 1940, as applied to this Colony, empowers the Governor *inter alia*, to make such Defence Regulations as appear to him to be necessary for maintaining supplies and services essential to the life of the community. It is abundantly clear that the establishment of a Commodity Control Board is within the powers conferred upon the Governor by the subsection.

By section 1 (3) of the Acts of 1939 and 1940, as applied to this Colony, Defence Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the Regulations to make orders, rules and bye-laws for any of the purposes for which such Regulations are authorised to be made. By regulation 3 of the Defence Regulations, 1939, the Governor may appoint a Competent Authority for the purposes of all or any of the regulations, in which that expression occurs. That expression occurs in regulation 44, and in that regulation the Competent Authority is empowered to make orders. Those orders are for the purposes for which Defence Regulations are authorised to be made, and are therefore properly and lawfully made.

By paragraph 11 (1) of the Order of the 8th October, 1942, "no person shall sell any price-controlled article at a price exceeding the maximum price prescribed by this Order". The order prescribes that the maximum retail price in Georgetown and within one mile of the boundaries thereof of "Onions (other than Madeira onions)" is to be at the rate of 23 cents per pound. It cannot be contested by the appellant that she did sell onions (other than Madeira onions) by retail at a price exceeding the prescribed maximum retail price, but counsel for the appellant has submitted that there was no legal proof that the appellant was a retailer. There is however nothing in the order to indicate that the offence of selling a price-controlled article at a price exceeding the maximum retail price prescribed by the Order can only be committed by a "retailer" as defined in the Order: the offence can be committed by any person, provided that the transaction is a sale by retail.

The other grounds of appeal were not argued, and were abandoned.

The appeal is therefore dismissed, and the conviction affirmed, with costs.

Appeal dismissed.

J. B. FIGUEIRA v. PUBLIC TRUSTEE.

JOHN BAPTISTA FIGUEIRA, Plaintiff,

v.

PUBLIC TRUSTEE as Administrator of the estate of
JOSE MENDES, deceased, Defendant.

[1941. No. 230—DEMERARA].

BEFORE DUKE, J., (Acting).

1943. SEPTEMBER 1, 2, 3, 6, 7.

Evidence—Legal proof—Certainty not required—Such a measure of probability—Derived from ascertained facts—As to entitle judicial mind—Reasonably to infer fact in issue.

Legal proof does not require certainty, but such a measure of probability, derived from ascertained facts as to entitle the judicial mind reasonably to infer the fact in issue.

Board of Education for City of Windsor v. Ford Motor Co., of Canada, et al (1941) 110 L.J.P.C. 34, applied.

ACTION by the plaintiff John Baptiste Figueira against the Public Trustee as administrator of the estate of Jose Mendes, for salary and accounts.

J. L. Wills, for the plaintiff.

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

DUKE, J. (Acting): In this action the plaintiff John Baptista Figueira claims from the defendant the Public Trustee as administrator of the estate of John Mendes, deceased:

- (a) one-third of the net profits of the shop and timber businesses carried on by the said John Mendes, from the 1st February, 1934, to the 29th August, 1940: and/or
- (b) the sum of \$1470 moneys due for salary for the period 1st January, 1938, to the 31st August 1938, at the rate of \$50 a month, and for the periods 1st February, 1934, to the 31st December, 1937, and the 1st September, 1938, to the August, 1940, at the rate of \$40 a month.

I am not convinced by the evidence of the plaintiff and of his witnesses that Jose Mendes (hereinafter referred to as “the deceased”) at any time entered into an agreement with the plaintiff whereby the deceased was to surrender to the plaintiff any share whatever in the profits of the shop and timber businesses carried on by the deceased. It may be that in June or July, 1940, the deceased did express an intention to the plaintiff’s witnesses that he would do something for the plaintiff, but that would not be evidence that the plaintiff was already entitled as of right, to a share (whatever be its extent) in the net profits of the shop and timber businesses carried on by the deceased. The deceased became ill in July, 1940, and he died on the 29th August, 1940. The claim of the plaintiff

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for one-third of the net profits of the shop and timber businesses carried on by the deceased in his lifetime must necessarily fail.

The plaintiff, who was a cousin of the deceased, arrived in the Colony from Madeira in January, 1934. The deceased met the plaintiff on his arrival, and he took him to Bartica where the deceased had established a shop business in 1933. The plaintiff was employed by the deceased in his shop. He alleges that it was agreed between him and the deceased that his salary was to be \$40 a month as from the 1st February, 1934. I do not believe him, and I may, at this stage, point out that when the plaintiff arrived in the Colony he could not speak English. On the whole evidence, and from the surrounding circumstances, I find that the plaintiff's salary was at the rate of \$30 a month from 1st February, 1934 up to the 31st December, 1936; and at the rate of \$40 a month from the 1st July, 1940 to the 29th August, 1940. In July and August, 1940 the plaintiff, in consequence of the illness of the deceased, had to perform additional services for him and the plaintiff should receive therefor an additional sum of \$20 a month. The aggregate amount of the salary earned by the plaintiff was \$2,610.

During the first part of year 1938 the plaintiff was released from his employment with the deceased, and he was employed by one Burnett in connection with a timber grant. The plaintiff alleges that he was so employed for eight months in 1938, from January to August, at \$50 a month; that the salary was to be paid equally by Burnett and the deceased; that it was arranged between Burnett, the deceased and the plaintiff that the total salary of \$400 for the eight months would be paid by the deceased to the plaintiff, the deceased debiting Burnett with the sum of \$200 as having been paid by the deceased on behalf of Burnett to the plaintiff; and that the plaintiff was never paid the sum of \$400 by the deceased. I am not satisfied that the deceased agreed to contribute one-half of the salary of the plaintiff of \$50 per month, neither am I satisfied that the deceased ultimately became responsible to the plaintiff for the payment to him of the sum of \$400.

The deceased defrayed the cost of the passage of the plaintiff from Madeira, as well as the cost of the passages of the plaintiff's wife and six children therefrom. The total amount so paid by the deceased was \$324.

The plaintiff, for his own benefit, took out a policy of insurance on his life. The deceased paid premiums aggregating \$289.30. The deceased paid rent for the plaintiff as follows: from November 1935 to December 1936, 14 months at (say) \$5 a month, and from January 1937 to August 1940, 44 months at \$7 per month. The total amount so paid was \$378.

The plaintiff estimates that he took rations from the shop at the rate of \$20 per month, for 77 months from February 1934 to

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August 1940 (both months inclusive). The total amount so admitted by the plaintiff is \$1,540. It may be useful to mention, at this stage, that in the particulars of the claim which the plaintiff filed with the Public Trustee, he stated that in July and August 1940 he took goods and rations from the deceased's shop to the extent of \$100.

It appears from the evidence that, at times, small sums of money were handed by the deceased to the plaintiff.

The plaintiff states that, apart from those small sums of money, he received no payment whatever from the deceased for his services. On that assumption the position (if the estimated figure of \$1,540 for rations is accepted as correct,) would appear to be as follows:

Salary		\$2,610.00
	Debits	
Passages	\$324.00	
Insurance	\$289.30	
Rent	\$378.00	
Rations	\$1,540.00	<u>\$2,531.30</u>
	Balance	<u>\$ 78.70</u>

It will be observed that if the plaintiff had estimated the average amount of goods taken by him from the shop at \$1.03 more per month for the 77 months in addition to his estimate of \$20.00 per month he would have nothing to receive; and that if the plaintiff had estimated that the average amount of goods taken by him from the shop was \$26.23 per month, he would also have nothing to receive, even if the plaintiff ought properly to be credited with the sum of \$400 as salary in the Burnett transaction, inasmuch as the sum of \$400 would be exhausted by taking a further amount of rations to the value of \$5.20 every month for 77 months. In *Board of Education For City of Windsor v. Ford Motor Co., of Canada, Ltd., et al* (1941) 110 L. J. P. C. 34, Lord Atkin said:

Legal proof does not require certainty but such a measure of probability, derived from ascertained facts as to entitle the judicial mind reasonably to infer the fact in issue.

In view of the large family of the plaintiff, which has been steadily increasing since the arrival of his wife in this Colony in 1935, and in view of the fact that, according to the plaintiff himself, he took in July and August 1940 goods and cash from the shop of the deceased at the rate of \$50 per month, it is reasonable for me to infer that the average value of goods and cash taken by the plaintiff from the shop was at least \$26.23 per month. Consequently, the plaintiff has been fully satisfied for his services.

In arriving at this conclusion I have not taken into considera-

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tion the fact that the plaintiff received, after the death of the deceased, the sum of \$266.65 from the proceeds of sale of some of the timber of the deceased.

There will be judgment on the claim for the defendant with costs.

The defendant has counter-claimed for an account. The plaintiff has admitted his liability to account, and he has rendered an account in the course of his evidence. Counsel for defendant has expressed no opinion as to whether the defendant is satisfied with the account, but, in the circumstances of this case, he does not wish to further press the claim for account. He has, however, submitted that the plaintiff should have rendered his account before the counter-claim was filed, and he should not have waited until he was in the witness-box at the trial of the action. I agree with counsel's submission, and, although I make an order that the counter-claim do stand dismissed out of Court, I make an order that the defendant's costs of and incidental to the counterclaim be paid by the plaintiff.

Judgment for defendant.

Solicitors: *Carlos Gomes; R. G. Sharples.*

Re MARIA DE MONTE GOMES.

[1943. No. 166.—DEMERARA].

BEFORE SIR JOHN VERITY, C.J.: IN CHAMBERS.

1943. SEPTEMBER 6, 10.

Lunacy—Receiver of estate of a person—Application for appointment—Refused—Civil Law of British Guiana Ordinance, cap. 7, s. 23 (3) (c) (i).

Order refused for the appointment of a receiver under section 23 (3) (c) (i) of the Civil Law of British Guiana Ordinance, cap. 7.

ORIGINATING SUMMONS by Manoel Luiz Ferreira, Augusta Ferreira, the wife of Jose Ferreira, and Joao Luiz Ferreira, who claimed to be the brothers and sisters of Maria DeMonte Gomes, for an order under section 23 (2) and section 23 (c) (i) of the Civil Law of British Guiana Ordinance, cap. 7, appointing the Public Trustee of British Guiana as receiver of the property of Maria De Monte Gomes.

J. A. Luckhoo, K.C. and *H. C. Humphrys*, K.C., for the applicants.

Sir Lennox A. P. O'Reilly, K.C., Trinidad and Tobago, (*A. J. Parkes*, *S. I. Cyrus* and *L. M. F. Cabral* with him), for the respondent Maria DeMonte Gomes.

Re M. DE MONTE GOMES.

VERITY, C.J.: This application is made under section 23 of the Civil Law Ordinance, Cap. 7 for the appointment of a receiver of the estate of a person alleged to be incapable of managing her affairs by reason of mental infirmity arising from age. The application is supported by affidavits alleging that the person concerned has become forgetful and peevish, takes strong drink, is under the influence of her attorney, has disposed of certain of her property to the wife of the attorney, has become estranged from her relatives and has recently married a son of her attorney aged 19 or 20, she herself being 73 years of age. It is alleged that she has admitted that she is unable to resist the influence of her attorney or reject his advice. Affidavits have also been made by the person concerned, by her attorney and by three medical men. The affidavits of the person concerned and of her attorney deny or explain certain facts alleged by the applicants, while those of the medical men are to the effect that in their opinion the person concerned is suffering from no mental infirmity. Having heard counsel for the applicants as well as for the person concerned, I decided, in the exercise of my discretion, to interview her before giving directions for the further hearing of the application although I cannot say that I was satisfied that the affidavits in support of the application disclosed in themselves facts which either separately or together pointed necessarily to mental infirmity, while such a state was definitely negated by the testimony of the medical witnesses. I have interviewed the person concerned and with the assistance of the interim receiver appointed by the Court on the 29th June last, I have also examined the books of account kept by her attorney. I find nothing in the demeanour of the person concerned nor in her answers to my questions which would lead me to believe that the doctors who have examined her are in any way mistaken in their conclusion that she is not suffering from any mental infirmity nor do I find in the state of her affairs as disclosed in the books of account anything which would lead me to believe that the conduct of her affairs has been such that a person of ordinary mental ability would have suspected that anything was wrong with their management. There appears on the face of the books such husbanding of her estate as would justify a person of ordinary intelligence being satisfied with its management, as indeed the person concerned appears to be.

With regard to the general allegations made in support of the application, it must be borne in mind that it is not uncommon for elderly persons even though they may suffer from no mental infirmity to view with suspicion and perhaps resentment any undue interest displayed in their affairs by relatives whom they may, wrongly or rightly, suspect of being actuated rather by motives of self-interest than of concern for the well-being of those from whom they may have expectations of future financial advantage

Re M. DE MONTE GOMES.

It is not uncommon for elderly persons in such circumstances to repose their confidence in some person whom they may select for the management of their affairs, whether a relative or a stranger, nor is it uncommon for them to place perhaps too much reliance upon the integrity and altruism of the person so selected by them. Any questioning of their wisdom in so doing is likely to create further resentment and result in further estrangement. None of these things are signs of mental infirmity nor are they inconsistent with full capacity to manage their own affairs in their own way, whether it be directly in their own hands or by the hands of those in whom they have placed their trust. The extent of the trust so placed may be unwise or indiscreet, but it is not only those who are mentally infirm who have been known to be guilty of indiscretion in the conduct of their business affairs or their private lives. Whatever opinion I may have of the conduct of the attorney in consenting to the marriage of his minor son with his principal and whatever may be my view of the conduct of the young man in marrying a woman of such advanced years their conduct is not evidence of mental infirmity on the part of the lady concerned. Their motives may or may not be of the highest, but the question with which I am concerned is the state of mind of the lady herself, and although I may have my personal opinion as to the wisdom or folly of such a marriage I cannot hold that it is, in itself, evidence of legal incapacity to manage her affairs.

In view of the contents of all the affidavits filed as well as of the impressions formed by me during the course of my interview with the person in respect of whom the allegations of mental infirmity have been made, I do not consider that I should be justified in ordering further inquiry into the state of her mind which is the sole issue before me in determining this application. I am indeed satisfied that any further investigation would be fruitless and would not be in the interest and protection of the person concerned. It may indeed be true that an elderly and illiterate person who places entire confidence in her attorney lays herself open to the possibility of being defrauded should that attorney prove dishonest, and that she does not add to her security by an alliance in marriage with that attorney's son. It may be that the lady would be well-advised if she and her solicitor were vigilant in the oversight of her affairs. She has, however, made her choice as to how those affairs should be managed. I see no evidence of mismanagement in the past such as would lead to the conclusion that her choice could only have been made if she were mentally infirm. The view I have formed is rather that in making her choice she has done so with a fairly shrewd eye to what she believes to be her own personal comfort, though no doubt with no consideration for the future interests of those relatives who have made this application. Events will show whether the

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choice has, even in her own interest, been a wise one; but in the meantime I can find no grounds upon which I could properly make the order sought and the application is therefore dismissed. No order as to costs save, by consent, payment of the costs of the interim receiver from the estate. Costs to be agreed and in default of agreement to be settled by the Court.

Application refused.

Solicitors: *J. Edward DeFreitas*, for the applicants;

W. D. Dinally, for respondent.

PEER BACCHUS, Plaintiff,
 v.
 NARAIN HOOKUMCHAND AND CHRISTMAS
 HOOKUMCHAND, Defendants.

[1940. No. 45.—DEMERARA.]

BEFORE VERITY, C.J.:

1942. MAY 18, 19, 20, 21, 22; JUNE 17, 18; 1943. SEPTEMBER 17.

Servitude—Title to—Contained in transport in favour of person entitled hereto—Not sufficient—Must appear in title to property over which servitude exercised—Transport of that property—Servitude not reserved therein—Extinguished.

Immovable property—Document of title to—What conferred on holder—Indefeasible title—Incumbrance or servitude not included in document—Free from.

Servitude—Merger of—Property over which servitude exercised—Conveyed to owner of servitude.

Evidence—Document—Construction of—“Front lands” in relation to right of grazing thereon—Meaning of “front lands”—Ambiguity in—User before, at the time of, and immediately after, date of document—Evidence of—Admissible.

Declaration—As to what rights of parties are—Rights limited by transport—Injunction granted to protect infringement—Declaration not necessary.

Under the system of conveyancing practised in this Colony, the person entitled to the benefit of a servitude does not rest his claim upon any right secured to him by his own transport or document of title which is, as a rule, silent on this point. His rights rests in a reservation contained in the title of the person over whose property it is to be exercised.

It is possible, therefore, for such a servitude to be extinguished by omission thereof from the transport by which the property over which it is exercised, is transferred to some third party.

D’Aguiar v. Phillips, Limited Jurisdiction 11th January, 1904; General Jurisdiction, 29th March 1904, applied.

The document of title to immovable property confers upon its holder indefeasible title to the property comprised therein, free from any incumbrance or servitude not included in the document. A purchaser therefore who takes under his transport free from any servitude cannot be faced with a servitude arising from the title of his neighbour.

At one time the three plantations, Hope, Washington and Rising Sun were owned by one and the same person.

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Plantations Washington and Rising Sun were conveyed to the plaintiff's predecessor in title; and, in the transport, there was reserved to the owners of Plantation Hope, rights of grazing over Plantations Washington and Rising Sun. These two plantations were conveyed to the plaintiff by transports No. 39 of 1920, No. 205 of 1920 and No. 333 of 1934. By transports No. 319 of 1934 and No. 333 of 1934 the plaintiff became the owner of the land situate in the rear of Plantations Washington and Rising Sun.

Plantation Hope was conveyed to Richard Bertie Butts by transport No. 128 of 1910; and, in that transport, there was reserved to the owners of Plantations Washington and Rising Sun rights of grazing and drainage over Plantation Hope. Subsequently, Butts also acquired title to certain lands situate at the rear of Plantation Hope, and these lands were subject to the same right of grazing. By transport No. 307 of 1932 Butts conveyed to the plaintiff. "All those pieces or parcels of land comprising the southern or back portion of Plantation...Hope...with the right of drainage through the northern portion of the said Plantation...Hope not hereby transported."

Held, that by that transport any right of grazing over those lands in favour of the owners of Plantations Washington and Rising Sun was thereby extinguished or merged in full ownership.

After the death of Butts, Plantation Hope passed to his heirs by transport and in that transport the right of grazing is reserved in the following terms: "Subject...to the right of the proprietor or proprietors of Plantations Washington and Rising Sun of grazing cattle and other stock over the front lands of the said Plantation Hope." In 1938 Plantation Hope was put up for sale at Execution, and the advertisement thereof described the grazing rights of the owners of Washington and Rising Sun in terms identical with those of the transport to Butts' heirs. The defendant was the purchaser at the execution sale, he entered into possession forthwith of the property purchased, but at the time of hearing of the action (and of judgment) he had not yet obtained judicial sale transport thereof.

Held, that whatever grazing rights the plaintiffs had, prior to the transport by Butts in favour of his heirs, over Plantation Hope, he (the plaintiff), subsequent to such transport had no more grazing rights over Plantation Hope than were reserved in the transport passed in favour of the heirs of Butts.

Where there exists such an ambiguity which is not patent upon the face of a document but emerges from an attempt to construe the document in the light of surrounding circumstances, it is admissible to consider all circumstances which can tend to show intention of parties, whether before or after the execution of the deed.

Van Diemen's Land Co. Table Cape Marine Board (1906) A.C. 92, applied.

The Court found that there was an ambiguity in the meaning of the term "front lands" appearing in the transport passed by the personal representatives of Butts in 1934 in favour of the heirs of Butts, which transport was not opposed by the plaintiff.

Held, that it was therefore proper to consider the evidence of user before, at the time of, and immediately after, the date of the document in which the phrase "front lands" was used, and to which the plaintiff by inaction signified his assent.

The plaintiff claimed that he was entitled, by his transport, to the right of grazing cattle over the whole of a plantation. The defendant counter-claimed that by a subsequent transport, the right of grazing was limited to that portion of the plantation which was situate north of the public road. The Court agreed with the defendant, and granted him an injunction restraining the plaintiff from depasturing cattle elsewhere than on the portion of the plantation situate north of the public road.

Held, that it was not necessary in those circumstances to grant a declaration as to the extent of the grazing rights of the plaintiff.

ACTION by the plaintiff Peer Bacchus against the defendant Naraine HOOKUMCHAND for (a) A declaration that the plaintiff is entitled to the right of drainage through, and grazing of cattle and other live-stock on Pln. De Hoop, also called Pln. Hope, West Coast, Berbice; (b) an injunction restraining the defendant his servants or agents, from impounding the plaintiff's cattle

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whilst grazing on the property and from erecting any fences in order to prevent the plaintiff's stock from grazing thereon; and (c) the sum of \$1,000 as damages for unlawful impounding by the defendants of the plaintiff's cattle whilst grazing in or upon the said plantation during the year 1939 and in the month of February, 1940.

The defendant counter-claimed (a) an injunction restraining the plaintiff from depasturing cattle and stock on part of the plantation south of the public road; (b) a declaration that the plaintiff is not entitled to the right of grazing of cattle or stock on that parcel of land; and (c) the sum of \$2,000 as damages. On the 18th May, 1942, the Court directed that Christmas Hookumchand who claimed ownership of the property be joined as a defendant. By virtue of an order made by the West Indian Court of Appeal on the 28th June, 1943, Christmas Hookumchand is the owner: and see (1942) L.R.B.G. 134.

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

S. L. van B. Stafford, K.C., for the defendant Naraine Hookumchand.

J. A. Luckhoo, K.C., and *W. J. Gilchrist*, for the defendant Christmas Hookumchand.

Cur. adv. vult.

VERITY, C.J.: In this case the plaintiff seek a declaration of certain rights of drainage and grazing, an injunction preserving those rights, and damages.

The plaintiff is the owner of certain properties adjoining Plantation Hope, the property of the second-named defendant who was joined by consent as a defendant pending the determination of a dispute as to title in order that there should be no undue delay in declaring the plaintiff's rights, if in fact such rights are proved to exist.

At the date of the hearing of this suit, however, the question of title remained undecided and for this reason I have deferred the delivery of this judgment. By the dismissal of an appeal in a suit between the first and second-named defendants, however, in June, 1943, the matter has now been determined and I proceed therefore upon the basis that ownership of Plantation Hope resides in the second-named defendant.

It appears that at one time the three properties—Hope, Washington and Rising Sun—were owned by one person, but as the result of a number of transactions the first became vested in the defendant's predecessor in title and the two latter became vested in the plaintiff's predecessors in title. At that time there was reserved to the owners of Hope rights of grazing and drainage over Washington and Rising Sun, and to the owner of these properties similar rights over Hope. In so far as rights of drainage are concerned no question arises, the issue in this respect being

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confined to an alleged interference by the defendants with the rights of the plaintiff. This interference is denied. As regards the right of grazing, however, in the events which have followed the distribution of these properties the question has arisen as to the extent of the rights now reserved to the plaintiff, and it becomes necessary in the first place to examine the history of the title to these properties.

As to Washington and Rising Sun it appears that in 1920 the plaintiff became the owner of 14 undivided 16ths of these properties by transport No. 39 of that year, and by transport No. 205 of the same year he acquired one further undivided 16th. In 1934 he became the owner of 15 undivided 16ths of land situate at the rear of the plantations by transport No. 319 of that year and later in the same year by transport No. 333 he acquired the remaining undivided 16th of both plantations and of the land situate at the rear thereof. In the original transport, there is reserved to the owners of Hope the right of drainage and grazing of all stock.

As to Hope, it appears that in 1910, by transport No. 128 of that year, Richard Bertie Butts acquired Plantation Hope, and in that transport there was reserved to the owners of Washington and Rising Sun the right of drainage and of grazing all stock. Subsequently, Butts also acquired title to certain lands situate at the rear of Hope, subject to the same right of grazing, and in 1932 by transport No. 307 Butts conveyed to the plaintiff "All those pieces or parcels of land comprising the Southern or back portion of Plantation . . . Hope . . . with the right of drainage through the Northern portion of the said plantation . . . Hope not hereby transported."

It is to be observed that in the original title to Hope rights of grazing were reserved to the owners of Washington and Rising Sun without limitation, and that nothing is to be found in any subsequent transport up to the date of the death of Butts limiting or restricting this right. After the death of Butts, however, the property passed to his heirs by transport in which the right of grazing is reserved in the following terms: "subject . . . to the right of the proprietor or proprietors of Plantations Washington and Rising Sun of grazing cattle and other stock over the front lands of the said plantation"

Under the system of conveyancing practised in this Colony the person entitled to the benefit of a servitude does not rest his claim upon any right secured to him by his own transport or document of title which is, as a rule, silent on this point. His right rests in a reservation contained in the title of the person over whose property it is to be exercised.

It is possible, therefore, for such a servitude to be extinguished by omission thereof from the transport by which the property over which it is exercised is transferred to some third party. This was held to be so in *D'Aguiar v Phillips* (L.J. 11th January, 1904;

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G. J. 29th March, 1904). The owner of the servitude can only secure his rights by vigilance and by opposition to any transport where he may observe that from the advertisement thereof his servitude is in danger of being omitted. This somewhat curious position is inherent in a system whereunder the document of title confers upon its holder indefeasible title to the property comprised therein free from any encumbrance or servitude not included in the document. A purchaser, therefore, who takes under his transport free from any servitude cannot be faced with a servitude arising from the title of his neighbour. Whatever may be the relative merits and demerits of the system, it is, nevertheless, clear that whatever were the rights of the plaintiff prior to the transport of Hope to the heirs of Butts he then had no more than was reserved in the transport passed in their favour.

In 1938 Hope was put up for sale at execution and the advertisement thereof described the grazing rights of the owners of Washington and Rising Sun in terms identical with those of the transport to Butts' heirs.

It is not contested on the part of the plaintiff that his rights are to be found in these later documents, and this issue in the case depends quite simply upon what construction is in the circumstances to be placed upon the words "front lands" as they appear in the transport to Butts' heirs, for it does not appear that the defendant has yet received transport although the property was purchased at execution sale in 1938 and the defendant entered into possession forthwith.

The plaintiff's contention may be stated shortly thus:

Prior to 1932 the whole of Plantation Hope was held by Butts subject to the plaintiff's right of grazing thereon without limitation. In 1932 Butts conveyed to the plaintiff the southern or back portion of Hope over which any right of grazing was thereby extinguished or merged in full ownership. There remained unaffected the northern or front portion of Hope over which the original right of grazing remained unlimited or unrestricted. When in 1934 this remaining portion of the plantation was transported to Butts' heirs this right was reserved and maintained although the draughtsman instead of using the words "northern or front portion" used the words "front lands." It is contended, however, that in the circumstances the two phrases are identical in meaning, and that by the transport of 1934 there is reserved to the owners of Washington and Rising Sun the same rights of grazing as were reserved by the transport of 1910, unlimited and unrestricted, save in so far as in relation to the southern or back portion they were merged by the conveyance of 1932. The plaintiff's contention rests therefore quite simply upon the meaning of the words "front lands" and the argument that if the "back portion" of a property is sold, then the phrase "front lands" embraces the whole of the remainder.

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In order to appreciate the defendant's contention it is necessary to consider briefly the description of the property itself. It appears to comprise four distinguishable areas. In the extreme south there is an area which did not form part of the original plantation, and which has been described as the extra depth. Immediately to the north of the extra depth lies an area south of the railway line: north of the railway there is an area lying between the railway and the public road; and north of the road lies an area between the road and the sea. The parcels conveyed to the plaintiff by Butts in 1932 comprised the extra depth and a portion of the area lying between the extra depth and the railway, and the remainder available to Butts' heirs and now in the possession of the defendant runs from a line some distance south of the railway to the sea.

The defendant contends that by "front lands" is meant that area only which lies to the north or in front of the public road, and that the area between that road and the northern boundary of the plaintiff's holding is held by him free of any right of grazing by the plaintiff's stock. Commissioned Land Surveyors were called by both parties, and attempts were made to secure opinions by them as to the meaning, which they, as surveyors, would attach to the words "front lands" in such circumstances. Although there was some difference of view as to the meaning these gentlemen would in particular circumstances attach to that phrase, it became clear that the words have no generally accepted significance amongst surveyors, and that the phrase is not a term of art having a precise technical meaning for members of their profession.

The defendant does not in the main rely upon any such foundation, however, and his contention is two-fold. Stated shortly, it would appear to be in the first place that in view of the ambiguity of the phrase appearing in the document of title it is permissible to examine the history and use of the property in order to determine what was the right exercised by the plaintiff at and before the date of the transport; what therefore, was meant by Butts' executors when they transported to his heirs, and what was accepted by the plaintiff when he allowed that transport to be advertised without opposition. From this evidence, it is submitted, can be gathered the intention of all parties when they used or permitted to be used the words "front lands." In the second place, it is contended that by reason of the conduct of the parties over many years, and the nature of the user, more especially of the lands lying between the railway and the road, it may be determined that the plaintiff had prior to 1932 lost or abandoned his right of grazing save to the north of the public road, and that the words "front lands" can only apply therefore to that part of the lands over which the plaintiff retained his rights.

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There can be little doubt, if any, that the phrase "front lands" is not free from ambiguity. Had the words "northern or front portion" been used in contradistinction to the "southern or back portion" conveyed to the plaintiff in 1932, then there might have been little doubt as to the meaning, or on the other hand, had the transport of 1932 described the portion then conveyed as the "back lands" then the term "front lands" might well have been used to describe the remainder with but little room for question; or again, it might be thought that were the grazing rights of the plaintiff intended to cover the whole of the property transported to Butts' heirs there would have been no necessity to use any words which might be construed as placing limitations upon them.

Where, as in this instance, there exists such an ambiguity which is not patent upon the face of the document but emerges from an attempt to construe the document in the light of surrounding circumstances it is admissible to consider, as was said by Lord Halsbury in *Van Diemen's Land Co., v. Table Cape Marine Board*, (1906) A. C. 92, "all circumstances which can tend to show intention of the parties, whether before or after the execution of the deed." While in the present case the plaintiff was not strictly speaking a party to the transport to the Butts' heirs, yet, as his rights were affected thereby, and he was entitled to oppose and failed to do so, he is in a position of a consenting party. In order to ascertain what is meant by the words "front lands" it is proper, therefore, to consider the evidence of user before, at the time of and immediately after the date of the document in which that phrase is used, and to which the plaintiff by inaction signified his assent.

If, for some time prior to the passing of the transport, the plaintiff had continued in the use of the whole of that part of Hope which remained in the ownership of Butts; if he was doing so at the time of the passing of the transport and continued to do so thereafter, then it would be reasonable to assume that when the words "front lands" were used they were intended to cover, as the plaintiff contends, the whole of the "northern or front portion" of the plantation. If, on the other hand, the evidence shows that for a considerable time before the passing of this transport the plaintiff had used for grazing only the lands lying north or in front of the public road and the remainder of the northern or front portion of the plantation had been devoted to purposes inconsistent with grazing rights, and if at the time of the passing of the transport to Butts' heirs the plaintiff's user was so restricted and continued to be so restricted for some time after the passing of the transport, then it would be reasonable to assume that the words "front lands" were intended to give expression to such a restricted right. This would be the more acceptable when the use of any such words might reason-

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ably appear to be distinguishable from the words “northern or front portion” and in itself to imply some lesser use than over the whole of the property transported.

A considerable amount of evidence was adduced by both parties in proof of the nature and extent of the plaintiff’s user during a period of nearly thirty years, and there is considerable conflict in this evidence. While the plaintiff admits that many years ago the area between the railway line and the public road was enclosed by a wire fence and the land so enclosed used from time to time for agricultural purposes, coconut planting, food-farming and rice-growing, he contends that this was by specific agreement between the owners for periods limited to the earlier years of the coconut planting and between rice-planting and harvesting. The defendant, on the other hand, contends that the enclosure was of a permanent nature, that the use to which the land was put was inconsistent with the grazing rights originally held by the owners of Washington and Rising Sun, but was assented to by such owners including the plaintiff who thereby abandoned his rights to a more extended use, in return for a reciprocal abandonment on the part of the owner of Hope. (It may here be observed that Butts relinquished all grazing rights on the two former properties at the time of his sale to the plaintiff of the southern portion of Hope).

I have given careful consideration to all this evidence and have come to the conclusion that on balance the weight is in favour of the defendant’s witnesses, for their testimony receives the greater support of both reasonableness and probability. As I listened to the plaintiff and his witnesses I could not fail to be impressed by the extraordinary nature of the position presented by their testimony. I find it difficult indeed to believe that Butts’ tenants year after year would plant their food crops only to find them laid open to destruction by the plaintiff’s cattle immediately the rice crop was harvested, and not, let it be observed, by an occasional marauding animal whose depredations might be sufficiently destructive, but by a herd of animals turned in to graze with what must have been completely disastrous effects upon the growing crops. That this process can have gone on year after year without protest or redress is to me inconceivable even though witnesses have testified to that effect upon oath, and I the more readily accept therefore the evidence of the witnesses called by the defendants in denial of the existence of any such state of affairs. That a landowner such as Butts is represented to be would allow such a use of his land and such treatment of his tenants is all the more improbable. It would require the testimony of witnesses far more favourably impressive than those of the plaintiff to convince me of the truth of their story.

I find as a fact therefore that for many years prior to the

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transport to Butts' heirs the plaintiff had ceased to graze his stock elsewhere than on the lands to the north of the public road and had, as a matter of fact, abandoned use of the lands south of the public road for that purpose, this land having with his acquiescence been devoted by the owner to uses inconsistent with the plaintiff's right of grazing. I find also that this was the state of affairs existent at the date of the transport and that it continued for some time thereafter, until in fact, upon the property changing hands, the plaintiff attempted to resume what had originally been his rights of grazing over the whole property.

It is in the light of these facts that fresh consideration should be given to the words "front lands" as they appear in the transport and advertisement which now determine the rights and interests of the parties.

It must be assumed that the plaintiff was aware of the terms of the proposed transport to Butts' heirs as duly advertised, and that he made no opposition to transport in those terms, although they do in themselves constitute a departure from the method of description adopted in Butts' transport to him of the southern or back portion of the plantation. They also suggest that his grazing rights did not extend over the whole of the property to be transported, for if they did then the use of the words of limitation to "front lands" would be redundant, for on the plaintiff's present interpretation the whole of the property transported would be "front lands." I can only conclude that the plaintiff did not oppose transport in those terms which were ambiguous at the best, and unfavourable to him at the worst, because they then appeared to him, as to all parties, sufficiently to describe the area over which he had been, was at that time and was desirous in the future of using for the purpose of grazing stock. The area which fulfilled these conditions was in fact the area north of the public road and I find therefore that this is the area intended to be described by the words "front lands." The plaintiff had in fact abandoned his user of the remainder of Hope for grazing stock as originally reserved to him by the earlier transport, and by the transport to Butts' heirs such unrestricted rights were legally terminated and there was substituted therefor a right over that portion only which lies north or in front of the public road, described in the document as "front lands."

The plaintiff therefore fails in his claim for a declaration that he is entitled to the right of grazing all stock on all parts and portions of Plantation Hope, as also in his claim for an injunction restraining the defendant from impounding cattle or other stock grazing on that property. The defendant admits his right of grazing north of the public road and there is no evidence of intention to interfere therewith such as would justify the issue of an injunction in regard thereto. He fails also in his claim for damages for the alleged unlawful seizing and impounding of his

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cattle while grazing on that part of the property upon which I have found they had no right to graze.

In regard to his claim for a declaration as to his right of drainage, this is secured to him by the transport which he holds and the defendants do not contest the right so secured. The evidence of actual interference by the defendants with this right is so vague and inconclusive that I am unable to reach any conclusion as to the extent to which the acts of the defendants have affected the drainage of the plaintiff's property, if at all, and in such circumstances an injunction must also be refused.

The plaintiff's whole claim must therefore be dismissed with costs.

The precise incidence of these costs is not easy to determine in view of the conflict which existed at the time of trial between the two defendants and I will hear argument on this point before making a final order as to these costs.

As to the defendant's counter-claim there will be an injunction restraining the plaintiff from depasturing cattle on any portion of Plantation Hope other than that portion described as the front lands of the said plantation, that is to say, the portion situate north of the public road. No declaration is necessary as the plaintiff's rights are limited by transport and the defendant is secured from further encroachment by injunction.

As to damages there is no evidence as to the special damage suffered by reason of the wrongful acts of the plaintiff, but the entry by the plaintiff's cattle by the deliberate act of the plaintiff is admitted and the defendant is entitled to some damages. I assess them at \$50.

The second-named defendant is entitled also to the costs of his counter-claim. In regard to the costs of the first-named defendant I will hear argument.

Judgment for defendant on claim and counterclaim.

Solicitors: *J. Edward De Freitas* for the plaintiff;

R. G. Sharples for the first-named defendant, and

E. A. Luckhoo, O.B.E. for second-named defendant.

EDITOR'S NOTE.—The plaintiff appealed to the West Indian Court of Appeal, and on the 11th November, 1944, the appeal was allowed with costs.

SOOKUN v. RAJMANTIA.

SOOKUN, Plaintiff,

v.

RAJMANTIA, Defendant.

[1943. No. 227.—DEMERARA].

BEFORE DUKE, J. (Acting).

1943. AUGUST 30; SEPTEMBER 6, 14, 20.

Will—Construction of—Intention of testator—To be given effect—How intention gathered—From language of will—Read in light of surrounding circumstances.

Will—Construction of—Dictionary supplied in will by testator—To be used by Court.

Will—Construction of—General restraint on alienation—Void and ineffective.

It is a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made.

Perrin v. Morgan (1943), A.C. 399, 420, per Lord Romer, applied.

Where a testatrix, in the will itself, provided her own dictionary as to the meaning of a word, that dictionary was applied in construing the meaning of the word, wherever it appeared in the will.

In re Lynch, Lynch v. Lynch (1943) 168 Law Times Reports, 189, applied.

After making certain bequests and devises, a testatrix proceeded as follows: "After my death these property cannot sell or Mortgage, but grand to grand could enjoy it."

Held, that by these words there was created a general restraint on alienation, and that, such being the case, the intention of the testatrix was inoperative and could not be carried into effect.

Attwater v. Attwater (1853), 18 Beav. 330, 337, per Sir John Romilly, M.R., applied.

ORIGINATING SUMMONS taken out by the plaintiff Sookun individually and as a devisee under the last will of Sookhree, No. 64 of 1881, deceased, against Rajmantia, individually and as executrix under the said last will for the construction of the said will.

C. Lloyd Luckhoo, for the plaintiff.

E. W. Adams, for the defendant.

Cur. adv. vult.

DUKE, J. (Acting): In this originating summons the plaintiff Sookun claims that he is entitled, as a devisee under the will of Sookhree, female, No. 64 of 1881, deceased, to the entire interest, and not only to a life-interest, in lot 17, La Jalousie, West Coast Demerara the property of the estate of the deceased; and he asks for an order that the defendant Rajmantia, as executrix under the will of the deceased, be directed to pass transport to him accordingly. The defendant resists the claim of the plaintiff, and submits that the interest of the plaintiff as a devisee under the will of the deceased is a life-interest only.

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The will of the deceased is as follows:

I, Sookhree, F. No. 64 of 1881, *Birth Stewartville*, hereby revoke all former wills and codicils made by me and declare that this is my Last Will.

All of my property, real and personal, movable and immovable, whatsoever and wheresoever, I devise and bequeath to my husband Sookun, No. 311-1874, if I die, After my husband death the property could divide between the said my daughter Phulmati or Pagali, Mohan No 1749 B.R. 1921. This is my grandson it is motherless and fatherless, child. The said lot No. 17 (seventeen) part of front lands of Pln. La Jalousie W.C. Dem. with buildings erections on and a water boiler and a copper Land and other property (3) three room in lot B The range for the said daughter Phulmati or Pagali above-named. And the two house and a fall-back for my son Tilack in house lot B. front Lands Pln. La Jalousie,

After my death These property cannot sell or Mortgage But grand to grand could enjoy it. I appoint The said my daughter Rajmantia 1384 of 1900 as Executrix of This my Last Will and guardian of my minor children, and as such executrix I give her the power of assumption. In Witness Whereof I have hereunto set my hand This twenty-eight day of December one thousand nine hundred and thirty six

SOOKHREE her X mark

No. 64 of 1881.

Signed by the abovenamed Sookhree No. 64 of 1881 Last Will and Testament in the joint presence of herself and us who at her request and in such joint-presence have hereunto subscribed our names as

Witnesses:

1. Babulall Pandit, Pln. La Jalousie, W.C. Dem.,
2. Ragoonanan, La Jalousie,
3. Patan.

In *Perrin v. Morgan* (1943) Appeal Oases 399, 420, Lord Romer said:

“I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. In order to understand the language employed, the Court is entitled, to use a familiar expression, to sit in the testator’s armchair.”

In ascertaining the intention of the testatrix, the Court must therefore read the will in the light of the circumstance that the contents of the will were dictated by an illiterate woman. The contest in this application is as to the interpretation of the words “could divide” appearing in the will of the deceased. The testatrix has pro-

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vided, in the will itself, her own dictionary for the interpretation of the word "could": see *in re Lynch, Lynch v. Lynch* (1943) 168 Law Times Reports 189. When the testatrix made use of the words "After my death These property cannot sell or Mortgage But grand to grand could enjoy it," she obviously used the word "cannot" as a substitute for the words "is not to" and the word "could" as a substitute for the words "was to." Similarly, when she used the words "after my husband death the property could divide . . ." she meant that on the death of her husband Sookun the property was to be divided. It will be further observed that the testatrix made detailed provision as to the disposition of her property after the death of her husband; there is a bequest to her daughter Phulmati or Pagali, a bequest to her son Tilack, and the residue to be divided between Phulmati and the grandson of the testatrix, Mohan, B.R. No. 1749 of 1921. From a perusal of the will, dictated as it was by an illiterate person, I am satisfied that the intention of the testatrix was only to confer a life-interest upon her husband, the plaintiff Sookun, and that intention must be carried into effect.

In *Attwater v. Attwater* (1853) 18 Beav. 330, 337, there was a bequest to A. with an injunction never to sell it out of the family but if sold at all, it must be sold to one of his brothers; and it was held by Sir John Romilly, M.R., that the restriction on alienation was inoperative. By the words "After my death These property cannot sell or Mortgage But grand to grand could enjoy it" appearing in the will of the testatrix Sookhree, there was created a general restraint on alienation, and, such being the case, the intention of the testatrix in this respect is inoperative, and cannot be carried into effect.

I therefore hold that on the true construction of the will of Sookhree, deceased, the plaintiff Sookun is not entitled to the entire interest, but only to a life-interest, in lot 17, La Jalousie, West Coast, Demerara, with the buildings and erections thereon and in the other property the estate of the deceased Sookhree, and that the plaintiff Sookun, Phulmati or Pagali, Mohan No. 1749 B.R. 1921 and Tilack the legatees and devisees under the will of Sookhree, deceased, take their legacies and devises free of the restraint on, alienation imposed by the use of the words "After my death These property cannot sell or Mortgage But grand to grand could enjoy it".

The costs of the plaintiff (save and except his costs of and incidental to the hearing on the 30th August 1942) as between party and party, and the costs of the defendant as between solicitor and client, are to be paid out of the estate of the deceased Sookhree. I certify for counsel.

There will be liberty to apply.

Solicitors: R. S. Persaud; A. Vanier.

MANGAR v. MANGARI.

MANGAR, Plaintiff,

v.

MANGARI, Defendant.

[1942. No. 417—DEMERARA.]

BEFORE DUKE, J. (Acting).

1943. SEPTEMBER 22. 23.

Practice and procedure—Action altogether abandoned and incapable of being revived—Cause of action not thereby extinguished—Same relief may be claimed in a subsequent action—Rules of court, 1900, Order, 88, rule 5 (2)—Exception—Action to enforce opposition to transport or mortgage—Rules of the Supreme Court (Deeds Registry), 1921, rule 7.

Opposition to transport or mortgage—Action to enforce—Deemed altogether abandoned and incapable of being revived—Rules of Court. 1900, Order 22, rule 5 (2)—Fresh action cannot be brought within 10 days of certificate by Registrar of entry of opposition—Cause of action in so far as based on opposition—Extinguished—Rules of the Supreme Court (Deeds Registry), 1921, rule 7.

Where under the provisions of rule 5 (2) of Order 32 of the Rules of Court 1900, an action has become altogether abandoned and incapable of being revived, the cause of action on which the writ was based does not thereby become extinguished. In the case of an action to enforce an opposition to a transport or mortgage the cause of action, in so far as it is based on the opposition, becomes extinguished, but this state of affairs arises by reason of a special rule relating to oppositions, namely, rule 7 of the Rules of the Supreme Court (Deeds Registry), 1921. In all other cases, when an action has become altogether abandoned and incapable of being revived, the plaintiff is entitled to issue another writ claiming the same relief as was sought in the action which was abandoned.

Wills v. Eleazar (1941; L.R.B.G. 12, and *Camacho v. Mackay* (1919) L.R. B.G. 44, applied.

PRELIMINARY objection taken by the defendant that the plaintiff is not entitled to maintain this action against the defendant. The facts upon which the argument was founded are fully stated in the judgment.

C. Shankland, for the defendant.

C. Lloyd Luckhoo (for *E. V. Luckhoo*), for the plaintiff.

Cur. adv. vult.

DUKE, J. (Acting): On the 15th day of June, 1940, Mangar issued a writ of summons (No. 158 of 1940) against Mangari in which he claimed the sum of \$500 as damages for wrongful entry by the defendant on the 26th March, 1940, and the 27th May, 1940, on lots 168, 169, 170, 171 and 172 section B, Victoria, all of which he alleged he was owner; and an injunction restraining the defendant, her servants and agents from entering on the said lots and from in any way interfering with the plaintiff's use and enjoyment of the said lots. To that writ Mangari entered appearance on the 20th June, 1940. Mangar did not deliver or file a statement of claim in that action. There was no proceeding for one

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year from the last proceeding had; namely, the entry of appearance on the 20th June, 1940, and on the expiration of the period of one year, the action became, under Order 32 rule 5 (2), altogether abandoned and incapable of being revived. On the 31st day of October, 1941, the Registrar of the Supreme Court issued a certificate to that effect.

On the 21st day of December, 1942, Mangar issued the writ in this action against the said Mangari. The writ herein is identical with the writ in action No. 158 of 1940, except that Mangari is alleged to have committed further acts of wrongful entry on the 24th January, 1941, the 5th July, 1941, the 5th June, 1942, the 13th August, 1942 and the 20th October, 1942.

Upon the action coming on for hearing counsel for the defendant took the preliminary objection that, in the circumstances hereinbefore stated, the plaintiff is not entitled to maintain this action against the defendant. Counsel cited several authorities, but he specially relied upon the judgment of the late Chief Justice in *Wills v. Eleazer* (1941) L.R.B.G. 12, 17. It was there held that where an action to enforce opposition to a transport or mortgage had become, under Order 32 Rule 5 (2) of the Rules of Court 1900, altogether abandoned and incapable of being revived, the opposer could not bring a fresh action to enforce the opposition. Such an action must by Rule 7 of the Rules of the Supreme Court (Deeds Registry), 1921, be brought within 10 days after the Registrar has certified that the opposition was entered; and it is obvious that such time must have expired when the action which was brought to enforce the opposition has become altogether abandoned and incapable of being revived. The case of *Wills v. Eleazer* does not therefore apply to the facts and circumstances of this case.

Where under the provisions of rule 5 (2) of Order 32 of the Rules of Court, 1900, an action has become altogether abandoned and incapable of being revived, the cause of action on which the writ was based does not thereby become extinguished, As was pointed out by Camacho C. J. *Wills v. Eleazer* in the case of an action to enforce an opposition to a transport or mortgage the cause of action, in so far as it is based on the opposition, becomes extinguished, but this state of affairs arises by reason of a special rule relating to oppositions, namely, rule 7 of the Rules of Supreme Court, (Deeds Registry), 1921. In all other cases, when an action has become altogether abandoned and incapable of being revived, the plaintiff is entitled to issue another writ claiming the same relief as was sought in the action which was abandoned. In *Camacho v. McKay* (1919) L.R.B.G. 44 the defendant submitted that the plaintiff was not entitled to maintain the action against him. In a previous action by the plaintiff against the defendant in which the same relief was claimed, the defendant had consented to judgment; the plaintiff, however, did not request judgment

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thereon, and the action became on the expiration of one year after the filing of the consent, altogether abandoned and incapable of being revived. The Court held, and in my opinion rightly so, that the plaintiff was entitled to maintain the second action against the defendant.

It was therefore competent for the plaintiff to institute this action in respect of the acts of wrongful entry on the 26th March, 1940 and the 27th May, 1940, alleged and specified in the previous action No. 158 of 1940; and it necessarily follows that it was competent for the plaintiff to institute this action based upon those alleged acts of wrongful entry as well as upon the further acts alleged and specified in the writ of summons herein.

It therefore follows that the preliminary objection must be overruled. It is unnecessary for me to express an opinion as to the application, to the facts of this case, of the judgment in *Smith v. Charles* (1941) L.R.B.G. 165, delivered by the West Indian Court of Appeal in Grenada, on the 10th April, 1941.

Preliminary objection overruled.

MARY BISSEMBER (Plaintiff),

v.

WILHEMINA MAUGHN, individually and in her capacity as administratrix of the estate of James Walter Maughn, deceased; George Weithers, Edgar Weithers and Edward Weithers (Defendants).

[1942. No. 54.—BERBICE].

BEFORE DUKE, J. (Acting):

1943. SEPTEMBER 24, 28, 29, 30.

Principal and agent—Sale of land—Contract for—Made in writing—By person without authority of owner—Ratification—Evidence of.

Specific performance—Sale of land—Contract for—By administratrix of deceased—Refusal by Registrar of leave to sell and pass transport—Deceased Persons Estates' Administration Ordinance, cap 149, s. 41, proviso (a)—Decree cannot be granted.

Specific performance—Sale of land—Contract for—Seller entitled to ownership of an infinitesimal interest only—No indication by purchaser that title to such would be accepted—Decree with proportionate diminution in price not made.

Sale of land—Purchase price paid on account—Claim for return of—Money paid to purchaser's lawyer for legal fees and expenses—No benefit derived by vendor—Money had and received—Action for—Unjust to vendor to order return—No order made.

Immovable property—Building materials resting on land—Not immovable property.

Practice—Joinder of Parties—All necessary parties before court—Whether as plaintiffs or as defendants—Power of Court to adjudicate.

Practice—Parties—Co-defendants—Defendant not a party to counter-claim by co-defendant.

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Practice—Counterclaim—Can only be filed against plaintiff—Not against plaintiff and another person—Two defendants—Counterclaim by one—other defendant a necessary party thereto—Counterclaim dismissed—Judicature Act, 1873, s. 24 (3); Supreme Court of Judicature (Consolidation) Act, 1925, s. 39 (1) (b)—English Rules of Supreme Court, Order 21, rules 11 to 14, Rules of Court, 1900, Order 19.

On the 15th May, 1941, A., in her own right and on behalf of B., C, and D., purported to make a contract in writing for the sale of land, the property of the estate of E., deceased, to F., for \$500. There was no evidence (1) that A., was authorised by B., C., and D., to sell the land or to sign a binding contract of sale on their behalf; (2) that A., ever showed B., C., and D., or any of them a copy of the contract of sale; or (3) that A., ever informed B., C and D., or any of them of the contents of the contract, or that she had signed a contract of sale on the 15th May, 1941, on their behalf.

On the 29th April, 1942, A., in her capacity as administratrix of the estate of E., deceased (in whom the title to the land was vested) swore to an affidavit in support of her application made in that capacity to the Registrar of the Supreme Court for the grant of the necessary authority to sell the land, the property of the estate of E., deceased, out of hand instead of by public auction. In the affidavit she stated that she had received an "offer" of \$500 from F., for the land. The application was filed on the 2nd May, 1942. Later in the month of May, 1942, B., C., and D., at the request of A., in her capacity as the administratrix of the estate of E., deceased, signed a consent, for the purposes of that application, to A. as administratrix selling the land to F., for \$500. The consent was intitled "In the matter of the estate of E., deceased. And in the matter of the Deceased Persons Estates' Administration Ordinance, cap, 149".

Held, that there was no evidence upon which the Court could properly find that B., C., and D., had ratified and confirmed the contract of sale of the 15th May, 1941, whereunder A., in her own right and on behalf of B., C., and D., purported to sell the land to F., for \$500.

Specific performance cannot be decreed of a contract by the administratrix of the estate of a deceased person to sell immovable property, the property of the estate, where the Registrar has refused to grant to the administratrix, under proviso (a) to section 41 of the Deceased Persons Estates' Administration Ordinance, cap. 149, the necessary authority to sell and pass transport.

A., sued B., for specific performance of a contract for the sale by B., to him of lot 164, Cumberland Village. B., was not the owner of lot 164. As one of the heirs of C., in whose administratrix the title to the land was vested, she may become entitled to an infinitesimal undivided interest in lot 164. At the hearing, counsel for the plaintiff did not indicate any intention of accepting transport of less than the entire interest in the lot.

Held, that specific performance, with a proportionate diminution in price, would not be decreed of the interest (if any) in lot 164, Cumberland Village, to which B., might become entitled, by transport, as one of the heirs of C.

A., purported on her own behalf and on behalf of B., C., and D., to sell lot 164, Cumberland the property of the intestate estate of E., deceased to F., for the sum of \$500. E., was twice married. A., was the sole issue of his first marriage. He was survived by his widow G., who died intestate, leaving as her heirs, B., C., and D.. A., was the administratrix of the estate of E., deceased. The transaction of sale was effected in the office of F.'s lawyer, to whom A., was taken by F., and who made the contract of sale in writing in which it was expressed that the vendors were A., in her own right and B., C., and D., in their own right. No application had been made for Letters of Administration in respect of the estate of G., deceased. At the time of the contract both F., and her lawyer knew that, as the purchase price of the lot was only \$500, the beneficial interest of A., in the aforesaid lot was infinitesimal (if any), and that, for all practical purposes, the net value of the estate of E., deceased entirely belonged to B., C., and D., they being the sole heirs of G., who died intestate. In order that F. should obtain title for lot 164, Cumberland, it was necessary, according to the contract of sale, (1) that letters of administration be obtained to the estate of G., deceased, (2) that transport of the land be passed by A., in her capacity as administratrix of the estate of E., deceased, in favour of A., in her own right and also in favour of the

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administratrix of G., deceased; (3) that transport be passed by the administratrix of G., deceased (in so far as the interest of the estate of G., in the land was concerned), in favour of B., C., and D., in their own right, they being the heirs *ab intestato* of G.; and (4) that transport of the entire interest in the land be then passed in favour of F., by A., in her own right and by B., C., and D., in their own right. However, no application was made by F.'s lawyer for Letters of Administration of the estate of G., deceased, although B., C., and D., the heirs of G., had signed a consent to A., being so appointed. At the time of the signing of the contract of sale, the sum of \$50 was paid by F., to A. This money was, however, handed to F.'s lawyer for legal fees and disbursements, A. did not have any of the money for herself. A suit by F., against A., B., C., and D., for specific performance was dismissed, and a claim against them for damages was also dismissed.

Held, that the action for money had and received has always been recognised to be in its nature and essence, an equitable form of action, that F., and her legal adviser well knew the risks they were incurring when the money was paid to A., and that, in the circumstances of this case, it would be unjust to A., if an order were made for the repayment by her to F., of the sum of \$50.

Building materials resting upon the land are not immovable property.

Hulme v. Brigham (1943) 1 K.B. 152, 156, and *Northern Press and Engineering Co. v. Shepherd* (1908) 52 S.J. 715, applied.

In this Colony it is not possible to file a counter-claim naming the plaintiff and others as defendants.

A defendant is a party to proceedings in an action in so far as they relate to the claim by the plaintiff, but he is not a party to the proceedings in the action in so far as they relate to a counter-claim brought by a co-defendant against the plaintiff.

A. sued B. and C.—B. did not enter appearance. C. counterclaimed against A. Ordinarily, the counter-claim should have been brought by B.

Held (1) that B. was not a party to the counter-claim; he was only a party to the proceedings in so far as they related to the claim by A; and

(2) that as B. was not a party to the counter-claim by C., it must be dismissed.

The trend of modern legal thought is to the effect that the Court is entitled to adjudicate so long as all the necessary parties are before it, whether as plaintiffs or as defendants.

Baird & Dragten v. Solomon et al (1943) L.R. B.G. 133 mentioned.

ACTION by the plaintiff Mary Bissember against the defendant Wilhemina Maughn individually and in her capacity as the administratrix of the estate of James Walter Maughn, deceased, Letters of Administration having been granted to her by the Supreme Court of British Guiana on the 28th February, 1941, No. 9 of 1941, and against the defendants George Weithers, Edgar Weithers and Edward Weithers, for an order for specific performance of a contract in writing entered into on the 15th May, 1941, between the plaintiff and the defendants for the sale by them to the plaintiff of lot 164, Cumberland Village, Canje, Berbice; alternatively, the sum of \$300 as damages and any other order that the Court may deem fit. The defendant Maughn did not enter appearance. The defendants George Weithers, Edgar Weithers and Edward Weithers denied that they entered into the contract, and they pleaded that as heirs *ab intestato* of their grandmother, Janet Elizabeth Maughn, who was the widow of James Walter Maughn, they were entitled to the entire estate of James Walter Maughn, deceased, as its net value did not exceed the sum of \$500. They filed a counter-claim in which they claimed: (a) to have the agreement of sale of the 15th May, 1941,

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set aside and cancelled; (b) possession of lot 164, Cumberland Village, Canje, Berbice; (c) mesne profits from the 15th July 1941, alternatively, from the 31st December 1942, till possession is given up to the defendants George Weithers, Edgar Weithers and Edward Weithers; (d) damages in the sum of \$50 or such other sum as the Court may award not exceeding \$100; and (e) such further and other relief as to the Court may seem just.

S. I. Cyrus, for the plaintiff.

J. Edward de Freitas, solicitor, for the defendants George, Edgar and Edward Weithers.

Cur. adv. vult.

DUKE, J. (Acting): This is an action by the plaintiff Mary Bissember, the wife of Joshua Bryant Bissember, in which she claims against the defendant Wilhemina Maughn individually and in her capacity as administratrix of the estate of James Walter Maughn deceased, and the defendants George Weithers, Edgar Weithers and Edward Weithers an order for specific performance of a contract in writing alleged to have been entered into on the 15th July, 1941, (in the indorsement on the writ of summons the date is stated to be the 15th May, 1941,) between the plaintiff and the defendants for the sale by them to the plaintiff of lot 164, Cumberland Village, Canje, Berbice; alternatively, the sum of \$300 as damages, and any other order that the Court may deem fit.

James Walter Maughn was married to Martha Maria Piggot on the 24th day of May, 1896. The only child of that marriage was the defendant Wilhemina Maughn. The mother of the defendant Maughn died on the 29th March, 1916, and James Walter Maughn was married, for the second time, to Janet Elizabeth Simon, born Chance, a widow, on the 20th day of October, 1917. Janet Elizabeth Maughn had no children by her second marriage, but she had had one child, Hannah Rosetta Simon, by her first marriage. Hannah Rosetta Simon was never married. She died on the 8th day of January, 1936, leaving as issue the defendants George Weithers, Edgar Weithers and Edward Weithers.

By transport dated the 28th day of June, 1926, No. 159 James Walter Maughn acquired title to lot 161, Cumberland Village, Canje: this transport was passed subsequent to the death of Martha Maria Maughn, the first wife of James Walter Maughn. The latter died intestate on the 27th day of May, 1937, leaving a widow, Janet Elizabeth Maughn, and one child the defendant Wilhemina Maughn, him surviving. The widow was entitled to his whole estate if the net value did not exceed the sum of \$480; but if the net value of his estate exceeded the sum of \$480 the widow Janet Elizabeth Maughn, formerly Simon, born Chance, was entitled to the sum of \$480 and to one-third of the residue,

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while his daughter the defendant Wilhemina Maughn would be entitled to two-thirds of the residue, that is to say, to two-thirds of the net value of the estate of James Walter Maughn, deceased, after deducting therefrom the sum of \$480.

The widow Janet Elizabeth Maughn did not take out Letters of Administration in respect of her husband's estate, and she died on the 3rd day of February, 1939. She died intestate, and the persons who were, and are, entitled to succeed to the estate of Janet Elizabeth Maughn, deceased, are her grandchildren the defendants George Weithers, Edgar and Edward Weithers, their mother Hannah Rosetta Simon having predeceased her mother the widow Janet Elizabeth Maughn, on the 8th day of January, 1936.

On the 21st day of January, 1941, the defendant Wilhemina Maughn filed an application (No. 9 of 1941) for Letters of Administration of the estate of James Walter Maughn, deceased. The oath of the intended administratrix was sworn to on the said day, and the gross value of the estate was sworn to be \$630. In the oath, the defendant Maughn swore that Janet Elizabeth Maughn, formerly Simon, born Chance, died on the 4th day of February, 1928, intestate and without issue, and that she, Wilhemina Maughn, was the only person entitled to the estate of the defendant James Walter Maughn. This was not an accurate statement, as the defendants George Weithers, Edgar Weithers and Edward Weithers were entitled to whatever interest their grand-mother Janet Elizabeth Maughn formerly Simon, had in the estate of James Walter Maughn, deceased, by virtue of being his widow and of his dying intestate. The defendant Maughn also produced to the Registrar a statement showing that she was applying for Letters of Administration in order that she might vest title in herself in respect of lot 164, Cumberland. On the 21st day of January, 1941, the defendant Maughn filed an Estate Duty declaration and inventory (No. 11 of 1941) in respect of the estate of James Walter Maughn, deceased, and she stated that she was entitled to the whole of his estate. The assets of the estate were stated to be: household furniture and effects valued in the sum of \$30, and lot 164, Cumberland Village, valued in the sum of \$600. No claim was made for deductions in respect of debts or funeral expenses. The defendant Maughn produced to the Registrar of Deeds an affidavit sworn to by Stephen Fitzgerald Carew, on the 11th day of January, 1941, in which he valued lot 164, Cumberland Village, in the sum of \$600.

Letters of Administration were granted by the Court on the 28th February, 1941, and they were issued to the defendant Maughn on the 3rd day of March, 1941. At that time she believed that she was solely entitled to the net value of the estate of her father James Walter Maughn, deceased.

On the 25th March, 1941, the plaintiff, through her husband

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who transacted business affairs on her behalf, wrote to the defendant Maughn offering to purchase lot 164, Cumberland Village, from her if she was selling at a reasonable price. She also asked for an early reply as to the cash price of the lot as she had arranged for another property: and she stated that she wished to meet the defendant Maughn, personally. There was no conversation between the plaintiff and the defendant Maughn relative to any sale of lot 164, at any time prior to the 25th March, 1941.

The defendant Maughn wrote a letter to the plaintiff, but it was not produced in evidence. On the 29th April 1941 the plaintiff, through her husband, wrote the defendant Maughn offering her \$500 cash for the property. She stated that it was a good offer as repairs would have to be effected because certain parts had been eaten by wood ants. She also stated that the other house which she was offered, was "still waiting" on her, but that she preferred lot 164, Cumberland as it was near to her family. Mr. W. Ramdas, clerk to Mr. E. A. Luckhoo, O.B.E., solicitor, is a brother of the plaintiff; and his wife and himself live on the adjoining lot. There was no conversation between the plaintiff and the defendant Maughn, relative to any sale of lot 164, Cumberland at any time prior to the 29th April, 1941.

On the 15th May 1941 the plaintiff and her husband took the defendant Maughn to their lawyer, Mr. Mungal Singh in New Amsterdam, for the purpose of having an agreement made for the sale of lot 164, Cumberland, by the defendant Maughn to the plaintiff for the sum of \$500. The defendant Maughn handed to Mr. Mungal Singh the grosse transport No. 159 of the 28th June, 1926, in favour of James Walter Maughn for lot 164 Cumberland; and also the letters of administration in respect of his estate issued in her favour on the 3rd March, 1941. An agreement was prepared by Mr. Mungal Singh whereunder the vendors of lot 164, Cumberland were alleged in the agreement to be the defendants to this action. The vendors purported to sell that lot to the plaintiff for the sum of \$500. By the agreement, it was provided that the sum of \$50 was to be paid by the plaintiff to the defendants forthwith; the sum of \$18 was to be paid when required by Mr. Mungal Singh; and the balance (\$437) of the purchase price was to be paid to the defendants on the passing of transport by the vendors, the defendants herein, to the plaintiff, the expenses of that transport to be borne equally by the plaintiff and by the persons alleged in the agreement to be the vendors. It was further provided in the agreement that possession was to be given to the plaintiff of lot 164, Cumberland, on the 15th May, 1941, and that all rates and taxes shall be paid by the plaintiff as from the 15th May, 1941. The plaintiff entered into possession of lot 164, Cumberland on the 15th May, 1941. The agreement was signed by the defendant "W. Maughn for self and on behalf of George Weithers, Buller Weithers and Eddie Weithers, vendors".

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It was also signed by the plaintiff “Mary Bissember per Joshua Bryant Bissember, purchaser”.

There was no evidence, and it is not suggested by counsel for the plaintiff, that the defendant Maughn was authorised by the other “vendors” to sell lot 164, Cumberland, or to sign a binding contract of sale on their behalf. There was also no evidence that the defendant Maughn ever showed the defendants George Weithers, Edgar Weithers and Edward Weithers or any of them a copy of the contract of sale of the 15th May, 1941, or informed them or any of them of the contents of the contract, or informed them or any of them that she had signed a contract of sale on their behalf. It is, however, submitted on behalf of the plaintiff that the acts of the defendant Maughn were ratified and confirmed by the defendants George Weithers, Edgar Weithers and Edward Weithers because:

- (a) on the 21st May, 1941, they signed a consent to the defendant Maughn declaring the estate of Janet Elizabeth Maughn, formerly Simon, born Chance, deceased intestate and making application for Letters of Administration on their behalf; (b) in May, 1942, in respect of an application made to the Registrar by the defendant Maughn in her capacity as the administratrix of the estate of James Walter Maughn on the 4th May, 1942 (No. 2 of 1942), under proviso (a) to section 41 of the Deceased Persons Estates’ Administration Ordinance, cap. 149, for authority to sell lot 164, Cumberland Village the property of the estate of James Walter Maughn deceased out of hand instead of by public auction, the defendants George Weithers, Edgar Weithers and Edward Weithers signed a consent that the defendant Maughn in her capacity as administratrix of the estate of James Walter Maughn, deceased do sell and transport lot 164, Cumberland to the plaintiff for the sum of \$500; and (c) by letter dated 24th November 1942, Cameron & Shepherd the solicitors for the defendants George Weithers, Edgar Weithers and Edward Weithers, informed the Registrar in New Amsterdam, Berbice, that their clients, now that they know the true position, were not prepared to agree to any sale by the defendant Maughn to the plaintiff, and that they wished to withdraw any document which they may have signed.

These documents will be considered in their proper sequence in the narrative of events. It should, however, be mentioned at this stage that in his opening speech, counsel for the plaintiff stated that he was going to call the defendant Maughn. She was in Court during the whole of the trial, but counsel for the plaintiff did not call her as a witness.

The plaintiff gave evidence, but her counsel interposed on many an occasion to say that her husband transacted all the business for her. The plaintiff’s husband gave evidence, but the plaintiff’s counsel interposed on many an occasion to say that Mr. Mungal Singh, barrister-at-law, transacted all the business for the plaintiff. Mr. Mungal Singh was not called as a witness on behalf of the plaintiff.

Although the plaintiff and her husband have done their best to conceal from the Court what really transpired when they took the defendant Maughn to the chambers of Mr. Mungal Singh on

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the 15th May, 1941 (as alleged in the agreement tendered by the plaintiff and admitted in evidence), or on the 15th July, 1941 (as alleged in the agreement pleaded in the Statement of Claim) it is nevertheless easy to infer what really took place.

When that agreement was made, Mr. Mungal Singh knew that the defendants Weithers were three of the “owners” of lot 164, Cumberland Village, Canje, Berbice. He did not know this of his own knowledge, and it necessarily follows that the defendant Maughn told him:

- (a) that she was the daughter of James Walter Maughn by his first marriage;
- (b) that there was no issue of the second marriage of James Walter Maughn;
- (c) that his second wife, Janet Elizabeth Maughn, formerly Simon, born Chance survived him;
- (d) that Janet Elizabeth Maughn died intestate;
- (e) that, by her first marriage with one Simon, she had a daughter Han-nah Rebecca Simon who predeceased her unmarried leaving her surviving three children, the defendants George Weithers, Edgar Weithers and Edward Weithers.

The plaintiff and her husband were present when these statements were made; and, further, they had knowledge through their counsel, Mr. Mungal Singh. It may be serviceable here to quote paragraph 6 of the agreement of sale of the 15th May, 1941 in full:

The Vendors hereof are Wilhemina Maughn, 119 Third Street, Alberttown, Georgetown, daughter of James Walter Maughn deceased, George Weithers, Buler Weithers and Eddy Weithers, all of Kitty, East Coast, Demerara, as the Heirs *ab intestato* of their Grand-mother, Janet Maughn, late Simon, born Chance, deceased who was the second wife and surviving Spouse of James Walter Maughn, deceased.

It is implicit from the agreement of sale dated the 15th May, 1941 that it was the intention of the plaintiff, and of her counsel Mr. Mungal Singh, that transport of lot 164, Cumberland Village was to be passed in favour of the plaintiff, not by the defendant Wilhemina Maughn in her capacity as administratrix of the estate of James Walter Maughn deceased, but by the defendant Maughn in her own right and by the defendants George Weithers, Edgar Weithers and Edward Weithers in their own right. Title was to be passed by the administratrix of the estate of James Walter Maughn, deceased, in favour of the defendant Maughn and the administratrix of the estate of Janet Elizabeth Maughn deceased; from the administratrix (to be appointed) of the estate of Janet Elizabeth Maughn, deceased, in favour of the defendants George Weithers, Edgar Weithers and Edward Weithers and, finally, by the defendant Maughn in her own right and by the defendants George Weithers, Edgar Weithers and Edward Weithers all in their own right, in favour of the plaintiff Mary Bissember.

The agreement of the 15th of May, 1941, (which is the subject-matter of the present action) was not made by the defendant Maughn in her capacity as administratrix of the estate of James Walter Maughn, deceased; it was made by her in her own right

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and also on behalf of the defendants George Weithers, Edgar Weithers and Edward Weithers.

On the 15th May, 1941, Mr. Mungal Singh prepared a consent (previously referred to) in respect of the estate of Janet Elizabeth Simon, deceased, intestate. This document was handed to the defendant Maughn who brought it to the city of Georgetown and its environs. It purports to have been signed by George Weithers, residing at 64, William Street, Kitty; by Edgar Weithers residing at lot 23, Hill Street, Albouystown; and by Edward Weithers residing at lot 67, Public Road, Kitty. There is no evidence that the signatures on the consent are those of the defendants sued in the writ of summons by those names. But, assuming that there is such evidence, the consent is merely a consent to the defendant Maughn declaring the estate of Janet Elizabeth Maughn, deceased, and making an application for Letters of Administration in respect of that estate, on their behalf. There is nothing whatever in the consent to indicate that the persons who signed the consent had ratified the agreement of sale of the 15th May, 1941.

On the 23rd May, 1941, the plaintiff, through her husband, wrote the defendant Maughn enquiring whether she has got "the other heirs to sign the paper", meaning thereby the consent just mentioned. The defendant Maughn did indeed forward to Mr. Mungal Singh the consent dated 21st May, 1941, in the matter of the estate of Janet Elizabeth Maughn, deceased, because on the 29th May, 1941, he wrote her a letter (produced by the plaintiff's husband) acknowledging its receipt and asking to be furnished with other documents which were required by him for the purpose of the application by her for Letters of Administration in respect of the estate of Janet Elizabeth Maughn, deceased.

At some time between the 23rd May, 1941, and the 12th June, 1941, the defendant Maughn wrote the plaintiff a letter, but it has not been produced in evidence. On the 12th June, 1941, the plaintiff, through her husband, replied to that letter. She requested the defendant Maughn to do her best to get the documents required by Mr. Mungal Singh. The plaintiff stated that she knew that the defendant Maughn had not got a cent of the money yet; and that one of the heirs (meaning thereby one of the Weithers brothers, George, Edgar and Edward) had written a letter (which was shown to the plaintiff) to one Mr. Lowe saying that lot 164, Cumberland Village, was not sold. I have already pointed out that the consent which was signed on the 21st May, 1941, had no reference to any sale of lot 164, Cumberland Village, so that, even if it were in fact signed by the Weithers Brothers there was nothing in it to indicate to them that on the 15th May, 1941, the defendant Maughn had purported on their behalf, to sell lot 164, Cumberland Village, and had entered into an agreement in writing therefor. Mr. Lowe used to collect the

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rent on lot 164, Cumberland. In the letter of the 12th June, 1941, the plaintiff stated:

“I am sorry to hear of all the worries you are in Mr. Lowe is indeed a cunning and deceiving fellow. It appears also that the tenants agree with him. He showed me a letter which he received from one of the heirs saying that the place is not sold. But I believe that is to fool him. He refused some time ago to give me the key after interviewing a lawyer. But after all, he had to give me.

The defendant Maughn forwarded some documents to Mr. Mungal Singh, required by him for the purpose of making the application for Letters of Administration in respect of the estate of Janet Elizabeth Maughn, deceased, because by letter of the 27th June, 1941, to the defendant Maughn (produced by the plaintiff’s husband) Mr. Mungal Singh acknowledged the receipt of four documents, and he specified three others which in his opinion were necessary.

At some time between the 27th June, 1941 and the 18th July, 1941, the defendant Maughn wrote a letter to the plaintiff, but this letter was not produced in evidence. On the 18th July, 1941, the plaintiff, through her husband, replied to this letter. The plaintiff informed the defendant Maughn that Mr. Lowe had given Mr. Mungal Singh all information about the three documents required by Mr. Mungal Singh, that the cost of them was \$2.58 and that there were no more worries about them. The plaintiff also informed the defendant Maughn that Mr. Mungal Singh had stated that in 2 weeks’ time the papers would be fixed up, and that after the advertisement, the money due to Carrega would be paid.

No application was ever filed on behalf of the defendant Maughn for Letters of Administration in respect of the estate of Janet Elizabeth Maughn, formerly Simon, born Chance, deceased.

On the 27th April, 1942, the plaintiff, through her husband, wrote to the defendant Maughn informing her that she, and not the plaintiff nor Mr. Mungal Singh, was detaining the passing of the transport. He told her that she must simply swear to the affidavit and then the papers would go to the Registrar in Georgetown for power to be given to advertise. She continued:

I am sorry to receive a liard letter from you that I am receiving all the rent and you are not getting the money, the money is prepared to pay as soon as the Transport passing, as arranged. Do not afraid. I am having the place in order, please reply. I am almost every-day in the lawyer’s office.

The “liard” letter of which this is a reply, has not been produced in evidence.

On the 29th April, 1942, the defendant Maughn swore to an affidavit, at the Supreme Court Registry, Georgetown, in support of her application made in her capacity as administratrix of the estate of James Walter Maughn, deceased (which application has been previously referred to) for leave to sell lot 164, Cumberland Village out of hand instead of by public auction. The application was filed on the 2nd May, 1942. The affidavit was drawn by Mr.

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Mungal Singh and sent to the defendant Maughn in Georgetown. It is the same affidavit as was referred to by the plaintiff in her letter of the 27th April, 1942, to the defendant Maughn. Paragraphs 9 to 15 of the affidavit were as follows:

9. That the property in respect of which Leave to sell is now being sort (*sic*) required extensive repairs, soon becoming unfit for human habitation, unless the repairs had done (*sic*) within a short time.
10. That I have no means to repair the building on said property, or to pay off the sum of \$67.77 being the amount due for judgment and costs to the judgment Creditors, Messrs. James Lade and Company, of Strand, New Amsterdam, Berbice, Merchants, for goods sold and delivered and owing by the said James Walter Maughn, deceased, in his life time. The judgment Creditors threaten to levy on the said property. Judgment was obtained on the 16th day of May, 1941, at the New Amsterdam Magistrate's Court.
11. That the said property sought to be sold has been valued at the price of \$500.00 by the Competent Appraiser, namely—Stephen Fitz Gerald Carew,—Merchants and Landed Proprietor of 30 years experience.
12. That since the death of my father I am practically destitute and it is difficult to obtain the necessities of life for myself.
13. That I have received an offer of \$500.00 from Mary Bissember, the wife of Joshua Bissember, to whom she was married subsequently to the 20th day of August, 1904, of Cumberland Village, Canje, Berbice, for the said property.
14. That I verily believe and aver that it will be in the interest of all creditors, beneficiaries, devisees, and myself, if leave be obtained to sell and transport the said property (lot 164, Cumberland Village) out of hand instead of by Public Auction, thereby avoiding expenses of Auction and the expenses of or Foreclosure or Mortgage and Parate, Execution and sale.
15. That it is not possible to obtain more than the said sum of \$500.00 for said property although I have made several efforts to obtain more.

The statement in paragraph 11 is untrue. The lot was valued by Mr. S. F. Carew in the sum of \$600, and not in the sum of \$500. On the 11th May, 1942, Mr. Mungal Singh wrote a letter to the defendant Maughn (produced by the plaintiff's husband) acknowledging receipt of the sworn affidavit of the 29th April, 1942 and informing her that he had filed the application. He continued as follows:

The Deeds Registry is requesting that the three other heirs (meaning thereby the defendants George Weithers, Edgar Weithers and Edward Weithers) *ab intestato* and beneficiaries also sign a consent of their approval for you to sell for \$500 the said property to Mrs. Mary Bissember. Herewith please find enclosed the Consent for the three persons to sign with their respective addresses with pen and ink and witnessed by two strangers.

The consent (previously referred to) was obtained from persons signing as follows: Philip Adolphus Weithers (an alternative name for George Weithers) residing at 64, William Street, Kitty; Edgar Christopher Weithers, residing at 98, La Penitence Street, Albouystown and Edward Lawson Weithers, residing at 67, Public Road, Kitty. In the consent as prepared by Mr. Mungal Singh, they are described as "the other heirs *ab intestato* Estate James Walter Maughn, deceased." The consent is dated May, 1942 and is entitled "In the matter of the estate of James Walter Maughn, deceased. And in the matter of the Deceased Persons Estates' Administration Ordinance, chapter 149." The

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consent is ancillary to the affidavit. Nowhere in the affidavit is it stated or indicated that on the 15th May, 1941, the defendant Maughn in her own right, and on behalf of the defendants George Weithers, Edgar Weithers and Edward Weithers, sold lot 164, Cumberland Village to the plaintiff Mary Bissember. On the other hand, it is stated in paragraph 13 of the affidavit that the defendant Maughn in her capacity as administratrix of the estate of James Walter Maughn, deceased, had received an "offer" of \$500 from Mary Bissember the wife of Joshua Bissember for the said property. The consent bears, and has, no reference to any pre-existing contract of sale between the plaintiff and the defendants. The document was filed for the purpose of convincing the Registrar of the Supreme Court that he ought to grant the necessary authority to the defendant Maughn in her capacity as administratrix of the estate of James Walter Maughn to sell lot 164, Cumberland Village, the property of the estate, out of hand instead of by public auction, such sale being subsequent to the grant of such authority. The consent of the defendants George Weithers, Edgar Weithers and Edward Weithers was to such a sale, and not to a sale which took place on the 15th May, 1941, as to which they had no knowledge when they signed the consent. There is nothing whatever in the consent to indicate that the persons who signed it had ratified the agreement of sale of the 15th May, 1941.

The statement in paragraph 14 of the affidavit as to foreclosure is not understood, as lot 164, Cumberland Village was not subject to any mortgage.

On the 24th November, 1942 the consent dated May, 1942, was withdrawn. There is nothing in that withdrawal to indicate that the defendants George Weithers, Edgar Weithers and Edward Weithers had ratified or confirmed the agreement of sale of the 15th May, 1941.

No one of the documents alleged by the plaintiff to amount to ratification or confirmation of the agreement of sale, does in fact show that the defendants George Weithers, Edgar Weithers and Edward Weithers or any of them ratified or confirmed the agreement of sale of the 15th May, 1941, in so far as it purported to have been made by the defendant Maughn, in her own right, on their behalf. The agreement of the 15th May, 1941, was therefore not made by them and is not enforceable against the defendants George Weithers, Edgar Weithers and Edward Weithers by way of specific performance or by way of an action for damages. On the plaintiff's claim, there will be judgment for the defendants George Weithers, Edgar Weithers and Edward Weithers with costs.

The defendant Maughn is sued in her own right and also in her capacity as administratrix of the estate of James Walter Maughn, deceased. On the 22nd June, 1948, the Registrar of

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the Supreme Court refused to grant the necessary authority to the defendant Maughn in her aforesaid capacity to sell out of hand, lot 164, Cumberland Village, the property of the estate of James Walter Maughn, deceased, instead of by public auction. The contract of which the plaintiff seeks specific performance was not made by the defendant Maughn in that capacity, and if it were, a decree of specific performance with respect to lot 164, Cumberland, could not be granted, as the Registrar has refused to grant the necessary authority to the administratrix to pass transport.

As an heir *ab intestato* of the deceased James Walter Maughn, the defendant Wilhemina Maughn would be entitled only to an infinitesimal, (if any) interest in the net value of his estate, although the estate is probably liable to indemnify her in a certain sum of money, being moneys expended by her in respect of the estate of the deceased. In these circumstances, coupled with the circumstance that the plaintiff has not indicated any intention of accepting transport of less than the entire interest in lot 164, Cumberland Village, specific performance, with a proportionate diminution in price, will not be decreed of the interest (if any) in lot 164, Cumberland Village, to which the defendant Maughn may become entitled, by transport, as one of the heirs on the intestacy of her father.

The defendant Maughn purported to sell lot 164, Cumberland Village, to the plaintiff for the sum of \$500. The evidence led on behalf of the plaintiff is to the effect that the property is not worth more than the sum of \$500. The plaintiff has therefore not proved any damage.

The plaintiff paid to the defendant Maughn the sum of \$50 on the 15th May, 1941, on account of the purchase price. Is the plaintiff entitled to recover that sum from her? I think not. The action for money had and received has always been recognised to be, in its nature and essence, an equitable form of action. The plaintiff and her legal adviser well knew the risks which they were incurring when the money was paid, and the defendant Maughn has not benefited in any way by the payment of the money to her. It was handed to the legal adviser of the plaintiff who utilised it in paying disbursements and payment of his legal charges. The plaintiff and her husband took the defendant Maughn to their legal adviser to have the legal work done. In these circumstances it would be unjust to the defendant Maughn to make an order for the repayment of the sum of \$50. The defendant Maughn did not enter appearance, so there will be no order in her favour for costs.

By letter dated the 24th November, 1942, Cameron & Shepherd, solicitors for the defendants George Weithers, Edgar Weithers and Edward Weithers, informed the plaintiff Mary Bissember that lot No. 164, Cumberland Village, belongs to their clients; that

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they were not prepared to confirm the alleged sale which was made to the plaintiff; and that she must quit and deliver up possession of the lot on or before the 31st December, 1942. The defendant George Weithers, on behalf of his brothers Edgar Weithers and Edward Weithers as well as on his own behalf, made an entry on the lot shortly after the 24th November, 1942, but the plaintiff still continues in possession.

The defendants George Weithers, Edgar Weithers and Edward Weithers have filed a counterclaim in which they claim:

- (a) to have the agreement of sale of the 15th May, 1941, set aside and cancelled;
- (b) possession of lot 164, Cumberland Village, Canje, Berbice;
- (c) mesne profits from the 15th July, 1911, alternatively, from the 31st December, 1942, till possession is given up to the defendants George Weithers, Edgar and Edward Weithers;
- (d) damages in the sum of \$50 or such other sum as the Court may award not exceeding \$100;
- (e) such further and other relief as to the Court may seem just; and
- (f) costs.

With respect to paragraph (a) of the relief asked for by way of counterclaim, this relief has already been granted by reason of judgment being entered for the defendants on the claim against them by the plaintiff for specific performance of the agreement of the 15th May, 1941, and, in the alternative, for damages for breach thereof.

On the evidence given in this action, to which Wilhemina Maughn is a party, the value of lot 164, Cumberland Village does not exceed \$500. If that is so, and the defendant Maughn is satisfied that \$500 is the best price that is obtainable for lot 164, Cumberland Village, then the net value of the estate of James Walter Maughn, deceased, is considerably less than \$480, as the deceased owed a debt in his lifetime to James Lade & Co. and this debt in 1942 amounted to \$67.77: see paragraphs 15 and 10 of the affidavit sworn to by the defendant Maughn on the 29th April, 1942. As a result the first charge of the widow Janet Elizabeth Maughn, to the extent of \$480, on the net value of the estate of James Walter Maughn would not be completely satisfied, and the defendant Maughn would, because of insufficiency of assets, be entitled to nothing under the intestacy of her father James Walter Maughn, deceased; and the defendants George Weithers, Edgar Weithers and Edward Weithers being entitled to succeed to all the interest which their grandmother Janet Elizabeth Maughn had in the estate of James Walter Maughn, deceased, would be entitled to the entire estate of James Walter Maughn (subject of course to the payment of all just debts and liabilities), to the entire exclusion of Wilhemina Maughn the daughter of the said James Walter Maughn.

The plaintiff admits that there were some building materials on lot 164, Cumberland Village, under a genip tree, lying on the ground. These materials "were not sold to the plaintiff. They

were not attached to the land, they were resting on the land. In *Hulme v. Brigham* (1943) 1 K.B. 152, 156, Birkett, J., following the judgment of Eve, J., in *Northern Press & Engineering Co. v. Shepherd* (1908) 52 S.J. 715, held that printing machine, weighing 9 to 12 tons, resting on the floor of premises and held in their position by virtue of their own weight, were not attached to the realty. Similarly, the building materials which were lying upon the ground under a genip tree were movable property and did not form part of the immovable property comprised in the contract of sale of the 15th May, 1941. The evidence led in this case is to the effect that the materials were used in effecting repairs to the buildings on lot 164, Cumberland the subject matter of that contract of sale. At that time the plaintiff believed that lot 164 with the buildings and erections thereon, was her property. No evidence has been led as to value, and I would assess damages, if the counterclaim is maintainable by the defendants George Weithers, Edgar Weithers and Edward Weithers in the sum of \$5 (five dollars).

The defendants George Weithers, Edgar Weithers and Edward Weithers made an entry upon the land a few days after the 24th November, 1942; the plaintiff Mary Bissember was asked to give up possession on the 31st December, 1942, but she still continues in possession of the land. In these circumstances, if the defendants George Weithers, Edgar Weithers and Edward Weithers are entitled to maintain a claim for mesne profits, and for possession, mesne profits would be awarded as from the 1st January, 1943, at the rate of \$5 a month, and an order would be made against the plaintiff for recovery of possession on the 1st November, 1943. No order would be made for the recovery of mesne profits from the 15th May, 1941, to the 31st December, 1942, and to that extent the plaintiff would be considerably benefited.

It is perfectly true that the object of section 33 of the Supreme Court of Judicature Ordinance, cap. 10, is to avoid multiplicity of actions. And while it may be convenient both to the defendants and the plaintiff if I were to adjudicate on the counterclaim and enter judgment for possession, for mesne profits at the rate of \$5 per month from the 1st January, 1943, and for damages in the sum of \$5, I cannot make any such order unless I am satisfied that the Court has jurisdiction, even though counsel for the plaintiff did not submit that the Court has no power to make such an order.

The trend of modern legal thought is to the effect that the Court is entitled to adjudicate so long as all the necessary parties are before it, whether as plaintiffs or as defendants. This was, I think, indicated by me in my judgment in chambers in *Baird & Dragten v. Solomon et al.*, (1943) L.R.B.G. 133. Section 24 (3) of the Judicature Act, 1873 (now section

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39 (1) (b) of the Supreme Court of Judicature (Consolidation) Act, 1925) is not in force in this Colony, and rules 11 to 14 of Order 21 of the English Rules of the Supreme Court, which regulate the procedure where a counterclaim is filed against the plaintiff and another person, have been omitted from Order 19 of our Rules of Court, 1900. Consequently, in this Colony, it is not possible to file a counterclaim in which the plaintiff and others are named as defendants. Wilhemina Maughn in whom (in her capacity as administratrix of the estate of James Walter Maughn, deceased) the legal title to lot 164, Cumberland Village, is vested, is indeed a party to this action, but she is only a party to the proceedings herein in as far as they relate to the claim by the plaintiff Mary Bissember, she is not a party to the counterclaim brought by the defendants George Weithers, Edgar Weithers and Edward Weithers, This Court is therefore powerless to grant the relief claimed against the plaintiff by way of counterclaim. The counterclaim must therefore be dismissed but not on the merits, and in the circumstances, without costs.

Judgment for defendants on claim; Counterclaim of defendants Weithers dismissed but not on merits.

Solicitors: *Mungal Singh*, for plaintiff; *J. Edward de Freitas*, for the defendants George, Edgar and Edward Weithers.

REX

v.

DREPAUL NOHAR, HARRY LALL AND MADRAY KUTHAIN.

[1943. No. 267.—DEMERARA.]

BEFORE FRETZ, J.

1943. SEPTEMBER 8, 30.

Criminal law and procedure—Trial on indictment—Session closed—Judge functus officio.

Criminal law and procedure—Trial on indictment—Point arising on—Reservation of—For West Indian Court of Appeal—By Way of case stated—If Judge at trial did not consent to state case—Case cannot be stated—Criminal Law (Procedure) Ordinance, cap. 18, s. 174.

There is a clear implication from the words of section 174 of the Criminal Law (Procedure) Ordinance, cap. 18, that not only must the point arise at the trial, but also that the Judge should consent at the time of the trial to reserve the point.

A Judge is *functus officio* at the close of the Criminal Sessions, and at that time he could only state a case, under section 174 of the Criminal Law (Procedure) Ordinance, cap. 18, on a point of law raised at the trial, and which he had consented to state.

R. v. Boodhoo (1934) L.R.B.G. 182, applied.

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An accused person was convicted and sentenced on the 5th August, 1943. At the time of the trial, (which took place in Berbice), no request was made to the trial judge to state a case under section 174 of the Criminal Law Procedure Ordinance, cap. 18, nor did he consent to do so. On the 11th August, 1943, notice of motion was filed in the Supreme Court Registry in Georgetown, on behalf of the accused, under section 174 of the Criminal Law (Procedure) Ordinance, cap. 18, for the reservation by the Court of certain questions of law which were alleged to have arisen at the trial. The Berbice Criminal Session was declared closed on the 16th August, 1943. There was never any intimation to the Court, at the time of the trial or at any time at all before the close of the Sessions, that a motion of that nature would be filed; and indeed it became known to the trial judge only after a lapse of some considerable time after the close of the Session that such had been filed. The notice of motion was fixed for hearing before the trial judge in Georgetown, on the 8th September, 1943.

Held, that the trial judge had no jurisdiction to hear the application, primarily because no request was made to him at the time of the trial to state a case on any question of law; and, further, that at the close of the Criminal Session the judge became *functus officio*.

MOTION by Harry Lall and Madray Kuthain, under section 174 of the Criminal Law (Procedure) Ordinance, cap. 18, for the reservation by the Court of certain questions of law which were alleged to have arisen at the trial which took place in Berbice. At the time of the trial no request was made to the trial judge to state a case, nor did he consent to do so. On the 11th August, 1943, (six days after the accused were convicted and sentenced) the motion herein was filed in the Supreme Court Registry in Georgetown. The Berbice Criminal Session was declared closed on the 16th August 1943. The motion was not heard before the close of the Session.

J. A. Luckhoo, K.C., (*Edgar W. Adams*, with him), for the applicants.

A. C. Brazao, Crown Counsel, for the Crown.

Cur. adv. vult.

FRETZ, J.: This case was tried at the Criminal Sessions in Berbice during the months of July and August. The three accused were charged with murder and on the 5th August, after an exhaustive trial, the first accused was acquitted; the other two, found guilty of manslaughter, were each sentenced to seven years' penal servitude.

On August 11, six days after the trial, a Notice of Motion was filed in the Georgetown Registry by counsel for the two prisoners under section 174 of the Criminal Law (Procedure) Ordinance, Chapter 18, for a reservation by the Court of certain questions of law, which were alleged to have arisen at the trial.

The Berbice Sessions were declared closed on the 16th August. There was never any intimation to the Court, at the time of the trial or at any time at all before the close of the Sessions, that a Motion of this nature would be filed, and indeed it became known to me only after a lapse of some considerable time after the close of the Sessions that such had been filed. At the time of the trial,

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no request was made to me to state a case, nor did I consent to do so.

This Motion came before the Court for hearing on the 8th of September and the preliminary objection was immediately raised by counsel for the Crown that the Court had no jurisdiction to entertain the application on the ground that at the close of the Criminal Sessions in Berbice, at which the trial was held, the Judge became *functus officio*. It was further argued that at the time of the trial such points must be raised and the consent of the Judge must be then obtained at the time for the reservation of such questions of law as may be deemed fit in the Judge's discretion for consideration by the Court of Appeal.

The question arising primarily for my decision is, therefore, as to whether or not the trial Judge has any jurisdiction to hear a Motion of this nature after the close of the Sessions at which the trial took place, and it should be further considered in this respect at what specific time, if any, should the application under section 174 of Chapter 18 be made.

In this colony section 174 of the Criminal Law (Procedure) Ordinance, Chapter 18, gives the Judge of the Court before whom the case has been tried, and in his discretion, power to reserve any question of law which has arisen at the trial for the consideration of the Court of Appeal; there is no general right of appeal in Criminal Cases. The section in question reads:

Where any person has been convicted of any indictable offence, the Judge of the Court before whom the cause has been tried may in his discretion reserve any question of law which has arisen on the trial for the consideration of the Court of Appeal, and thereupon shall have authority to respite execution of the judgment on the conviction, or to postpone judgment until that question has been considered and decided, as he thinks fit.

In view of the words of the section, it appears to me that there is a clear implication that not only must the point arise but also that the Judge should consent at the time of the trial to reserve the point; he may then elect, either to respite execution of the judgment on the conviction, or to postpone judgment. It seems clear that his decision should be taken at the time of the trial on the application being made at that time.

This question was exhaustively argued in the case of *R. v. Boodhoo* (1934) B.G.L.R., p. 182, and after a review of the cases of *R. v. Martin* (1849), C. Cox C.C., *R. v. Mean*, 21 T.L.R., p. 172, and *R. v. Meertens* (1926), B.G.L.R. p. 129, and other authorities, it was held that a Judge is *functus officio* at the close of the Criminal Sessions and that at that time he could only state a case on a point of law raised at the trial and which he had consented to state.

In view of that ruling, from which I can find no reason to

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depart, I consider that I have no jurisdiction to hear this application, primarily because no request was made to me at the time of the trial to state a case on any question of law, and, further that at the close of the sessions the Judge became *functus officio*.

Motion refused.

Solicitor for the Crown: *Vivian C. Dias*, Acting Crown Solicitor.

DOOL (ABDOOL), Appellant (Defendant),
 v.
 DAVID ADAMS, Police Constable No. 4612,
 Respondent (Complainant).

[1943. No. 246.—DEMERARA.]

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

1948. OCTOBER 1.

Criminal law and procedure—Defence (Larceny of Poultry and Eggs)—Regulations, 1942, (No. 46 of 1942)—Do not extend to offence of killing with intent to steal—Flogging may not be ordered on conviction for that offence—Summary Jurisdiction (Offences) Ordinance, cap. 13, s. 86 (b).

The Defence (Larceny of Poultry and Eggs) Regulations, 1942, only relate to the offences of stealing, attempting to steal, and receiving: they do not extend to the offence of killing with intent to steal.

A person convicted under section 86 (b) of the Summary Jurisdiction (Offences) Ordinance, cap. 13 of the offence of killing a fowl with intent to steal the carcass, cannot be ordered to be whipped or flogged under the Defence (Larceny of Poultry and Eggs) Regulations, 1942.

APPEAL by the defendant Dool (Abdool) from a decision of the Magistrate of the West Demerara Judicial District convicting turn of wilfully killing a fowl with intent to steal the carcass, the fowl ordinarily being kept in a state of confinement for domestic purposes, contrary to section 86 (b) of the Summary Jurisdiction (Offences) Ordinance, cap. 13, as extended by the Defence (Larceny of Poultry and Eggs) Regulations, 1942, (No. 46 of 1942), and sentencing him to two months' imprisonment with hard labour and ordering that he be flogged with six strokes.

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 for killing a bird ordinarily

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kept in confinement for a domestic purpose with intent to steal the carcass.

It is submitted on behalf of the appellant that the evidence did not justify the magistrate in finding, firstly, that the identity of the appellant was established beyond reasonable doubt, and secondly, that the fowl the subject-matter of the charge was a bird ordinarily kept in confinement for a domestic purpose. We are of the opinion that the record discloses evidence upon which the learned magistrate could reasonably have arrived at both these findings, and we see no reason to differ from him in this respect.

It was also submitted that the learned magistrate erred in convicting the appellant of an offence "contrary to section 86 (b) of the Summary Jurisdiction (Offences) Ordinance (cap. 13) as extended by the Defence (Larceny of Poultry and Eggs) Regulations, 1942," in that the Regulations are not applicable to any offence under section 86 (b). The Regulations in question empower the Court to impose a greater penalty in respect of certain offences than is prescribed by section 86 of the Ordinance and specify the particular offences in respect of which such penalties may be imposed. The offence created by section 86 (b) is not among those specified in the Regulations, and the learned Assistant Attorney-General agrees with the contention that the Regulations are not therefore applicable in the present case. This is, in our opinion, a right interpretation of the Regulations and there can be no doubt that the learned magistrate had no power to order that the appellant should be flogged, and should not have included in his conviction a reference to the Regulations. This does not vitiate the conviction, however, for the inclusion of these words has no relation to the nature of the offence nor to the grounds upon which the appellant was convicted.

It was finally submitted that by reason of the magistrate's error in referring to the Defence Regulations he may have been misled as to the gravity of the offence, and, by treating it as one with regard to which it had been found necessary to issue Defence Regulations, he may have imposed a longer term of imprisonment than he would have done but for this mistaken point of view.

While there may be some substance in this contention it is to be observed that the learned magistrate in his reasons for his decision states the grounds upon which he based the measure of his sentence and that these are unrelated to the question of the Defence Regulations but do relate to the prevalence of similar crimes in the locality. In view of the nature of the offence and of the statement as to its prevalence and without having regard to the inapt Regulation, we are not of the opinion that the term of imprisonment imposed is excessive.

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The appeal as to conviction is dismissed, but the conviction will be amended by deleting therefrom all reference to the Defence (Larceny of Poultry and Eggs) Regulations, 1942, and the sentence will be varied by the deletion therefrom of the order that the defendant receive six strokes (flogging) with an approved instrument. There will be no order as to the costs of this appeal.

Appeal dismissed; sentence varied.

ENA FRANCES SPRATT, (Petitioner),
 v.
 WILLIAM RICHARD SPRATT, (Respondent).

[1943. No. 141.—DEMERARA.]

BEFORE FRETZ, J.

1943. SEPTEMBER 28, 29; OCTOBER 1.

Divorce—Domicil—Of choice—Acquisition of—Animus manendi—Meaning of—More than a passing intention.

Jurisdiction in divorce depends on domicile and there is no doubt that anyone seeking to override his domicile of origin takes upon himself a heavy burden of proof. There must be an *animus manendi* accompanied by acts showing that it was more than a passing intention.

Boldrini v. Boldrini and Martini (1932) Probate 9, 12, C.A., and *Munn v. Munn* (1931-37) L.R. B.G. 186, applied.

PETITION by Ena Frances Spratt for a dissolution of her marriage with William Richard Spratt. The facts appear from the judgment.

J. A. Luckhoo, K.C., for the petitioner. The respondent did not appear.

Cur. adv. vult.

FRETZ, J.: The petitioner in this case seeks to obtain a dissolution of her marriage with her husband, the respondent, on the ground of malicious desertion.

The respondent has entered no appearance but the question arises as to whether the Court has jurisdiction to pronounce a decree of divorce between the parties. This rests on the point of domicile.

The petitioner's domicile is that of her husband and if it is proved satisfactorily that the husband's domicile is in this colony the Court will then have jurisdiction.

The respondent's domicile of origin is admittedly American. He came to the colony in 1940 as an employee of the Elmhurst Con-

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tracting Company of the United States of America. The marriage with the petitioner took place on the 20th December, 1942 and the respondent left the colony on the 11th February, 1943. He returned to the American Air Base in the colony on the 27th April, 1943, and left again on the same day for Brazil and has not since returned.

The point of jurisdiction is governed by the question of domicile. By the ruling in *Munn v. Munn* (1931-1937) B.G.L.R. p. 186 and quoting the words of Lord Hanworth, M.R., in *Boldrini v. Boldrini* and *Martini* (1932) Probate, 9 (C.A.) "Jurisdiction in divorce depends on domicile and anyone seeking to override the domicile of origin takes upon himself a heavy burden of proof. There must be an *animus manendi* accompanied by acts showing that it was more than a passing intention. That has been held over and over again."

In the case before me the only evidence tending to suggest a change of domicile by the respondent are statements of the petitioner and her two witnesses to the effect that the respondent stated to them his intention to reside here and to make this place his home: that he made certain enquiries concerning the chances of his obtaining employment in the Colony and further enquiries as to the purchase of a house.

The guiding principles in these cases are laid down in *Stanley v. Barnes* (1830) 3 Hagg. Ecc. 373 "For certain purposes a man takes his character, *prima facie*, from the place where he is domiciled and *prima facie* he is domiciled where he is resident, and the force of residence, as evidence of domicile, is increased by the length of time during which it has continued. All these principles are clear; but time alone is not conclusive; for where is the line to be drawn?...As a criterion, therefore, to ascertain domicil another principle is laid down ... it depends upon the intention, upon the *quo animo*, that is the true basis and foundation of domicil; it must be a residence *sine animo revertendi*, in order to change the *domicilium originis*, a temporary residence for the purpose of health or travel, or business has not the effect, it must be a fixed and permanent residence, abandoning finally and forever the domicil of origin, yet liable to a subsequent change of intention."

In *Waddington v. Waddington* (1920) 36 T.L.R. 358, quoted by counsel for the petitioner, the circumstances differ from those of the present case and there also existed in that instance, a 21 years lease held by the respondent. In the case before me there was never any act on the part of the respondent to suggest an *animus manendi*. Assuming that his statements to the effect that he intended "to make this place his home" were accepted, there was never any act on his part to support, or in furtherance, of such intention: and I do not believe even under those circumstances that it was ever more than his passing intention to remain

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in this Colony. The facts and circumstances of the case confirm my belief that it was not the respondent's intention or desire to abandon his American domicile.

After careful consideration I find that I am unable to grant this petition as I consider that I have no jurisdiction. The petition is accordingly dismissed.

Petition dismissed.

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

EDITOR'S NOTE.—The petitioner appealed to the West Indian Court of Appeal. On the 10th October, 1944, the appeal was dismissed.

OSWALD PERCIVAL REID, (Petitioner),
 v.
 HERMINE ICELDO REID, (Respondent).
 [1943. No. 205.—DEMERARA],
 BEFORE DUKE, J. (Acting).
 1943. OCTOBER 4, 6.

Desertion—Intention to desert—Facts constituting desertion. Domicil—Actual residence coupled with animus manendi—Immaterial that stay in Colony may be cut short by a transfer to another country.

The petitioner, who was not born in this Colony, was an Elder of the Seventh Day Adventist Church. He was married in Jamaica in 1933. At the time of the marriage he was stationed in the Bahamas. In 1938 he was transferred to Barbados where his wife deserted him on the 8th August, 1941. Shortly after, he was transferred to this Colony. On the 5th July, 1943, he filed a petition for dissolution of marriage. At that time he, along with the only child of the marriage, had been residing in the Colony for nearly two years; and he had formed the intention of settling permanently in the Colony.

Held, that the petitioner had acquired a domicil of choice in this Colony, and that it was immaterial that there was a possibility that he might be transferred to a pastorate in some other territory in the Caribbean area.

May v. May & Lehmann (1943) 169 Law Times Reports, 42, applied.

PETITION by Oswald Percival Reid against his wife Hermine Iceldo Reid for dissolution of their marriage, on the ground of her malicious desertion.

E. W. Adams, for petitioner.

The respondent was in default of appearance.

Cur. adv. vult.

DUKE, J. (Acting): This is a petition by Oswald Percival Reid, for the dissolution of his marriage with his wife Hermine Iceldo Reid, born Aflalo, and for custody of Verna Eloise, the child of the marriage. The ground upon which the petition is based, is malicious desertion.

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The marriage took place on the 19th April, 1933, in Jamaica, British West Indies. The petitioner is an Elder of the Seventh Day Adventist Church. After the marriage, the petitioner and the respondent lived together at Nassau, Bahamas, where he was then stationed.

The child of the marriage, Verna Eloise, was born on February 1, 1934. In 1935 matrimonial differences arose. The respondent had a motor-car, and she would leave the petitioner's house at 5 o'clock in the afternoon, and she would not return home until the early or late hours of the following morning. She loved the gay night life in which she indulged at Fort Montagu beach, Nassau, and at the club there situated. In short, she behaved in a manner which was not becoming to the wife of an Elder of the Seventh Day Adventist Church. The petitioner pleaded with her, over and over again, to change her mode of life, but she refused to do so.

Since September, 1936, the respondent has consistently refused marital rights to the petitioner. In 1937 the respondent left the Bahamas against the wishes of the petitioner. She visited the United States of America and Canada, and was absent from the Bahamas for about three months. It was not her intention to return to Nassau, but it was too cold for her in Montreal. When the respondent returned to Nassau she was ill. On her recovery she told her husband, on the 5th November, 1937, that he meant nothing to her.

In 1938 the petitioner and the respondent went to Barbados. She remained in that island for only two weeks, despite all efforts made to induce her to remain. The respondent went to Jamaica and then to the Bahamas.

In 1940, after an absence of 2½ years, the respondent returned to Barbados: she brought with her the child Verna Eloise who had been with her grandparents in Jamaica. The day after the respondent arrived in Barbados, she notified the Post Office Authorities that letters arriving for her should not be delivered at the petitioner's residence, but should be kept at the Post Office where she would call for them. Letters arrived for the respondent, from Senor Jaime Toro, Airways Pilot, of Barranquilla, Colombia. The name of the respondent was stated to be: Miss Hermine Reid Toro. The petitioner intercepted an affectionate letter which was written by the respondent to Senor Toro on the 24th February, 1941. This letter, which was admitted in evidence, shows that the respondent had no longer any love or affection for her husband, that her thoughts were with Senor Toro, and that her desires were for Senor Toro and for him alone. The respondent told the petitioner that she was only remaining in Barbados for the sake of the child, Verna Eloise, and until she had heard from Senor Toro. Over and over again,

she made it clear to the petitioner that some day, when he returned home, he would find that she had left Barbados.

The respondent left Barbados on the 8th August, 1941. She did not take the child with her. She went to Trinidad. She wrote many letters to the child. The envelope of one of them was produced in evidence, and it shows that the respondent had described herself as "H. Toro, 4, Queen's Park East, P.O.S." She also sent a parcel to the child, and the name and address of the sender are stated in her handwriting as "Hermina Toro, Bagshot House, P.O.S. T'dad." The respondent is now living at Ford's Hotel, 60 N.E. Third Street, Miami, Florida, United States of America, under the name of "H.Toro-Reid."

On these facts it is clear that the respondent intended to desert the petitioner, and that she has in fact deserted him.

The question, however, whether the petitioner can properly be considered as being domiciled in this Colony for the purpose of instituting proceedings for dissolution of marriage is not free from difficulty. The petitioner is not a native of this Colony: he has only been in this Colony for about two years; he states that he intends to make this Colony his permanent home; that he is living here with his child, and that he has no other home. One cannot, however, lose sight of the circumstance that the petitioner may, at some future time, be transferred, for pastoral service, from this Colony to some other territory in the Caribbean area, in the same manner as he was transferred from the Bahamas to Barbados, and from Barbados to British Guiana.

In *May v. May & Lehmann* (1943) 169 Law Times Reports 42, determined on the 4th June 1943 the facts as stated in the head-note were as follows:

The Petitioner was a German Jew. In 1938 he was put into a concentration camp in Germany, and was later released, on his mother obtaining for him an immigration visa from the American Consulate General in Stuttgart where he had previously resided. The Home Secretary later allowed the petitioner to land in England as a trainee on condition that he would emigrate on completion of his training. He landed in England on 6th March, 1939, and his wife and child followed him to England a few months later. He commenced training as a sausage maker for F. In June 1940, steps were taken with the consent of the petitioner to have his immigration visa transferred to the British register with priority as from the date when it had originally been granted in Stuttgart. From July, 1940, until January, 1941, the petitioner was interned as an enemy alien, and since that date he had worked for F. The petitioner stated in evidence that during 1941 he would, under no circumstances, have returned to Germany, and the trial judge found as a fact that by January, 1942, when he filed his petition for dissolution, the idea of going to the United States had faded from his mind and he had come to regard England as his home.

On these facts it was held by Pilcher, J. that the *animus manendi*, coupled with the fact of residence, was sufficient to establish domicile; and, following *Boldrini v. Boldrini & Martini* (1932) Probate, 9, the fact that his stay in England was liable to be terminated at the pleasure of the Home Secretary did not

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prevent the petitioner from acquiring a legal domicile in England, and that the fact that in the present case he landed on condition that he emigrated on completion of his training, made no difference. In the course of his judgment, the learned Judge said:

The requirements necessary to the acquisition of a domicile of choice are actual residence and the intention to settle permanently in the new country of residence. No doubt the knowledge that residence in the new country may be cut short at any moment by the Home Secretary under the powers conferred upon him by the Aliens Act and Aliens Orders may influence the mind of the alien concerned in forming the intention which is necessary before domicile can be acquired, but once the court is satisfied that the intention has been formed, all the elements necessary to the acquisition of a domicile of choice are present and the domicile is acquired:

and see Law Quarterly Review, 1943, volume 59, page 219 and Law Times Journal, 1943, volume 196, page 52.

In this case, I am satisfied that, at the time of the filing of the petition herein on the 5th day of July, 1943, the petitioner had formed the intention to settle permanently in this Colony where he and his child reside and have been residing for about 2 years. It is immaterial that there is a possibility that the petitioner might be transferred to a pastorate in some other territory in the Caribbean area. I therefore hold that the petitioner is domiciled within this Colony.

There will therefore be a decree *nisi* for dissolution of marriage, and an order that the child Verna Eloise do remain in the custody of the petitioner. There will be no order as to costs.

Decree nisi made.

Solicitor for petitioners: A. Vanier.

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HECTOR FITZLAWRENCE THOMPSON, Petitioner.

v.

FRANCIS DENIS MENDONCA AND THE TOWN CLERK
OF NEW AMSTERDAM, Respondents.

[1943. No. 299.—DEMERARA.]

BEFORE DUKE, J. (Acting)

1943. OCTOBER 6, 7, 8.

New Amsterdam Town Council—Election of councillor—Qualification—May be questioned—By election petition within 4 days after election—New Amsterdam Town Council Ordinance, cap. 87, s. 67—If not so questioned—Cannot be questioned under Town Councils (Membership and Dissolution) Ordinance, cap. 88—Presumption that councillor was duly qualified.

Town Councils—Order declaring seat of councillor vacant—Petition for—Can only be brought in respect of duly elected councillor—Town Councils (Membership and Dissolution) Ordinance, cap. 88, ss. 2, 3 (1), 9, 10, 12.

New Amsterdam Town Council—Register of voters—Conclusive—Errors therein to stand—List of voters as settled by Council under section 11(5) of the New Amsterdam Town Council Ordinance, cap. 87—Register of voters—Person named therein—Entitled to vote at election of councillor—Cap. 87, ss. 7, 11 (1); Georgetown Town Council Ordinance, cap. 86, ss. 9 (d) (iii), 24 (2).

New Amsterdam Town Council—Registration of voters—Qualification for—Occupation of premises—No requirements as to residence therein for any specified period before registration—Removal from one part of town to another part of town—Qualification not lost—New Amsterdam Town Council Ordinance, cap. 87, s. 7.

New Amsterdam Town Council—Qualification of councillors—No record by Town Clerk as to—Councillors not required to state—Qualification at large—Subject only to section 12 of the New Amsterdam Town Council Ordinance, cap. 87—Cap. 86, s. 28 (1).

New Amsterdam Town Council—Councillor duly elected—Town Councils (Membership and Dissolution) Ordinance, cap. 88, s. 2—Qualification as councillor—When does duly elected councillor cease to be qualified to be elected—Cap. 88, s. 3 (1)—When he ceases to have one or more of the qualifications set forth in section 12 of the New Amsterdam Town Council Ordinance, cap. 87—Such qualifications may be acquired after election.

New Amsterdam Town Council—Councillors duly elected—Qualification by occupation of premises the rental value whereof is not less than \$20 a month—May be acquired after election—When acquired—As soon as such premises are occupied—Removal to other premises in town of same rental value—Qualification not lost—New Amsterdam Town Council Ordinance, cap. 87, s. 12, proviso (a) thereto.

Construction—Ordinance—Proviso to section—Not to extend ambit of section—New Amsterdam Town Council Ordinance, cap. 87, s. 12, proviso (a)—Meaning of—No application to circumstances arising after a voter has been elected councillor—Only operates where there is an actual election—No application to a qualification acquired after election.

The election of a councillor for the town of New Amsterdam who is not duly qualified may be questioned by way of an election petition brought under section 67 of the New Amsterdam Town Council Ordinance, cap. 87, within four days after the election.

In re *Wood, Wood v. Fernandes* (1925) L.R.B.G. 7, applied.

The election of a councillor cannot be questioned under the Town Councils (Membership and Dissolution) Ordinance, cap. 88. A petition can only be brought under Chapter 88, in respect of a person who was duly elected as a councillor.

In a petition brought under the Town Councils (Membership and Dissolution) Ordinance, cap. 88, for an order that the seat of an elected councillor

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has become vacant, the petitioner will not be permitted to allege that, at the time of his election, the councillor was not qualified to vote, or was not qualified to be elected a member of the Town Council. It must be assumed that he was duly elected as councillor, and that he is a councillor under the Ordinance.

The register of voters for the town of New Amsterdam is conclusive; any errors in it must stand, and any person whose name appears thereon is entitled to vote at the election of a councillor.

Pembroke Boroughs Case (1901) 5 O'Malley & Hardcastle Election petitions, 135, 144, applied.

A., was entitled to be placed on the register of voters for the town of New Amsterdam by virtue of occupation of premises at lot 16, Smythtown. His name appeared in the register as a voter, by virtue of being "Owner of property Part lot 16 Smythtown." A. was not the owner of property at Part lot 16 Smythtown, nor of any other property in New Amsterdam,

Held, that A., was entitled to vote at election of a councillor.

The list of voters for the town of New Amsterdam, as settled by the Council under section 11 (5) of the New Amsterdam Town Council Ordinance, cap 87, and not an inaccurate list, as published in the *Gazette*, is the register of voters. That list is final, and any person whose name appears on that list is entitled to vote at the election of a member of the Council.

Eleazar v. Abbensetts & Barclay (1925) L.R.B.G. 104, 105, applied.

In the town of New Amsterdam it is not required that a person, in order that he may be registered as a voter in respect of occupation of premises, should reside in those premises for any specified time before the end of December in any one year.

An inhabitant of the town of New Amsterdam does not lose his qualification as a voter, by virtue of occupation of premises, merely by removing from one part of the town of New Amsterdam to another part of the town.

It was the intention of the Legislature that the subject of qualification of councillors should be treated with less formality than exists in the city of Georgetown; that there should be no record in the archives of the Town Clerk as to the qualification of an elected councillor for the town of New Amsterdam; and that the qualification should be at large subject only to the provisions of section 12 of the New Amsterdam Town Council Ordinance, cap. 87.

By section 3 (1) of the Town Councils (Membership and Dissolution) Ordinance, cap. 88 the seat of a councillor who ceases to be qualified to be elected a member of his council shall become vacant on his ceasing to be so qualified.

Held, that the words "ceases to be qualified" can only mean, with respect to the town of New Amsterdam, ceases to have one or more of the qualifications, set forth in section 12 of the New Amsterdam Town Council Ordinance, cap. 87.

An elected councillor for the town of New Amsterdam continues to be qualified, so long as he holds some qualification, whether acquired before his election or subsequent thereto. He is entitled to continue in office as a councillor on the strength of a qualification acquired by him subsequent to his election as councillor. Such qualification may be the occupation of premises in the town the rental value whereof is not less than \$20 per month.

Unless the context otherwise requires a proviso to a section of an Ordinance should not be construed otherwise than as a proviso, that is to say, as not extending the ambit of the Ordinance.

Egham and Staines Electricity Board v. Egham Urban District Council (1942) 167 Law Times Reports 299, 300, 301, C.A. and *Ex parte The Demerara Mutual Life Assurance Society Limited* (1931-1937) L.R.B.G. 32, 34, applied.

Proviso (a) to section 12 of the New Amsterdam Town Council Ordinance, cap. 87, (which provides that in the case of a qualification for the office of councillor by virtue of occupation of premises in the town of the rental value of not less than \$20 per month the occupant shall have resided in the same premises during the six months immediately preceding his election as councillor) is a mere proviso, and does not extend the ambit of the section. The proviso has no application, and cannot be applied to circumstances arising after a voter has been elected as councillor. It only operates where

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there is an actual election. It has no application to a qualification acquired after election.

On the 14th July, 1941, M. was elected a councillor for the town of New Amsterdam. The qualification as councillor which was possessed by M. at the time of his election ceased on the 27th August, 1942. From the 1st May, 1942, and up to the hearing of the petition M. has been a tenant of various premises within the town of the rental value of not less than \$20 a month. On the 1st April, 1943, he removed from the premises which he had been occupying from the 1st May, 1942, to other premises: from the latter premises he removed on the 1st September, 1943, to the premises presently occupied by him.

Held, (1) that, on and after the 27th August, 1942, M., was entitled to continue in office as an elected councillor on the strength of a qualification acquired by him subsequent to his election as councillor;

(2) that on the 1st May, 1942, M. acquired a qualification as a councillor by virtue of occupation of premises the rental value whereof was not less than \$20 a month;

(3) that such qualification was not lost by reason of removal to other premises in the town the rental value whereof was not less than \$20 a month; and

(4) that M., had not ceased to be qualified to be elected as a councillor. There is no provision in the New Amsterdam Town Council Ordinance, cap. 87, that the qualification as a councillor by virtue of occupation of premises in the town of New Amsterdam of the rental value of not less than \$20 a month, cannot be acquired after election, unless and until the councillor has resided in the same premises for a period of six months. The qualification is acquired by an elected councillor as soon as he occupies premises in the town of the rental value of not less than \$20 a month, and is not lost by him on removal to other premises in the town of the rental value of not less than \$20 a month.

PETITION by Hector Fitzlawrence Thompson, a registered voter for the town of New Amsterdam, (registered as Hector F. Thompson), for an order declaring that the seat of Francis Denis Mendonca (registered as a voter under the name of F. Mendonca as a councillor on the New Amsterdam Town Council had become vacant.

C. Vibart Wight and Lionel A. Luckhoo, for petitioner.

H. C. Humphrys, K.C., for the respondent—Francis Denis Mendonca.

J. A. Luckhoo, K.C., for the respondent—The Town Clerk of New Amsterdam.

Cur. adv. vult.

DUKE J. (Acting): This is a petition by Hector Fitzlawrence Thompson, a registered voter for the town of New Amsterdam, for an order declaring that the seat of Francis Denis Mendonca as a councillor on the New Amsterdam Town Council has become vacant.

The petition is intituled "In the matter of the New Amsterdam Town Council Ordinance, chapter 87, and the Town Councils (Membership and Dissolution) Ordinance, chapter 88". The respondent Mendonca was elected a councillor on the 14th July, 1941, and the petition herein was filed on the 8th September, 1943. In the petition it is alleged that the respondent Mendonca, at the time of his election as councillor, was not qualified as a

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councillor, and was not qualified as a voter; and counsel for the respondents took the preliminary objection that the petition should therefore be dismissed. Provision is made by section 67 of Chapter 87 for the bringing of an election petition, or a petition complaining of an undue return or undue election of any councillor. In *In Re Wood, Wood v. Fernandes* (1925) L.R.B.G. 7, it was held by Berkeley, J. that the election of a councillor who is not duly qualified may be questioned by way of an election petition. No election petition was filed questioning the qualification of the respondent Mendonca to be elected as a councillor, and it is now too late to file such a petition, as it is provided by section 67 of Chapter 87 that an election petition must be filed within four days after the election, and the election in this case took place more than 2 years before the petition herein was filed. The election of a councillor cannot be questioned under Chapter 88; no petition containing an allegation that the respondent Mendonca was not qualified, at the time of his election as councillor, either as a councillor or as a voter, can be entertained under Chapter 88, in so far as that allegation is concerned; and a petition can only be brought under Chapter 88 in respect of a person who was duly elected as a councillor: see section 2.

Apart from the allegation that the respondent Mendonca, at the time of his election, was qualified neither as a councillor nor as a voter, there are allegations in the petition to the effect that, subsequent to the election of the respondent Mendonca, he became disqualified, and he ceased to be qualified to be elected to be a member of the Council. In these circumstances the preliminary objection must be overruled, but the petitioner cannot be permitted, in these proceedings, to allege that on the 14th July, 1941, the respondent Mendonca was not qualified to vote or to be elected a member of the Town Council. It must be assumed that he was duly elected as such, and that he is a councillor under Chapter 88.

By section 3 (1) of the Town Councils (Membership and Dissolution) Ordinance, cap. 88, if a councillor becomes disqualified, his seat on his becoming so disqualified, shall become vacant. A councillor may become disqualified under section 3 (2) of Chapter 88, or by virtue of sections 8 or 13 of Chapter 87, or perhaps by virtue of section 14 of Chapter 87. It is not suggested that section 3 (2) of Chapter 88, or section 8 or section 14 of Chapter 87, applies to the facts of this petition. Counsel for the petitioner however, submits that section 13 (a) of Chapter 87, which provides that "no one, having been elected a councillor, shall sit or vote in the Council, who is not entitled to vote at the election of a member of the Council" is applicable. The petitioner's case on the subject of disqualification is that the respondent Mendonca is not entitled to vote at the election of a member of the Council.

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Section 7 of the New Amsterdam Town Council Ordinance, cap. 87, is as follows:

Every inhabitant of the town who is of full age and not subject to any legal disability, and is a British subject or has resided in the Colony for not less than three years and is a proprietor of a house or tenement in the town rated in the book of the Town Clerk at the value of two hundred and fifty dollars or more, over and above the amount of any mortgage, or who occupies premises in the town the rental value whereof is not less than fifteen dollars a month, shall be entitled to vote at the election of a councillor.

It is not suggested by the petitioner that the respondent Mendonca is not an inhabitant of the town of New Amsterdam; or that he is not of full age; or that he is subject to any legal disability; or that he is not a British subject; or that he is an alien who has not resided in the Colony for at least three years.

By section 11 (1) of Chapter 87, it is provided that no property qualification shall be deemed to be sufficient unless the persons who claim thereunder are registered as owners on the books of the Town Clerk, and unless the particulars of the premises in respect of which the qualification is claimed are also recorded in those books. And the respondent Mendonca was never the proprietor of a "house or tenement" in the town rated in the books of the Town Clerk at the value of \$250 or more, over and above the amount of any mortgage. For at least the last ten years, the respondent Mendonca has been a director of M. De Mendonca and Company, Limited, a limited liability company owning considerable immovable property in the town of New Amsterdam; but in Chapter 87 there are no provisions similar to section 9 (d) (iii) of the Georgetown Town Council Ordinance, cap. 86, under which the attorney or director of a limited liability company owning immovable property in the city of Georgetown may be registered as a voter. It was not therefore possible for the respondent Mendonca to be registered as a voter, by virtue of a qualification depending upon proprietorship of a "house or tenement" in the town of New Amsterdam.

The respondent Mendonca was elected on the 14th July, 1941, as a councillor for the town of New Amsterdam. In the Register of Voters for the year 1941, the date of his registration as a voter is stated to be the 23rd December, 1936, and his qualification is specified as "Occupation of premises lot 5, Smythtown". In the Register of Voters for the year 1942, the date of his registration as a voter is stated to be the 23rd December, 1936, and his qualification is specified as "Occupation of premises lot 17, Smythtown": he had removed from lot 5, Smythtown to lot 17, Smythtown during the year. In the Register of Voters for the year 1943, as printed and published in the *Gazette*, the date of his registration as a voter is stated to be the 23rd December, 1936, and his qualification is specified as "Owner of property Part lot 16, Smythtown". In *The Pembroke Boroughs Case*, an election petition tried before Darling, J. and

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Channell, J., on the 22nd January, 1901, and reported in volume 5 of O'Malley & Hardcastle's Election Petitions at pages 135, 144, it was held that the register of voters was conclusive, and, in the course of his judgment, Channell, J., said:

When it is said that the register is to be conclusive, what is meant is that the errors in it must stand. If it were always absolutely correct there could be no importance in saying that it was to be conclusive.

In that case persons who were not entitled to be registered as voters in a particular constituency were held to be entitled to vote because their names were on the register of voters. In the present case the respondent Mendonca was entitled to be placed on the Register of Voters for 1943, by virtue of occupation of premises at lot 16, Smythtown, to which he had removed on the 1st May, 1942. In the Register of Voters for 1943, as printed, his qualification was however stated to be "Owner of property Part lot 16 Smythtown": the respondent Mendonca had no property qualification. If the Register of Voters for 1943, as published in the *Gazette*, is the authentic and official register, then, on the authority of *The Pembroke Boroughs Case*, I must hold that the Register is conclusive, that the errors in it must stand, and that as the name of the respondent Mendonca is on the Register, he is entitled to vote at the election of a councillor.

Section 11 (5) of the New Amsterdam Town Council Ordinance, cap. 37 is as follows:

The Council shall hold an open court in the month of December in each year to determine any objections to the list of voters so prepared (meaning thereby, the list of voters prepared by the Town Clerk) and shall give one week's notice in the *Gazette* of the date and hour of the court. The decision of the Council upon any objection shall be final.

An open court was duly held by the Council on the 18th December, 1942. No objection was made to the retention of the name of the respondent Mendonca in the list of voters. His name remained in the list, and it was stated therein that he had been registered on the 23rd December, 1936: as he had removed during the year 1942 to lot 16, Main Street, Smythtown, it was stated in the list that the premises occupied by him were situate at lot 16, Smythtown. The nature of his qualification as a voter remained the same as it was, in respect of the years 1941 and 1942, namely, "Occupation of premises." The list of voters, as revised by the Council on the 18th December, 1942, was published in the *Gazette*. By section 24 (2) of Cap. 86 such lists, in respect of the city of Georgetown, are required to be published in the *Gazette*: but there is no such requirement, under cap. 87, in respect of the town of New Amsterdam. As the result of a printing error, which was not detected by the clerk to the New Amsterdam Municipality who read the proof, the nature of the qualification of the respondent Mendonca was changed from

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“Occupation of premises” to “Owner of property,” This change was not authorised by the Council. The list of voters as settled by the Council under section 11(5) of Chapter 87, and not the list as inaccurately published in the *Gazette*, is the register of voters. That list, as is indicated in the subsection, is final. In *Eleazar v. Abbensetts & Barclay* (1925) L.R.B.G. 104, 105, Douglass, J. said the same thing in the following words: “the only person entitled to say that anyone had ceased to possess the necessary qualification as a voter is the Town Council in December of every year”: section 11 (5) of Ordinance No. 10 of 1916, now Cap. 87.

The respondent Mendonca is entitled to vote at the election of a member of the Council, as his name appears on the Register of Voters for 1943, as revised and settled by the Council. If it were necessary for me to determine whether his name was properly on that list, I would say that it was, because, *firstly*, on the 18th December, 1942 he was in occupation of premises in the town of New Amsterdam of the rental value of not less than \$15 a month, *secondly*, there is no enactment requiring a voter to reside in the premises (in respect of which he is registered) for any specified time before the end of December in any one year, and *thirdly*, there is no enactment that an inhabitant of the town of New Amsterdam loses his qualification as a voter, by virtue of occupation of premises, merely by removing one part of the town of New Amsterdam to another part of the town.

The respondent Mendonca, being entitled to vote at the election of a member of the Council, has not become disqualified under section 3 (1) of the Town Councils (Membership and Dissolution) Ordinance, cap. 88.

Section 12 of the New Amsterdam Town Council Ordinance, cap. 87 (which relates to the qualification of councillors) is as follows:

Every voter who is of full age and not subject to any legal disability and is a proprietor of any household property in the town, rated in the book of the Town Clerk at the value of one thousand dollars or more, over and above the amount of any mortgage, or occupies premises in the town the rental value whereof is not less than twenty dollars a month, shall be qualified and eligible to be elected a member of the Council: Provided that—

- (a) in the case of occupation as aforesaid, the occupant shall have resided in the same premises during the six months immediately preceding his election as Councillor; and
- (b) the attorney or chairman of the board of directors of any limited liability company shall be qualified for election as a member of the Council if that company is in possession or occupation of premises within the town

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which would have constituted the necessary qualification of any one in possession thereof not a company.

By section 3 (1) of the Town Councils (Membership and Dissolution) Ordinance, cap. 88, if a councillor, that is to say, one who has been duly elected to be a member of a Council, ceases to be qualified to be elected a member of his council, his seat, on his ceasing to be so qualified shall become vacant.

Counsel for petitioners has submitted that, on the true construction of a section 12 of Chapter 87 and of the proviso (a) thereto, whatever may be the position with respect to the qualification as proprietor, or to the qualification as attorney or chairman of the board of directors of a limited liability company being proprietor, the qualification of a councillor by occupation of premises of the rental value of not less than \$20 a month if not acquired before his election as a councillor, cannot be acquired subsequent thereto, inasmuch as it is a condition precedent to the obtaining of such a qualification that the councillor should have resided in the same premises during the six months immediately preceding his election as councillor; and counsel further submitted that if the qualification by occupation of premises is the only qualification alleged to be presently held by a councillor, and if that qualification was not held by him at the time of his election, it necessarily follows that the councillor has ceased to be qualified to be elected a member of the Council. In the alternative, he argued that, if the qualification of a councillor by occupation of premises of the rental value of not less than \$20 a month can be acquired after his election as councillor, it can only be so acquired when the councillor shall have resided in the same premises for a continuous period of six months.

It was held by the Court of Appeal (MacKinnon, L.J., Lord Clauson and Goddard, L.J.) in *Egham and Staines Electricity Company, Limited v. Egham Urban District Council* (1942) 167 Law Times Reports 299, 300, 301, that the phrase "provided always," which appeared in a clause of an agreement between the parties to that appeal, did not really introduce a proviso to what had gone before, that it was merely a shortened form of saying "provided always and it is hereby agreed," that is to say, that it added a substantive provision for the protection of the council, and was not merely importing a proviso to that which had before been provided for the protection of the company. Each case must be decided upon its own circumstances, and in that case, the Court of Appeal held that, in the circumstances of the agreement construed in that case, the proviso was more than a proviso, and that it was a substantive provision. In section 12 of Chapter 87 I can, however, find no indication that proviso (a) thereto should be construed otherwise than as a proviso, that is to say, as not extending the ambit of the section: see the judgment of Savary, J. in *Ex Parte The Demerara Mutual Life Assurance Society, Limited*

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(1931-1937) L.R.B.G. 32, 34. Proviso (a) has reference to that portion of section 12 which enacts that "every voter who is of full age and not subject to any legal disability and occupies premises in the town the rental value whereof is not less than twenty dollars a month shall be qualified and eligible to be elected a member of the Council"; and it provides that in such a case, the occupant shall have resided in the same premises during the six months immediately preceding his election as councillor. The proviso has no application, and cannot be applied, to circumstances arising after a voter has been elected as councillor. It only operates where there is an actual election.

Section 28 (1) of the Georgetown Town Council Ordinance, cap. 86, is as follows:

Everyone elected a member of the Council shall, before voting or sitting at any meeting thereof, deliver to the Town Clerk a statement in writing, signed by him, of his qualification, in the form contained in the fifth schedule hereto, and shall sign the declaration in the form contained in that schedule.

There is no similar enactment in the New Amsterdam Town Council Ordinance, cap. 87. The Legislature intended that in New Amsterdam the subject of qualification of councillors should be treated with less formality than exists in the City of Georgetown; that there should be no record in the archives of the Town Clerk as to the qualification of an elected councillor for the Town of New Amsterdam; and that the qualification should be at large subject only to the provisions of section 12 of Chapter 87.

In respect of the City of Georgetown, the words "ceases to be qualified" in section 3 (1) of the Town Councils (Membership and Dissolution) Ordinance, cap. 88, have to be interpreted with due regard to the provisions of section 28 (1) of Chapter 86: but, there being no similar enactment in respect to the Town of New Amsterdam, the words "ceases to be qualified" can only mean, ceases to have one or more of the qualifications set forth in section 12 of Chapter 87. A councillor therefore continues to be qualified, so long as he holds some qualification, whether acquired before his election or subsequent thereto. He is entitled to continue in office as a councillor on the strength of a qualification acquired by him subsequent to his election as councillor.

Proviso (a) to section 12 of Chapter 87 has no application to a qualification acquired after election; and there is no enactment in Chapter 87 that, in such a case, the qualification by occupation of premises the rental value whereof is not less than \$20 a month, is not acquired until the councillor shall have resided in the same premises for a continuous period of six months.

It is unnecessary for me, in these proceedings, to consider the submission of counsel for the respondents that the word "attorney" in proviso (b) to section 12 of Chapter 87 includes the

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secretary or director of a limited liability company, and does not necessarily mean a person acting under a power of attorney in writing: neither is it necessary for me to consider the submission made by counsel for the respondent Mendonca that, although it is required that a councillor should be qualified, on election, in accordance with section 12 of Chapter 87, his seat does not become vacant if, at any time after election, he ceases to have any qualification whatever under Chapter 87.

On the 14th July, 1941, the respondent Mendonca was elected a councillor for the town of New Amsterdam, and on the 30th July, 1941, he took and subscribed the oath required by section 15 of Chapter 87 to be taken and subscribed by every councillor, before voting or sitting at any meeting of the Council. At the trial of this petition, it was not disputed by the petitioner, and it was established to my satisfaction, that between the 14th July, 1941, and the 27th August, 1942, the respondent Mendonca had not ceased to be qualified to be elected a member of the New Amsterdam Town Council: during that period he was the chairman of the board of directors of M. De Mendonca and Company, Limited, a limited liability company, which was the proprietor of "household property" in the town of New Amsterdam, rated in the book of the Town Clerk at the value of \$1,000 or more, over and above the amount of any mortgage. However, the respondent Mendonca did not cease on the 27th August, 1942, to be qualified because on that day he had already acquired another qualification founded on his occupation of premises in the town the rental value whereof was not less than \$20 a month.

On the 1st May, 1942, the respondent Mendonca became a tenant of premises situate at lot 16, Main Street and paid therefor a monthly rent of \$20 until the 31st January, 1943, and of \$25 until the 31st March, 1943. On the 1st April, 1943, he became a tenant of premises situate at lot 11, Strand, and paid therefor a monthly rent of \$25 until the 31st August, 1943. On the 1st September, 1943, he became and still is a tenant of premises situate at lot 5, Coburg Street at a monthly rent of \$30. The respondent has, therefore, from the 1st May, 1942, up to the present time, occupied premises in the town the rental value whereof was not less than \$20 a month.

The respondent Mendonca was elected as a councillor prior to the 1st May, 1942, and he is still holding that office. Proviso (a) to section 12 of Chapter 87 has no application, and cannot be applied, to circumstances arising after a voter has been elected as a councillor, although, of course, it can be availed of for the purpose of questioning the qualification of a councillor by way of an election petition brought under section 67 of Chapter 87 within four days after the election.

It is therefore immaterial that the respondent Mendonca removed from lot 16, Main Street to lot 11, Strand on the 31st

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March, 1943; and from lot 11, Strand to lot 5, Coburg Street on the 31st August, 1943. It is also immaterial that on the 27th August, 1942 (on which date his qualification as chairman of M. De Mendonca and Company, Limited, ceased) he had not been residing at lot 16, Main Street for a period of 6 months; or that he did not reside at lot 11, Strand for a period of 6 months; or that at the time of the presentation of this petition (8th September, 1943) he had been residing at lot 5, Coburg Street for a period of only a week.

The qualification as a councillor by virtue of occupation of premises the rental value whereof was not less than \$20 a month was acquired by the respondent Mendonca, on the 1st May, 1942, it continued up to the date of the filing of this petition and it still exists. It is admitted by the petitioner that the respondent Mendonca was qualified up to the 27th August, 1942, and it therefore follows that the respondent Mendonca has not ceased to be qualified to be elected a member of the New Amsterdam Town Council, and that his seat has not thereby become vacant under the Town Councils (Membership and Dissolution) Ordinance, cap. 88.

I have already held that the respondent Mendonca has not become disqualified. The petition must therefore be dismissed with costs, and if necessary, I certify for counsel.

Petition dismissed.

Solicitors: *A.G. King*, for the petitioner;
J. Edward de Freitas, for the respondent Mendonca;
H. B. Fraser, for the respondent, the Town Clerk of New Amsterdam.

J. SALAMALAY v. C. B. DYAL.

JOSEPH SALAMALAY, Plaintiff,

v.

CECIL BISHUN DYAL, Defendant.

[1943. No. 381.—DEMERARA.]

BEFORE SIR JOHN VERITY, C.J.

1943. SEPTEMBER 27, 28, 29; NOVEMBER 16.

Principal and agent—Commission agency—Principal himself effects a sale—Agent entitled to commission—Where agreement between principal and agent expressly so provides.

Where a principal himself effects the sale of property which he has authorised a commission agent to sell on his behalf, the agent is entitled to commission where the agreement between the principal and the agent expressly so provides.

Action brought by Joseph Salamalay against Cecil Bishun Dyal by way of opposition to transport, to recover the sum of \$750. The facts appear from the judgment.

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

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

Cur. adv. vult.

VERITY, C.J.: In this case the plaintiff seeks to recover a sum by way of commission under an alleged contract of agency.

The plaintiff avers that a contract was entered into between the defendant and himself on 18th August, 1942, whereby the defendant authorised him to sell the Aruka Estates comprising 2,000 acres of land for the sum of \$40,000 of the currency of the United States of America, his remuneration being fixed at \$2,000. The agreement which was reduced to writing further provided that the time allowed for sale was up to and including the 30th September, 1942, and that in the event of the defendant himself transacting a sale prior to that date the plaintiff was to be remunerated at the rate 5% of the sale so made by the defendant.

The plaintiff had not effected a sale before the 30th September and on 30th October the defendant sold certain property described in the contract of sale as being known as the Aruka Estates for the sum of \$15,000. The property sold by the defendant did not comprise all the holdings of the defendant in that area there being excepted therefrom Pln. Wycaribbee stated to be about 725 acres in extent.

The plaintiff alleges that the original agreement of 18th August was renewed by the defendant on 19th October and the time extended to 30th November, 1942, with an undertaking to renew further to 31st December, 1942, if necessary. He claims that he is entitled under the renewed contract to 5% commission on the sum of \$15,000 received by the defendant.

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The defendant denies the renewal and further contends that in any event the property sold by him not being the full extent of the property covered by the agreement, the plaintiff is not entitled to any commission thereunder.

It will be convenient first to determine the facts in regard to the alleged renewal of the agreement. The plaintiff alleges that, having elicited certain enquiries from parties in the United States through Messrs. Foster and Company, commission agents, but the same not having been dealt within the time prescribed by the original agreement, the defendant met Mr. Foster and himself at Mr. Foster's office on 19th October and there the defendant agreed to extend the time of the agreement as now alleged. He was then acquainted with the identity of the prospective purchasers' representative in the Colony and the nature of the enquiries. In this the plaintiff is supported by Mr. Foster although the latter's recollection as to the details of this interview is by no means clear. The defendant denies that he agreed to extend the time and he alleges that in the first place he was informed of the name of the enquirer's representative and immediately stated that to proceed further with the matter would be useless as the person concerned had already seen and disapproved the property. He states that he therefore refused to extend the period of the agency. The defendant is not supported by the testimony of any other person in regard to his version of this interview and in coming to a conclusion as to what I should accept as the truth I can gain little assistance from the apparent credibility of the witnesses through any impression made upon my mind by their demeanour. It is however, difficult to see any reason why Mr. Foster, who appears to be a disinterested witness, should have chosen to falsify deliberately his account of the transaction and I do not think that his failure to recollect details of the interview suffices to explain the complete variance of his version from that of the defendant or to discredit his clear statement as to the upshot of the conversations. Consideration of the balance of probability, moreover, leads me to incline rather to the plaintiff's version than that of the defendant for it is difficult for me to believe that a man with Mr. Foster's business experience would have disclosed to the principal the name of the prospective purchaser after the expiration of the agency unless and until it had been renewed. It appears very much more likely that he would first have secured on the plaintiff's behalf a renewal of the contract and only then have made disclosure of the details of the enquiries, although I can readily believe that the defendant, as soon as he heard the name of the person concerned, realised that this line of enquiry would in all probability prove fruitless and may then and there have regretted his renewal of the plaintiff's agency on terms which were designed to secure to the plaintiff remuneration in any event. The defen-

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dant nevertheless proceeded forthwith to conclude his own contract of sale independently in the hope that he might thereafter evade payment of remuneration which he no doubt felt the plaintiff had done little or nothing to earn. This I believe did in fact happen and it remains to consider what are the rights of the plaintiff, if any, in the circumstances which then arose.

It is clear that the area of the property sold by the defendant to Dr. Wong differs materially from that described in general terms in the original agreement with the plaintiff and was substantially less than that covered by the agreement. It is also clear that in the more detailed description of the property supplied by the defendant himself in response to the enquiries put to him after the renewal of the agency there is also a substantial difference from the more general terms of the original agreement.

There can, I think, be no doubt that had the plaintiff succeeded in effecting a sale in accordance with the particulars last supplied by the defendant he would have been entitled to remuneration, provided that the other terms of the contract were complied with. It would appear to follow that had the defendant within the prescribed time himself effected a sale in accordance with those particulars the plaintiff would equally have been entitled to remuneration in the terms secondly provided in the agreement.

The question for consideration is how far does the difference, if any, between the property described in the agreement of 18th August as modified on 19th October and that described in the contract of sale to Dr. Wong, affect, if at all, the plaintiff's right to remuneration.

It will be convenient to set out the descriptions in so far as they can be gathered from the documents Exhibits A, B and K.

In Exhibit A., the original agreement between plaintiff and defendant, the property is described as—

“The Aruka estates . . . comprising 2,000 acres planted with Hevea rubber trees 11,000 more or less, also coffee, fruits, limes, etc., with the buildings and erections thereon save and except the saw-mill business”

In Exhibit B, the particulars disclosed by the defendant on 19th October, the property is described as “Aruka Estates” and as containing “total acreage in rubber 1,000 acres; 200 acres in “rubber and the rest in coffee, timber and fruit,” the number of rubber trees is given as “4,000 being tappable when cleaned and “another 1,500 can be tapped next year, at Hooboo Hill several young trees will be ready for tapping in about three years.”

In Exhibit K, the agreement for sale to Dr. Wong, the property is described as being known as—

“The Aruka Estates with all buildings and erections thereon . . . except Pln. Wycaribbee (which is about 725

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acres in area) and except the coffee machinery and sawmill building business and equipment on the Aruka Estates . . .”

From Exhibit F, the defendant's title to the property, it appears that he held an area of approximately 2,100 acres from which was excepted some 360 acres, leaving an actual holding of about 1,740 acres. From this he excepted a further 725 acres from his sale to Dr. Wong, thus transferring approximately 1,000 acres. In exhibit A the defendant appears to have given the gross total acreage of the Aruka Estates, approximately 2,000 acres alleged to bear 11,000 rubber trees and therein he appears to have included Pln. Wycaribbee and to have made mention of limes which, it appears, are planted in that part of the estates alone. In Exhibit B he reduced the acreage to 1,000 and the number of rubber trees to 5,500 capable of being tapped within 2 years and several young trees which would be ready for tapping a year later. He made here no mention of limes. He would appear, therefore, to have omitted from these particulars the area excepted from his own holdings which he had included in Exhibit A and to have omitted also 700 odd acres bearing limes. This would indicate that he had at that date intended to except Pln. Wycaribbee from the sale he then authorised the plaintiff: to effect. By Exhibit K he contracted to sell to Dr. Wong an area which amounts to approximately 1,000 acres and it appears from the evidence that the number of rubber trees amounted to no more than 7,000, a figure more nearly conforming to the particulars of the 19th October than that given in the agreement of 18th August.

From this somewhat tedious examination of the various descriptions of the property, all of which were furnished by the defendant himself, it is clear that he had mis-described the extent of the property and the number of rubber trees in Exhibit A and that although he would then appear to have contemplated the inclusion of Pln. Wycaribbee in the sale he had at the date of the renewal already determined to exclude it and did in fact exclude it from the particulars he then gave. I find therefore that during the continuance of the plaintiff's agency as extended on 19th October he transacted a sale of the property in respect of which he had authorised the plaintiff to sell and that the plaintiff is entitled to remuneration in accordance with the terms of his agency, that is to say, 5% of the purchase money. The defendant sold for \$15,000 and the plaintiff is entitled to recover the sum of \$750. Judgment will be ordered for the plaintiff for that sum together with his costs of suit.

Judgment for plaintiff.

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

EDITOR'S NOTE.—The defendant appealed to the West Indian Court of Appeal. On the 10th November, 1944, the appeal was allowed with costs.

REX v. DHANRAJ SINGH.

REX

v.

DHANRAJ SINGH.

[1943. No. 62.—BERBICE].

BEFORE DUKE, J., (Acting):

1943. DECEMBER 3.

Criminal law and procedure—Reservation of question of law—For consideration of West Indian Court of Appeal—Question must have arisen on the trial—Otherwise, it will not be reserved—Criminal Law (Procedure) Ordinance, Cap. 18. S. 174.

Under section 174 of the Criminal Law (Procedure) Ordinance Cap. 18, a question of law which did not arise on the trial will not be reserved for the consideration of the West Indian Court of Appeal.

MOTION by the accused Dhanraj Singh that certain questions of law be reserved for the consideration of the West Indian Court of Appeal.

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

S. E. Gomes, A.A.G., and *J. L. Wills*, for the Crown.

DUKE J. (Acting): This is a motion filed on behalf of the accused Dhanraj Singh, under the provisions of section 174 of the Criminal Law (Procedure) Ordinance, Chapter 18, for the reservation of certain questions of law which arose at the trial for murder, which took place on the 17th, 18th and 19th days of November, 1943, at the October 1943 Criminal Session of the Supreme Court for the County of Berbice.

On the 19th November, 1943, I reserved for the consideration of the West Indian Court of Appeal the following questions of law which arose at the trial:

- (a) whether I was right in directing the jury that there was no material upon which they could find that the accused acted in self-defence, and that they could not return a verdict of not guilty upon the indictment; and
- (b) whether I was right in directing the jury that there was no adequate material upon which they could find that there was, in law, such provocation as to justify the reduction of the crime from murder to manslaughter, that the circumstances deposed to by the witnesses for the Crown did not constitute such provocation, that the circumstances deposed to by and on behalf of the accused did not constitute such provocation, and that on the whole evidence there was no such provocation.

A copy of the case in which these questions of law were reserved was delivered to counsel for the accused Dhanraj Singh,

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on Sunday the 21st November, 1943, and this motion was filed on the 26th November, 1943.

As argued, the motion asks that a further point be reserved, and as I understand the argument, the question is as follows:

- (c) whether I was right in not directing the jury that, notwithstanding that the question was not raised at the trial by counsel for the accused, the crime of murder may be reduced to the offence of manslaughter even though there was no provocation, and that it was open to the jury to return a verdict of Not Guilty of Murder but Guilty of manslaughter if from the facts and circumstances of the case, the jury considered that to be a proper verdict.

In this case, the act of striking Eric Houston two swinging blows, in quick succession, with the back of the axe-head of a woodcutter's axe was not an unintentional act, and it did not arise as the result of some criminal negligence on the part of the accused: it was an intentional act. The death of Eric Houston was caused by that act.

I have reserved for the consideration of the West Indian Court of Appeal the questions as to self-defence and provocation which were raised by counsel at the trial. The question which counsel for the accused now proposes to have reserved, was not raised at the trial, and counsel for the applicant did not direct the attention of the Court on the hearing of this motion, to any legal principle, other than provocation, which would operate to reduce the crime of murder (when the act which caused death is admitted to be an intentional act) to the offence of manslaughter. I have already reserved the question of provocation, and it is not seriously denied that the act of the accused in striking Eric Houston was an intentional act, and not one caused by some criminal negligence on his part.

The motion is therefore refused.

Motion refused.

O. A. FERNANDES v. A. GUMBS & ANR.

OVID ALOYSIUS FERNANDES, Plaintiff,

v.

AURELIA GUMBS AND CHARLES RODRIGUES
NASCIMENTO, Defendants.

[1943. No. 153.—DEMERARA].

BEFORE DUKE, J. (Acting).

1943. DECEMBER 1, 2, 6, 7, 10, 13, 14, 15.

Specific performance—Contract of sale—Purchaser unable to pay purchase price in full—Decree refused.

Contract—Of sale of immovable property—Abandonment by purchaser—Offer by him to purchase property at a reduced figure—Vendor entitled to treat contract as at an end.

Contract—Of sale of immovable property—Small payment made by purchaser at time of contract on account of purchase price—Contract abandoned by purchaser—Treated by vendor as at an end—Refund of part payment of purchase price—Claim for—Not entertained—In any event, damages suffered by vendor to be deducted from amount paid by purchaser.

Specific performance will not be decreed at the instance of a purchaser where the evidence discloses that he will be unable to pay the purchase price in full.

Where a purchaser has abandoned his contract of sale, has informed the vendor and his agents on numerous occasions that he is financially unable to complete, and has made new offers to the vendor to purchase the property at a reduced figure, it is not necessary for the vendor, before he can treat the contract as being at an end, to give notice to the purchaser that if the contract was not completed within a reasonable time, the vendor would treat the contract as being at an end.

Cornwall v. Henson (1900) 2 Ch. 298, C. A., distinguished.

A. agreed to sell a piece of land to B. for the sum of \$3,000, and B. paid to him the sum of \$75 on account of the purchase price, at the time the contract was made. B. abandoned the contract. A. became entitled to treat the contract as being at an end, and he did so treat the contract.

Held (1) that A. was not bound to return to B. the sum of \$75.

Nadim Antar v. Valverde (1942) L. R. B. G. 442, and *Doobay v. Moulai* (1942) L. R. B. G. 411, applied.

(2) that in any event if the sum of \$75 were refundable, there would have to be deducted therefrom the losses and expenses which the vendor had suffered by reason of the purchaser's abandonment of the contract.

ACTION by the plaintiff Ovid Aloysius Fernandes against the defendants Aurelia Gumbs and Charles Rodrigues Nascimento claiming, as against the defendant Gumbs, specific performance of a contract of sale by the defendant Gumbs to the plaintiff of lot 198, Queenstown, Georgetown, and as against the defendant Nascimento, an injunction restraining him from causing the said property to be sold at execution. The defendant Gumbs counter-claimed for accounts, and for the delivery up to her of her grosse transport for Lot 198, Queenstown, Georgetown. The facts appear fully from the judgment.

S. I. Cyrus, for plaintiff.

S. L. van Batenburg-Stafford, K.C., for defendants.

Cur. adv. vult.

O. A. FERNANDES v. A. GUMBS & ANR.

DUKE, J. (Acting): In this action the plaintiff Ovid Aloysius Fernandes claims against the defendants Aurelia Gumbs and Charles Rodrigues Nascimento:

- (a) an order decreeing specific performance by the first named defendant of an agreement of sale made and entered into by and between the plaintiff and the first named defendant on the 19th day of May, 1942, at Georgetown, Demerara, in respect of the property situate at lot 198, Queenstown, Georgetown with all the buildings and erections thereon;
- (b) an order directing the first named defendant, and failing her the Registrar, to transport forthwith the said property to the plaintiff;
- (c) an order declaring that the first named defendant by her agent Mr. R. G. Sharples acted in collusion with the second named defendant in acquiring the rights of the mortgagee of the said property situate at lot 198, Queenstown, Georgetown, and in proceedings thereafter to foreclosure thereof and to sale at execution thereby creating a fraudulent preference in favour of the second named defendant as a purchaser of the said property subsequent to the said agreement of sale between the plaintiff and the first named defendant; and
- (d) an injunction restraining the sale at execution of the said property as advertised for sale in the *Official Gazette* doted the 8th day of May, 1943.

On the 19th May, 1942 the plaintiff agreed to purchase from the defendant Gumbs, and the defendant Gumbs agreed to sell to the plaintiff, lot 198, Queenstown for the sum of \$3,000. The agreement was in writing. The plaintiff paid the sum of \$75 on account of the purchase price, and one of the terms of the agreement was "transport to be completed in three months from date hereof." The defendant Nascimento claims that subsequent to the 1st December, 1942 he purchased the said property for the sum of \$3,000. The plaintiff is in possession of the grosse transport for lot 198 Queenstown belonging to the defendant Gumbs, and he refuses to deliver it up. On the 9th September, 1940 the defendant Gumbs mortgaged lot 198, Queenstown to the Hand-in-Hand Mutual Fire Insurance Company, Limited to secure repayment of the sum of \$1,200 with interest thereon at the rate of six per centum per annum. This mortgage was transferred to the defendant Nascimento on the 22nd April 1943. On that day there was default by the defendant Gumbs in the terms of the mortgage; she had not paid the first instalment of capital (\$300) which became due and payable on the 9th September 1942, and she had failed to pay a premium of fire insurance in respect of the mortgaged property. In consequence of such breaches, the mortgagee was entitled to foreclose the said mortgage and to recover the amount owing thereunder. Having acquired, by purchase, the rights of the mortgagee the defendant Nascimento issued a writ (No. 120 of 1943) *in rem* on the 22nd April, 1943, claiming to foreclose the said mortgage and bring the mortgaged property to sale at execution and recover and receive from the proceeds of such sale the amount then due, to wit, the sum of \$1,212.43 with further interest on the sum of \$1,200 at the rate of 6 per centum per annum from the 22nd April, 1943, to date of payment. The writ was returnable for Monday the 3rd May, 1943. A copy of the writ

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was duly served upon the property mortgaged, and on the day of such service, the 22nd April, 1943, the plaintiff had possession of the copy so served. The defendant Gumbs, or her representatives, could not honestly defend the action: the only defence was to pay up the mortgage debt with interest and costs. Judgment was given in favour of the defendant Nascimento on the 3rd May, 1943, for foreclosure and sale of the mortgaged property. The plaintiff Fernandes was present in Court when judgment was so given. The defendant Nascimento proceeded to execution, and on the 7th May, 1943, he caused lot 198 Queenstown to be taken in execution. The said property was advertised in the *Gazette* of the 8th, 15th and 22nd days of May, 1943, for sale at execution on the 25th May, 1943, at the instance of the holder of the mortgage. On the 25th May, 1943, the writ in this action was filed, that is to say, the writ was filed nine months after the time for completion of the agreement of the 19th May, 1942, had already expired. On the application of the plaintiff, an interim injunction was granted on the 25th May, 1943, to restrain the sale at execution which was then about to take place. On the 5th July, 1943, an interlocutory injunction was granted restraining the sale at execution until the hearing and determination of this action, and it was ordered that the plaintiff Fernandes do deposit within 3 days from the date of the order the sum of \$1,300 in the Registry of Court to abide the further order of the Court in this action. The money was not deposited within the time prescribed (although the order was made by consent), and on the 12th July, 1943, the time for making the deposit was extended to 7 days from the 12th July. The money was deposited on the 16th July, 1943. The plaintiff deposed in evidence that the sum of \$1,300 so deposited belonged to him, and he is corroborated by Mr. Herman Da Silva, agent of Mrs. M. F. Roza, the person from whom \$1,000, part of that money, was borrowed by the plaintiff: I accept that evidence.

The plaintiff's wife Muriel Fernandes, is a niece of the defendant Aurelia Gumbs. Miss Gumbs is a native of this Colony, she went to the United States of America where she remained for 30 years and became a naturalised American citizen. She returned to this Colony in 1935 with the intention of remaining in this Colony. She, however, did not like conditions here, and in 1940 she made up her mind that she would leave the Colony and would never return. In 1940 she was 60 years of age.

Miss Gumbs owned lot 198, Almond and Oronoque Streets, Queenstown, on which there were two cottages. The premises were appraised in the Town Books in the sum of \$2,350. She lived in Oronoque Street in the smaller or "back" cottage (which was built in 1937), and the larger, or front cottage (which is in Almond Street) was rented for \$18 a month.

About the month of June 1940 the plaintiff and his wife and

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children went to live in the “back” cottage with Miss Gumbs. On the 9th September, 1940, she executed the mortgage previously referred to, for the sum of \$1,200: she paid off an old mortgage of \$400, and expenditure amounting to about \$200 in respect of repairs to the back cottage. On the 10th September, 1940, she signed, and delivered to the plaintiff, an authority in the following terms:

I hereby authorise Mr. Ovid Fernandes during my absence from the Colony of British Guiana, to collect all rents payable by tenants of the Buildings on my property Lot 198, Almond & Oronoque Streets, Queenstown, Georgetown, pay all taxes and rates and insurance and any other expenses which may become due on the said property from time to time, effect all necessary repairs and generally supervise the property and to receive any Insurance Profit or Bonus that may accrue to me from the said property.

Miss Gumbs handed the plaintiff her grosse transport for the property, and also her will in a sealed envelope. She left the Colony for the United States of America in the month of September, 1940, shortly after the 10th September. Before leaving the Colony, she saw Mr. James Slater, the Secretary of the Hand-in-Hand Mutual Fire Insurance Company, Limited, and told him that the plaintiff was being left by her in charge of the property, and that he would pay the rates and taxes, fire insurance premiums, interest, etc., in respect of Lot 198, Queens-town.

Shortly after Miss Gumbs had left the Colony, the plaintiff, by moving the palings, reduced the quantity of land which was occupied by the tenant of the front cottage along with that house. The then tenant, Mr. M. S. Fitzpatrick, Solicitor, gave the plaintiff notice on the 30th September, 1940, that he would quit and deliver to him, as agent for Miss Gumbs, possession on the 1st November, 1940, of the premises which he then occupied as her tenant (Exhibit 2). The plaintiff stated that Mr. Fitzpatrick did not pay him the rent for the month of October, 1940. This is true, but the rent was remitted by Mrs. Fitzpatrick direct to the defendant Gumbs at her residence at 34, Buffalo Avenue, Brooklyn, New York, United States of America.

The front cottage was vacant during the month of November, 1940. It was let at \$18 a month to a new tenant and she remained as a tenant up to the 31st August, 1941. At the end of July, 1941, she gave the plaintiff notice to quit, and the plaintiff says that she did not pay him the rent for August, 1941.

A new tenant was secured for, the front cottage as from the 15th September, 1941, and he is still the tenant. He paid, and is paying, \$20 a month as rent.

The front cottage was therefore unoccupied for 1½ months—November, 1940, and the first half of September, 1941. The plaintiff did not receive rent for 2 months—October, 1940, and August, 1941, (I have, however, already pointed out that the rent for October, 1940, was paid direct to the defendant Gumbs).

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So that for a period of 3 years and 3 months, the plaintiff (it would appear) has received all the rents of the front cottage, save and except the rent for 3½ months.

The plaintiff pays no rent for the cottage occupied by him, and all that the owner of lot 198, Queenstown, has received from that property since she left for the United States of America in September, 1940, is the sum of \$18, the rent for October, 1940, which was remitted to her by Mrs. Fitzpatrick.

On the 6th December, 1943, the plaintiff produced a bundle of vouchers, which he alleged, related to his expenditure on Lot 198, Queenstown. Counsel for the plaintiff at the time informed the Court that a statement of receipts and expenditure would be presented to the Court, but although the trial continued on the 7th, 10th and 13th days of December, 1943, no such statement was produced. The following observations may, however, be made on the vouchers. Exhibits 55, 56 and 58 show that goods were taken on Credit from De Freitas, Limited, in the name of "Miss A. Gumbs, 198, Oronoque Street, Queenstown," as follows—on the 17th September, 1940, \$20.79, on the 17th September, 1940, \$5.87, and on the 24th September, 1940, \$2.54. Exhibits 16, 17, 18 and 19 show that the total amount (\$29.20) of the goods so taken was paid off as follows: on the 8th November, 1940, \$15, on the 18th April, 1941, \$5, on the 31st May, 1941, \$3.20, and on the 2nd August, 1941, \$6. The buildings on Lot 198, Queenstown, were insured against fire, on four insurance policies, for \$2,500, and the yearly premiums payable amounted to \$18.75. One policy No. C 7253 for \$500 was entitled to profit in 1941, one policy No. C 21624 for \$500 was entitled to profit in 1942, and the other policies, No. C 26025 for \$1,000 and No. C 17192 for \$500, were entitled to profit in 1943. (Exhibits 23 to 33). On the 19th May, 1942, when the agreement of sale, the subject matter of this action, was made, the following rates and taxes were due and unpaid:

Town Taxes.

1941. Second Moiety	...	...\$23 97
1942. First Moiety	...	...\$23 74

Special Rate.

1941. First Moiety	...	...\$22 91
1941. Second Moiety	...	...\$22 90
1942. First Moiety	...	...Amount not given in evidence.

The first moiety of the town taxes for 1940 was paid by the defendant Gumbs on the 6th July, 1940, (Exhibit 34), that is to say, before she left the colony. The vouchers produced do not show when the second moiety of town taxes for 1940 was paid neither do they show when the first moiety of the special improvement rate for 1940 was paid. Exhibit 36 shows that the second moiety of the special improvement rate for 1940 was paid on the 14th July, 1941, (\$23.02, and interest \$1.15). Exhibit

35 shows that on the 14th July, 1941, the sum of \$5, with 12 cents interest, was paid on account of the first moiety of town tax for 1941. The vouchers produced do not show whether the balance was paid before, or after, the 19th May, 1942, Exhibits 37, 38 and 39 show that mortgage interest was paid as follows: on the 8th March, 1941, \$36 to the 9th March, 1941, on the 9th September, 1941, \$36 to that date, and on the 9th March, 1942, \$36 to that date. The mortgage interest was, therefore, regularly paid up to the 19th May, 1942. It appears from Exhibit 13 that the interest due on the 9th September, 1942, and the 9th March, 1943, was also paid. The plaintiff has asserted that the property always owed him money; he may be correct, but the vouchers produced do not convince me that that is an accurate statement. I am, however, satisfied that the yield from lot 198, Queenstown was insufficient, (the plaintiff was living rent free in the "back" cottage which had its entrance in Oronoque Street) to enable the whole sum of \$300 to be repaid to the mortgagee on account of the mortgage capital on the 9th September, 1942, in accordance with the terms of the mortgage deed. The total of the rents receivable by the plaintiff from September, 1940, to September, 1942, was \$392—9 months at \$18, \$162; and 11½ months at \$20, \$230. The annual fire insurance paid was \$18.75; the mortgage interest paid was \$108; the plaintiff paid DeFreitas, Ltd. the sum of \$29.20 for goods supplied in September, 1940; he paid charges to the municipality of Georgetown the amount whereof cannot be presently ascertained; and he claims to have paid for other expenditure incurred in respect of lot 198, Queenstown.

On the 4th December, 1940, the plaintiff wrote to the defendant Gumbs a letter (Exhibit 60), in which he mentioned that his wife had written her a letter "explaining certain happenings". He indicated that Mrs. Fitzpatrick had not paid the rent for the month of October, 1940, and that she had told him that "she'll see that you (Miss Gumbs) get it even if she has to send it to you" (Miss Gumbs). He mentioned that the "back" cottage in which he was residing had been repaired by him at the cost of \$100. He suggested that if he were appointed the attorney of the defendant Gumbs he could raise money for the repair of the front cottage, and he stated that if nothing was done, it would be a liability. He continued: "I myself have cleaned the mango trees from the bird vine, night has caught me doing it, and you should see them now with the rain that has fallen. The present tenant (who went into possession on the 1st December, 1940) seems to have heard a lot but I don't intend that they should have anything without asking my permission. I have made that clear the coconut trees when cleaned (sic) that money will go for clearing yard, they don't have to do that."

On or about 12th July, 1941, the plaintiff sent the defendant

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Gumbs two forms of authorisation (Exhibit 71 and 71A), along with a British Postal Order (Exhibit 72) for four shillings payable at "BUFFALO, New York City" for return postage. The forms of authorisation were headed "34 Buffalo Avenue, New York City, New York, U.S.A." The first form was an authority to the plaintiff to be her agent to take proceedings for possession against a tenant; and the other forms was an authority to the plaintiff to be her agent to take out a warrant of distress against a tenant. Miss Gumbs returned the forms unsigned. Neither of the forms contained the name of the tenant. The British postal order was also returned. In Exhibit 3 the defendant Gumbs pointed out to the plaintiff that Brooklyn is different from New York City, that unless he put "Brooklyn" on any letter which he might write her, she could not get it, and that he must address all letters: "A. GUMBS, 34 BUFFALO Avenue, Brooklyn, N.Y., U.S.A."

On the 21st July, 1941, the defendant wrote to the plaintiff a letter (Exhibit 3). She stated that she didn't know that the front cottage was not habitable, and she suggested to him that he should do what everybody else does, that is to say, take a little credit at a time. With respect to the plaintiff's suggestion about a power of attorney, Miss Gumbs said: "I inquired about it, I cannot afford to get one. After finding out certain things, I have decided not to send any. I left you an Authorization, I cannot understand why it is not good." Miss Gumbs then made this unequivocal statement: "Before going any further, I would like to make this plain to you. You are under the impression that I am guided by Mr. Fitzpatrick and wife, I want it stopped. I have always pleased myself, always did my business to please myself, without having anyone to tell me what should do or not". Miss Gumbs said: "It will soon be one year since I am here. I have not earned one penny, I have my problems. I am only on the kindness of friends. I am doing all that I can to regain my health, and as to my feet, I cannot stand on them for any time and they must be better soon as I cannot continue like this all the time," and she ended up by saying: "If a guava or mango is more important than the rent, well that is up to you. During such times as these, when the demand for houses is so great in the West Indies and South America, I cannot understand how you find it so difficult to get 198, Oronoque Street rented."

In his letter (Exhibit 70) to the defendant Gumbs dated the 20th September, 1941, the plaintiff regretted that she did not sign the forms and that she had "no confidence" in him. He stated that he had shown Mr. Slater Miss Gumbs' letter of the 21st July, 1941, (Exhibit 3) and the forms (Exhibits 71 and 71A) which he had sent up; that, to put it mildly, Mr. Slater was surprised to see that she had not signed the forms; and that his remarks were "that if things were to go on without recovery the

position would be serious, in other words, if the plaintiff could not make the necessary payments when due, he (Mr. Slater) would have to take over the property. The plaintiff continued: "Now surely Auntie I suppose you won't like that to happen neither would I, while on the contrary if you have lost interest and don't care what happen (sic) to the place I'll try to carry on in this way, that is meeting obligations as best as I could." The plaintiff was here indicating to the defendant Gumbs that, after managing lot 198, Queenstown, for a year (and living rent free in one of the two buildings on the land), he found that the expenditure exceeded the income. He pointed out that he had lost rent for 2 months (meaning thereby the rent for October, 1940, and the rent for August, 1941,) and that the front cottage was untenanted for 1½ months (meaning thereby, November, 1940, and the first half of September, 1941). He ended up his letter thus; "Please excuse me in not asking you earlier in the letter about your feet, are they all right? I see winter will soon be with you. Please care yourself for our sake."

On the 10th December, 1941, the plaintiff wrote to the defendant Gumbs a letter (Exhibit 69). In that letter he does not enquire about her health. He said "I wrote you about 2 months ago, but up to time of writing there was no reply. Are you so very busy, well, if so, I would like to be in your shoe, because being busy there is sure to be money and that's what is needed." He continued: "I wrote explaining things to you and an answer would be greatly appreciated. It's not fair to me or to the children that people can move away without paying; rent and expenses must still be met. How can I be a success being handicapped in this way? With your co-operation lots of things could be done; without it we go backward. As I said before, the house must be looked after and I cannot get a couple of hundred dollars to do what's necessary without security and that's my appeal. Your advice is needed." The plaintiff was here making a thinly veiled suggestion to Miss Gumbs that she should transfer the property to him, as a gift. He ended up by making pointed allusions to the approach of Christmas.

On the 7th February, 1942, the plaintiff wrote a letter (Exhibit 59) to the defendant Gumbs in which the suggestion that he should acquire the property, without paying any money therefor to Miss Gumbs, was less thinly veiled. He stated: "We received Xmas card and thanks for same, but still waiting for your reply to my last letter. I wrote saying how I was left. I could make no move to collect rent that's owing. In letter before last you replied saying you didn't think decent people would do that, well there is a saying in B.G. all things are possible. The house is (sic) badly needed repairs, the entire roof is leaking and the side walls' seams start to open, how can I do it without money? I remember your saying you had carpenter in a couple

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of times to level house and stop it from sinking but it was always the same after, I had it done and up to now it is still O.K., but to do it cost money and in fairness to Dolly (that is, the plaintiff's wife) and the children, it's not right to starve ourselves to take money from my earnings to do the other house (meaning the front cottage where the plaintiff does not reside, when people goes (*sic*) away with rent. Insurance and interest for last year is all paid, but a part of taxes are (*sic*) still owing and interest will be due soon. As I mentioned before I told Mr. Slater the position and you know the answer he will have to take property over. I will be sorry if it happens after what I have done for the place. Why because you won't let us get together in the right way? Your last words to me were to carry on and I won't regret it. Well we never thought about doing repairs so fast, or people moving away owing us. I was hoping you would have seen the situation and have things fixed right so if any time you thought of coming you will be coming to a real home, the home you always wanted and something to be proud of. We make sacrifices, get things nice, something happens and we are left in the cold, worse off than before. I am nothing to you, Dolly and Kids are, but you often remarked that I was more like a son and Dolly has done more for you than your other family, instead of taking from you she gave, must it be always like that? In my case, I treated you like a mother, why? Because some day somebody may do the same for mine, which I'll be grateful for. I am sorry if this letter bores you but answering it will be greatly appreciated. Dolly is not very well now with all this worrying and no letter from you . . . P.S. Since writing this I saw Mr. Slater. He said, if it's agreeable to you, I can take the mortgage over and get everything going smooth. But remember Auntie, it will still be your home when you think of coming back."

Miss Gumbs naturally became alarmed. She communicated with Mr. Slater. On the 7th April, 1942, he wrote the plaintiff a memorandum (Exhibit 4) in the following terms: "I have a letter from Miss G(umbs). Come and see me when convenient."

The plaintiff went to see Mr. Slater who told him what Miss Gumbs had written. Mr. Slater sent to Miss Gumbs a form of authority for her to sign. The defendant Gumbs approved of what Mr. Slater proposed to have done, and she signed an Authorization in the presence of two witnesses whose signatures are probably known to many persons in this Colony, and the authorization was notarially executed before a notary for the county of New York. The authorization is dated the 17th April, 1942, it was executed on the 20th April, 1942, and it is in the following terms:

I authorise Mr. R. G. Sharples, Solicitor, Georgetown, British Guiana to sell and transport my property, Lot 198, Almond and Oronoque Street

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Queenstown, Georgetown, British Guiana, and deal with all matters therewith.

Mr. Slater received this authorisation (Exhibit 73) by Air Mail on Friday the 1st May, 1942. On Monday, the 4th May, 1942, Mr. Slater wrote to the plaintiff a memorandum (Exhibit 5) as follows: "I have heard again from Miss G(umbs), Come and see me as soon as you can." On the 4th May, 1942, the plaintiff went to see Mr. Slater who told him that Miss Gumbs was selling the property, that the selling price was \$3,000 and that as he was related by marriage to Miss Gumbs, he was offering the property first to him, before offering it to anybody else. The plaintiff indicated to Mr. Slater, that in order to effect a purchase of the property, he would require a mortgage for an amount in excess of the mortgage (which was for \$1,200) then existing on the property, and he asked Mr. Slater if the Hand-in-Hand Mutual Fire Insurance Coy., Ltd., would grant one, Mr. Slater, who is secretary of that company, told the plaintiff that as he was then acting for Miss Gumbs, in effecting a sale of her property, he preferred that the plaintiff should go somewhere else for such a mortgage.

On the 4th May, 1942, Mr. Slater handed to Mr. R. G. Sharples the authorization (Exhibit 73). On that very day Mr. Philip Gunning, Mr. Sharples' clerk, telephoned Mr. Slater, asking to be allowed the opportunity of making an offer for lot 198, Queens-town. Mr. Slater told Mr. Gunning that there was a difficulty in the way of giving him (Mr. Gunning) an opportunity to make an offer, and he would explain if he came to him. Mr. Gunning went to see Mr. Slater on the 5th May, 1942, when it was explained that the property was first offered to the plaintiff who was related by marriage to the vendor, and that Mr. Slater could not deal with him (Mr. Gunning) just then.

On the 9th May, 1942, the plaintiff told Mr. Slater that he would purchase the property for \$3,000. Either then or on some subsequent occasion, he told Mr. Slater that he could not then get a big enough mortgage. Mr. Slater saw Mr. R. G. Sharples later in the day, and he told him that he could give the plaintiff three months within which to complete the purchase. On the 9th May, 1942, Mr. Slater sent to the plaintiff the following memorandum (Exhibit 6): "Since seeing you this morning have arranged with Mr. R. G. Sharples, High Street, to receive the \$75 and give you receipt, etc. You will have to stand ½ transport fees and stamps, etc. on the sale. Mr. Sharples can tell you how much it will be. Have you got the Transport of the property? If so, take it to Mr. Sharples. You can see him Monday if you wish."

On the 19th May, 1942, the plaintiff went to the office of Mr. R. G. Sharples but he did not take the grosse transport with him. He paid Mr. Sharples the sum of \$75 on account of the sum of

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\$3,000 being the purchase price of lot 198, Queenstown, and he received the following receipt and signed the following memorandum of agreement (Exhibit 7):

Mr. Sharples' Office,
18, High Street, Georgetown,
19th May, 1942.

\$75.00

Received from Ovid Aloysius Fernandes, Esqr. of lot 198, Oronoque Street Georgetown, Electrical Engineer, the sum of Seventy-five dollars being on account of \$3,000.00 (three thousand dollars) the purchase price of "Lot number 198 (one hundred and ninety-eight) Queenstown, Georgetown, with all the buildings and erections thereon".

Balance of purchase price to be paid on the passing of Transport.

Rates and Taxes to be paid by Vendor up to the passing of Transport.

Transport expenses to be paid in equal shares by Vendor and Purchaser.

Transport to be completed in three months from date hereof.

Possession already given to Purchaser.

AMELIA GUMBS,
By her agent,
R. G. SHARPLES.

Agreed to
O. A. FERNANDES.

Witness:—

PHILIP F. GUNNING.

It will be observed that Mr. Gunning was a witness to the agreement, and that therefore on the 19th May, 1942, he had full knowledge of the agreement which, it will be seen, contained the term "Transport to be completed in three months from date hereof."

Not long after the 19th May, 1942, the plaintiff asked Mr. Slater to reduce the purchase price of Lot 198, Queenstown, from \$3,000 to \$2,500. Mr. Slater told him that he could not do that, and that he was not going to write to Miss Gumbs about it; but that the plaintiff, having married the niece of Miss Gumbs, could write, and that whatever Miss Gumbs said, would be done. After that, the plaintiff would go to Mr. Slater whenever the Air Mail came in to find out if he had heard from Miss Gumbs.

About the middle of July, 1942, the plaintiff went to Mr. R. G. Sharples. He told him that he was not in a position to complete the agreement of the 19th May, 1942, and that he could not get a mortgage. Mr. Sharples asked him how much he wanted a mortgage for. The plaintiff replied that he wanted a mortgage for \$3,000. Mr. Sharples pointed out to the plaintiff that the purchase price was \$3,000, and that he could hardly expect to get a mortgage for the same amount. The plaintiff told Mr. Sharples that the most he could get a mortgage for, was \$2,500. The plaintiff uttered an untruth as at that time he had not contacted any person who was willing to lend him the sum of \$2,500 on the security of a mortgage on Lot 198, Queenstown. The plaintiff suggested to Mr. Sharples that he should make a new agreement for \$2,500. Mr. Sharples refused to do so. The plaintiff then suggested to Mr. Sharples that he should pass transport in his favour, that he would pay \$2,500, and he would

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give a promissory note for the balance. Mr. Sharples told the plaintiff that he could not agree to that. The plaintiff then said that he didn't know what to do, and that he was not in a position to carry on any further with the contract of the 19th May, 1942.

Mr. Sharples then told the plaintiff that Miss Gumbs was his wife's aunt, and the most that he could do to help him was to write Miss Gumbs and see if she would agree to let the plaintiff have lot 198, Queenstown, for the sum of \$2,500. Mr. Sharples told the plaintiff that if he heard from Miss Gumbs and if she agreed, he would send and call the plaintiff, and that the plaintiff and Mr. Sharples could then enter upon a new contract.

Mr. Sharples then drew the attention of the plaintiff to the fact that there were rates and taxes outstanding against the property of which the plaintiff was collecting the rents, and he suggested to the plaintiff that he should pay the rates and taxes. The plaintiff thanked Mr. Sharples, and left.

In his evidence the plaintiff stated that on the 19th May, 1942, when he entered into the agreement of sale, he had the balance (\$2,925) of the purchase price available at the time. This statement is untrue. I do not believe the plaintiff when he says that at all material times, he had \$600 of his own money (not borrowed money) either in his house or in the keeping of a third party. The plaintiff had applied to Lopes' Pawnbrokery for a loan of \$2,500 on the security of a mortgage on lot 198, Queenstown, but the pawnbrokery told him that they would not lend more than \$2,000.

At the time of the making of the agreement of the 19th May, 1942, the plaintiff had asked Mr. Sharples what would be his share of the transport fees. Mr. Sharples told him that his half share would be \$42.36, but the plaintiff never returned to Mr. Sharples to arrange for the passing of transport, neither did he go to any other lawyer for the purpose. The plaintiff had possession of the grosse transport for the property.

On the 11th July, 1942, the plaintiff's wife wrote to Miss Gumbs a letter (Exhibit 61) telling her that the plaintiff had paid Mr. Sharples the sum of \$75 on the 19th May, 1942, to bind the bargain "to take over the property," that the plaintiff could not get a loan for the amount and that she decided to try herself and obtained two offers of a mortgage loan of \$2,000. She asked Miss Gumbs to accept the amount of \$2,000 and she, the plaintiff's wife, will pay all the rates and taxes. In the alternatives, she asked Miss Gumbs to state the least price that she will take, and to give instructions to Mr. Sharples to take a note for that portion of the purchase price which exceeded \$2,000 until the end of 1942. Mrs. Fernandes continued: "You see the valuation is \$2,300. I can't get more, unless the corner (front) house is done, no one will give me that or the value in the Town Books. I'd like to do the place. If you could let me

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or Mr. Sharples know as early as possible, I'd get in touch with him. I decided to try and see what I could do through the children. . ." This letter is relied upon by the plaintiff in paragraph 5 of the statement of claim as part of his case.

Towards the end of July or early in August, 1942, Mr. Sharples wrote a letter to the defendant Gumbs: he did not receive a reply to, or an acknowledgement of, that letter.

On the 15th September, 1942, the plaintiff wrote to the defendant Gumbs a letter (Exhibit No. 62) in the following terms:

I have been writing you very often. Dolly also have written to you, but we have no answering letters from you. This one I think should be answered because everything depends on it. You have decided to sell the property and a stated price was fixed. I decided to take for that but after making exhaustive enquiries no one would give me a mortgage on it. I went and told Sharples, he said he would write you and if you decided to let me have it, he would go ahead, but up to last week when I saw him no letter came from you. Mr. Slater knew that I intended to take over. Well, pending your decision taxes were due along with insurance. Sharples asked me to pay it which I did. The next thing more insurance due along with instalment and interest on mortgage. I went in to Mr. Slater about it, he decided to whole (*sic*) it over for a while and if nothing is heard will take the property over. It all boils down to this, both of us will lose and get nothing. What I have paid I can ill afford it to let it go that way. I am asking you to let me have the place for \$2,000. If you grant me this, you will be a couple of hundred dollars to the good. I am doing this not for myself but your grand (meaning the children of Miss Gumbs' niece), they are your flesh and blood. They are the ones that will benefit. Please write and let me know early.

That letter was not written by the plaintiff on the instructions of Mr. Slater, as is alleged by the plaintiff.

Lot 198, Queenstown, was advertised in the *Gazette* of the 28th September, 1942, and 5th October, 1942, for sale for nonpayment of the first moiety of the special improvement rate for 1941. Mr. Slater noticed the first advertisement, and he wrote to the plaintiff and to Mr. Sharples on the matter. On the 8th October, 1942, Mr. Slater, in order to frustrate the sale which was due to take place on the 13th October, 1942, went to the Town Hall and, out of his own moneys, paid the sum of \$29.42, being rate \$22.91, interest \$2.01, and costs \$4.50. Mr. Slater wrote to the plaintiff who refunded the amount, and Mr. Slater handed him the receipt, (Exhibit 14). Mr. Slater spoke to the plaintiff about the agreement of the 19th May, 1942, and the plaintiff told him that he couldn't manage it, and that he was unable to complete it.

After forwarding the authorization (Exhibit 73) in April, 1942, to Mr. Slater, the defendant Gumbs did not write Mr. Slater until she wrote him a letter enclosing the plaintiff's letter of the 15th September, 1942, (Exhibit 62). This was received by Mr. Slater in October, 1942.

The plaintiff had told Mr. Slater (as he had also told Mr. Sharples) that he was making a new offer of \$2,500 for lot 198, Queenstown, but he never told him that he was making an offer

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of \$2,000. The plaintiff, on his numerous visits to Mr. Slater, had always told him that he could not manage to complete his contract of the 19th May, 1942.

Mr. Slater became ill in the month of October, 1942, and was in hospital from the 27th October, 1942, to the 7th December, 1942.

On the 7th November, 1942, Mr. Sharples, not knowing at the time that the defendant Gumbs had written Mr. Slater forwarding plaintiff's letter to her of the 15th September, 1942, again wrote to her about the new offer of \$2,500 made by the plaintiff.

Between the middle of July, 1942, (when the plaintiff told Mr. Sharples that he was not in a position to complete, or to carry on any further with, the contract of the 19th May, 1942), and the 7th November, 1942, the plaintiff never indicated to Mr. Sharples that he was ready or willing to complete or perform the contract of the 19th May, 1942.

Towards the end of November, 1942, Mr. Sharples received a letter (Exhibit 63) from the defendant Gumbs, dated the 16th November, 1942. The letter was as follows:

I have to thank you for your letter of November 7th which is somewhat a surprise to me. I had received a latter from Mr. Fernandes not very long ago, offering me \$2,000 for the property and at the same time advising me to accept this as the only means of getting anything from the sale of the property.

I wrote Mr. Slater immediately enclosing Mr. Fernandes's letter via Air Mail which should have reached him before the 7th November, the date of your letter.

Mr. Sharples this matter is entirely in the hands of Mr. Slater and therefore I have nothing to do or say in the matter except sign all necessary documents as he may advise. I asked his help and he knows and understands my problems, and it is entirely up to him to advise you to accept or reject any offer received for the property.

I may mention that I have received about 4 letters from Mr. Fernandes, all of them remain unanswered, the last of them, as mentioned before, 1 enclosed in a letter to Mr. Slater of last month's (October) date.

I may here mention Sir, it is quite immaterial to me to whom the property may be sold. I am just interested in getting rid of it, and to have some peace of mind and not to be pestered by Mr. Fernandes.

Mr. Sharples went to see Mr. Slater in hospital in the month of November, 1942, and they discussed the sale of the property. On the 2nd December, 1942, Mr. Sharples, as agent of the defendant Gumbs, entered into an agreement to sell lot 198, Queenstown, to Mr. Philip Gunning for the sum of \$2,800. The sum of \$100 was paid on account of the purchase price. Out of that sum Mr. Sharples paid rates and taxes, interest and costs amounting to \$82.44 (Exhibits 64, 65 and 66) as follows:

TOWN TAX.	TAX	INTEREST	COSTS
2nd moiety for 1941	... \$23 97	\$2 07	\$4 50
1st moiety for 1942	... \$23 74	\$1 13	\$1 00
SPECIAL RATE	RATE	INTEREST	COSTS
2nd moiety for 1941	... \$22 90	\$1 63	\$1 50

It will be observed that proceedings had already been instituted for the recovery of the said rate and the said taxes by

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parate execution. Indeed, the property had been advertised in the *Gazette* on the 28th November, 1942, for sale on the 15th December, 1942.

On the 8th December, 1942, the plaintiff went to Mr. Sharples who showed him Miss Gumbs' letter of the 16th November, 1942 (Exhibit 63), and told him that he had resold lot 198, Queens-town to Mr. Gunning for the sum of \$2,800. It is not true, as alleged by the plaintiff, that Mr. Sharples told the plaintiff that he must make an offer in writing to Mr. Slater, or that he had merely received an offer from Mr. Gunning.

Mr. Gunning had been interested in lot 198, Queenstown, since the 4th May, 1942, but, as the plaintiff's wife was the niece of Miss Gumbs, Mr. Slater thought that the plaintiff should be allowed the first opportunity to purchase the property. In her letter of the 16th November, 1942, to Mr. Sharples, Miss Gumbs bluntly stated that it was quite immaterial to her to whom the property may be sold, and that she was getting rid of it in order that she might have some peace of mind, and in order that she might not be pestered by Mr. Fernandes. Had Mr. Sharples been previously aware of these views, he would not, in the middle of July, 1942, have undertaken to write to the defendant Gumbs neither would he have written her two letters in the interest of the plaintiff, the last one being as late as the 7th November, 1942.

On the 8th December, 1942, Mr. Sharples told the plaintiff that he could see Mr. Gunning to ascertain whether he would release his contract to him, but he pointed out to him that, even if Mr. Gunning so consented, the plaintiff would still have to satisfy him (Mr. Sharples) that he was in a position to purchase for the sum of \$2,800. At that time Mr. Sharples had not yet seen the letter of the 15th September, 1942, (Exhibit No. 62) which the plaintiff had written to Miss Gumbs. The plaintiff left Mr. Sharples' office, and went away.

The plaintiff returned on the same day to the office of Mr. R. G. Sharples. He said that he had brought the sum of \$500, and he asked Mr. Sharples to give him a receipt for \$500 on account of a sale to him for the sum of \$2,800, not on further account of the sale of the 19th May, 1942, for the sum of \$3,000. Mr. Sharples said that he couldn't do that, and he told him that he must first see Mr. Gunning before he could deal with him again. Mr. Sharples did not count the money, but I accept the plaintiff's evidence that he took with him the sum of \$500. The plaintiff did not mention the sale of the 19th May, 1942, for the sum of \$3,000. He said that he ought to have the preference with a sale for \$2,800. The plaintiff asked Mr. Sharples if Mr. Gunning was there. He was shown where he was. He went in that direction, and he afterwards cleared out of the office. Mr. Gunning refused to release to the plaintiff his

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agreement of the 2nd December, 1942, with respect to lot 198, Queenstown.

The plaintiff wrote Mr. Sharples a letter on the 8th December, 1942, (Exhibit 8) and signed it "Mrs. Muriel Fernandes." The letter is as follows:

Having heard that the property situated at 198, Oronoque and Almond Streets is for sale and the negotiated price is \$2,800, I beg to be given the first opportunity of purchasing same owing to being related to the owner Miss Gumbs and am asking you to be good enough to convey my offer to Mr. Slater.

On the 9th December, 1942, Mr. Gunning went to Mr. Sharples along with the defendant Nascimento. In consequence of what Mr. Gunning and Mr. Nascimento told Mr. Sharples, Mr. Sharples thereafter regarded the defendant Nascimento as the purchaser of Lot 198, Queenstown, Mr. Gunning having assigned to him the benefit of his purchase on the 2nd December, 1942, for the sum of \$2,800.

On the 17th December, 1942, the plaintiff went to see Mr. Slater at his residence. The plaintiff said that he had heard that an offer of \$2,800 had been made for Lot 198, Queenstown, and that he was prepared to pay that for it. Mr. Slater asked him how he could suddenly say that he could find the sum of \$2,800, when all along he had been saying that he could not complete his purchase. The plaintiff said that he had a friend who was helping him. Mr. Slater asked the plaintiff where the friend had been all along. The plaintiff did not reply. He did not mention the name of Mr. Gunning. The plaintiff had brought a letter dated 17th December, 1942, (Exhibit 9). After the plaintiff had left, Mr. Slater read the letter, which was as follows:

Mr. Sharples told me he has heard from Miss Gumbs' with regards to sale of property. On behalf of my wife who as you know is Miss Gumbs niece, I beg you to be good enough to give her the preference of buying property, which I heard that an offer has been made for \$2,800. I wrote Mr. Sharples on the 8th and was awaiting an answer from him but did not get any. So I called at his office to-day, and he told me to write you as your sanction is necessary. You may remember ray telling you that we have come to regard the place as home and would not like it to go out of the family and we would be very grateful if you would let us have it for above offer.

On the 18th December, 1942, Mr. Slater wrote a letter (Exhibit 10) to the plaintiff as follows:

I have received your letter of the 17th inst. I have not been out to business for the last 7 weeks and I do not know the position regarding the property. Mr. Sharples is selling the property to the best advantage as authorised by Miss Gumbs.

From the very outset, I took the responsibility of giving you the preference of purchasing the property and you have had a long time and every chance to take advantage of that preference but, unfortunately for you, you have not been able to take advantage of that preference and apparently you are not in a position do so now.

Miss Gumbs, as far as I am aware, has said nothing about giving you the preference, but she wishes the property sold to the best advantage which Mr. Sharples is endeavouring to do and under the circumstances, as you have not been able to arrange for the purchase yourself, I do not see that there is any other course left but for you to take your chance of purchase and be dealt with in the same manner as any other person.

I do not see that you can now expect any preference in the matter.

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Some time after the Xmas holidays, 1942, Mr. Sharples told the defendant Nascimento that Miss Gumbs was in the United States of America and was, as far as he could gather, having a very rough time, and that Lot 198, Queenstown represented her life savings. Mr. Sharples asked the defendant Nascimento whether, as an act of grace, he would not increase the purchase price from \$2,800 to \$3,000. Mr. Nascimento said that he would consider the matter, and some time after, he told Mr. Sharples that he would increase the purchase price from \$2,800 to \$3,000.

Mr. Slater was absent from Georgetown during the month of January, 1943. After his illness, he did not resume work at his office until the 1st February, 1943.

On the 3rd February, 1943, Mr. R. G. Sharples, as solicitor for the defendant Gumbs, wrote the plaintiff a letter (Exhibit 11) as follows:

RE PROPERTY: AMELIA GUMBS.

In connection with the above I have to inform you that I have seen Mr. Nascimento of Bartica pursuant to your request and have asked him whether he would be prepared to relinquish his rights under the agreement of purchase and sale dated the 2nd of December, 1912.

As you are aware and as I have repeatedly told you by reason of your default on the agreement into which you entered in the first instance with reference to the above property I have treated the said agreement as having been put an end to, and have actually forwarded to my principal Miss Gumbs, your subsequent alternative offer of \$2,500.00 (two thousand five-hundred dollars). In addition, I have shown you the correspondence which passed between myself and Miss Gumbs and which can leave no doubt whatever as to her attitude towards you.

When I received your disguised offer of \$2,800.00 of the 8th of December 1942, I had already closed with Mr. C. R. Nascimento for the said sum of \$2,800.00.

In view of Mr. Nascimento's present attitude which is that he intends to insist upon the implementation of his agreement of the 2nd December, 1942, and that he is entirely unwilling to transfer his rights thereunder to you it would serve no useful purpose for me to have any further negotiations with you on this subject.

With reference to the \$75.00 paid in by you as earnest money under your agreement of the 19th May, 1942, as I have told you before, this sum will not be refunded as there was a clear breach of contract on your part, and which said breach was admitted by you.

I would suggest therefore that you should commence at once to seek accommodation somewhere else as Mr. Nascimento has told me that he desires vacant possession of the premises as early as possible. I would urge you to accept this intimation in all seriousness as disregard on your part may lead to a good deal of unpleasantness which I would endeavour to avoid if I were in your position.

During the first week of February, 1943, Mr. Sharples and the defendant Nascimento went to see Mr. Slater. Mr. Slater approved of the sale of Lot 198, Queenstown, to the defendant Nascimento, for the sum of \$3,000.

On the 6th February, 1943, Mr. L. M. F. Cabral, barrister-at-law, wrote Mr. Sharples a letter (Exhibit 67) telling him that he had been consulted by the plaintiff with reference to the selling of Lot 198, Queenstown, by Mr. Sharples as agent for Miss Gumbs; and asking that Mr. Sharples, Mr. C. R. Nascimento and Mr.

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Slater should proceed no further with the transactions referred to by Mr. Sharples in his letter of the 3rd February, 1943, whether by seeking to pass transport or to obtain possession, for a period of six weeks from the 6th February, 1943.

Mr. R. G. Sharples prepared a power of attorney to be executed by the defendant Gumbs before the British Consul in New York City. This power (Exhibit 74) was so executed on the 25th February, 1943, and it conferred the following powers upon Mr. Richard Gui Sharples, the attorney of Miss Gumbs:

1. To enter into, sign and execute on my behalf all contracts of sale in respect of any property both movable and immovable belonging to me in the said Colony;
2. To advertise and pass all or any transport or transports, conveyance or conveyances for and on my behalf in respect of such property aforesaid; to appear before any Judge or Judges of the Supreme Court of British Guiana and/or the Registrar of the Supreme Court or the Registrar of Deeds of British Guiana and then and there to sign and execute any such transport or conveyance on my behalf;
3. To give and grant to any purchaser or purchasers of such property good and sufficient receipts, releases and discharges for any money received by my attorney on my behalf;
4. To take proceedings in my name and on my behalf before any Court in the Colony of British Guiana for the recovery of possession and to take such proceedings with or without a claim or claims for mesne profits;
5. To account and call to account any person or persons in respect of income derived from any such property and to bring any action or suit in any Court in the said Colony for the purpose of compelling such person or persons; and also to defend any action or suit which may be brought against me in respect of or in connection with such property or otherwise;
6. In my name and on my behalf to sue any person or persons in the said Colony for any indebtedness due by him or them to me;
7. To pay out of any moneys received by him my said attorney all and every debt lawfully due by me to any person or persons in the said Colony of British Guiana.

In her letter dated 25th February, 1943, (Exhibit 77) forwarding to Mr. R. G. Sharples the executed power of attorney, Miss Gumbs enclosed five letters written by the plaintiff and his wife to her (Exhibits 59, 60, 61, 69 and 70). She ended up her letter by stating: "I have read copy of Mr. Cabral's letter to you on behalf of Mr. Fernandes. Regret very much that Mr. Fernandes is trying to put us to some trouble. Am quite sure he has no known legal claim to my property."

Mr. Slater wrote to the plaintiff asking him to deliver up the grosse transport of the defendant Gumbs for Lot 198, Queenstown. The plaintiff told Mr. Slater that he was not going to give up the grosse transport as the property was his. Mr. Slater told the plaintiff that he was very stupid.

On the 9th March, 1943, the power of attorney of the 25th February, 1943, was registered in the Deeds Registry.

On the 9th March, 1943, Mr. R. G. Sharples, as attorney of the defendant Gumbs wrote the plaintiff a letter (Exhibit 12) demanding the delivery of the grosse transport which he has in his possession relating to her property at Lot 198, Queenstown.

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The plaintiff refuses to deliver up the grosse, and he has not even produced it in evidence in this Court. Under the power of attorney Mr. R. G. Sharples was not empowered to sue for delivery of the grosse transport, and transport could not be advertised in favour of the defendant Nascimento unless the grosse was produced to the Registrar of Deeds.

In April, 1943, application was made to the Hand-in-Hand Mutual Fire Insurance Company, Limited, to transfer the mortgage of the 9th September, 1940, to the defendant Nascimento. This application was approved by the directors (Exhibit 76).

On the 22nd April, 1943, an agreement (Exhibit 75) was entered into between the defendant Gumbs by her attorney Mr. R. G. Sharples, as vendor, and the defendant Nascimento as purchaser. The object of this agreement was to provide that Miss Gumbs should obtain the full purchase price, \$3,000 in the event of Lot 198, Queenstown, being sold at execution at the instance of the defendant Nascimento as the holder of the mortgage. The recitals were as follows:

- (1) there exists between the vendor and the purchaser an agreement of sale dated the 2nd day of December, 1942, in respect of lot 198, Oronoque Street, Queenstown, Georgetown, with the buildings and erections thereon;
- (2) the purchaser has already paid and advanced the sum of \$342.91 on account of the purchase price;
- (3) the vendor is experiencing some difficulty in completing the same by reason of the occupation of the said lot 198, Oronoque Street, by one Ovid Fernandes and/or his wife Muriel Fernandes;
- (4) the said Ovid Fernandes and Muriel Fernandes are also in possession of the grosse transport for the said lot 198, Oronoque Street, and have refused and/or neglected to surrender the same to the vendor's attorney;
- (5) by reason of the circumstances there is likely to be great delay in implementing the same aforesaid;
- (6) there exists a First Mortgage on the said property created by the vendor numbered 264 of the 9th September, 1940, in favour of The Hand-in-Hand Mutual Fire Insurance Company, Limited; and
- (7) the parties hereto are willing to avoid such delay by means of this agreement.

The operative part of the agreement is as follows:—

1. The parties agree that the purchaser shall be at liberty notwithstanding anything contained in the said agreement to pay to the Hand-in-Hand Mutual Fire Insurance Company, Limited aforesaid the amount presently due upon the said Mortgage and to take a transfer and/or assignment thereof in his own favour, such payment to be deemed as having been paid by the purchaser further on account of the purchase price agreed upon as aforesaid.
2. The Purchaser agrees on obtaining such transfer of the said Mortgage as therein provided for to proceed forthwith against the said property by foreclosure and to bring the same to sale at execution.
3. On the said property being brought to execution sale the purchaser undertakes and agrees that in the event of his becoming the purchaser thereof he will pay such sum to the vendor as may be necessary to make up the total sum to be received by the vendor in respect of the said property to the sum of \$3,000.00 (three thousand dollars) taking into account however all sums paid the vendor on account of the purchase price agreed on and the costs and expenses of such foreclosure and execution and all monies paid by the pur-

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chaser at execution sale over and above such amount shall be refunded by the vendor to him on the same being uplifted from the Registry by the vendor.

4. The vendor agrees to refrain from competing with the purchaser at such sale at execution.
5. In the event of the property being sold at execution to some person other than the purchaser at a figure that exceeds \$3,000.00 and the costs incurred in foreclosure and triumphant in execution the purchaser shall be entitled to receive from the vendor all moneys arising from the sale less the balance of the said purchase price of \$3,000.00 (three thousand dollars) which may then be due by the purchaser to the vendor taking into account the sums mentioned in paragraph 3 thereof.
6. In the event of any dispute arising between the parties hereto in relation to this contract the parties agree to refer the same to James Slater, Esquire, as arbitrator whose decision shall be conclusive and binding upon both parties hereto.

On the 22nd April, 1943, the mortgage No. 264 of the 9th September, 1940, was transferred by the Hand-in-Hand Mutual Fire Insurance Company, Limited, to the defendant Nascimento.

The plaintiff, from the 19th May, 1942, to the 2nd December, 1942, was unable to raise the sum of \$3,000 to pay for lot 198, Queenstown, in terms of the contract of sale of the 19th May, 1942. He said in his evidence that the said sum is now available to him. The contract was to have been completed on the 19th August, 1942, and if specific performance were ordered, the decree would be made upon terms, and one of the terms would be that the plaintiff would have to pay interest at the rate of 6 per centum per annum upon the purchase price (\$3,000) from the 19th August, 1942, up to the date of the passing of the transport in favour of the plaintiff (say, the 19th January, 1944). This interest would amount to the sum of \$255. The plaintiff says that some one (he has not called that person as a witness, he has not produced a receipt from that person, and he has not mentioned the name of that person) has the sum of \$600 in keeping for him. But, even if that be so, I am not satisfied that the plaintiff is able, at the present time, to pay for the property. The following particulars will show the position;

Balance of purchase price	...\$ 2,925
Half transport fees	... 42
Interest	... 255
Legal expenses of mortgage	... <u> ?</u>
	<u>\$ 3,222</u>
Amount of promised mortgage	...\$ 2,500
Money alleged to be in the keeping of some one for the plaintiff	<u>600</u>
	\$ <u>3,100</u>

On this ground alone, even if there were no other grounds, it would be impossible for the Court to decree specific performance.

Counsel has submitted that inasmuch as on or before the 2nd December, 1942, there was no power of attorney by Amelia

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Gumbs on record, or registered, in the Deeds Registry, the defendant Gumbs cannot be heard to say that on the 2nd December, 1942, she considered the contract of the 19th May, 1942, as being at an end. The authorization of the 17th April, 1942, was notarially executed in the county and state of New York, and if the plaintiff had shown that he was ready or willing, instead of showing that he was neither ready nor willing, to complete his contract of the 19th May, 1942, it would have been an easy matter for Mr. Sharples to return the authorization to the defendant Gumbs in Brooklyn in order that she might get the signature of the notary authenticated by the British Consul in New York City; or the Registrar of Deeds might have been disposed to register it on proof being given by affidavit of the signatures of the defendant Gumbs and of one or more of the attesting witnesses. There is neither merit nor substance in this submission.

Counsel for the plaintiff has submitted that on the authority of *Cornwall v. Henson* (1900) 2 Ch. 298, C. A., the contract of the 19th May, 1942, was still subsisting on the 2nd December, 1942, inasmuch as the defendant Gumbs did not give notice to the plaintiff that if the contract was not completed within a reasonable time, she would treat the contract as being at an end. In this case, however, the plaintiff was totally unable to perform and complete his contract, he himself abandoned it, and he was doing his best to induce the defendant Gumbs, either directly or through her agents, Mr. Sharples and Mr. Slater, to make a new contract of sale either for \$2,000 or for \$2,500. Between the 19th May, 1942, and the 2nd December, 1942, the plaintiff never at any time adopted the attitude that he would complete the contract of the 19th May, 1942, for \$3,000 if the defendant Gumbs refused to let him have it for less. The position was that he could not complete the contract of the 19th May, 1942, and he was beseeching the defendant Gumbs to make a new contract for less. I therefore hold that it was not necessary for the defendant Gumbs to give notice that if the contract was not completed within a reasonable time, she would treat the contract as being at an end.

I am of the opinion that on the 2nd day of December, 1942, the defendant Gumbs was entitled to treat the contract of sale of the 19th May, 1942, (whereby the defendant Gumbs agreed to sell to the plaintiff Fernandes lot 198, Queenstown for the sum of \$3,000) as being at an end, because:

- (1) one of the terms of that contract was that transport was to be completed, and purchase price paid, in three months from the 19th May, 1942;
- (2) in the middle of July, 1942, before the said period of three months had expired, the plaintiff, as was the fact, informed the defendant Gumbs through her

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agent Mr. Sharples, that he was not in a position to complete his agreement, or to carry on any further with it, and he made a new offer of \$2,500;

- (3) although on that occasion Mr. Sharples did promise that he would write to the defendant Gumbs and see whether she would agree to let the plaintiff have the property for the sum of \$2,500 (the figure which he said he could raise), Mr. Sharples indicated to the plaintiff that if the defendant Gumbs so agreed, the plaintiff could then enter into a new contract for \$2,500;
- (4) subsequent thereto, the plaintiff never at any time told Mr. Sharples nor indicated to him that he was ready or willing to carry out and complete his contract of the 19th May, 1942, for the sum of \$3,000;
- (5) on numerous occasions between the 19th May, 1942, and the 2nd December, 1942, the plaintiff told the defendant Gumbs through her agent Mr. Slater that he was unable, and could not manage, to complete his contract of the 19th May, 1942, and during that period he never told Mr. Slater that he was ready or able to complete his contract of the 19th May, 1942, for the sum of \$3,000;
- (6) on the 11th July, 1942, the plaintiff's wife wrote a letter to the defendant Gumbs (and this letter is relied upon by the plaintiff in paragraph 5 of his statement of claim) informing Miss Gumbs that neither the plaintiff's wife nor the plaintiff had been able to get a mortgage loan for more than \$2,000, and asking her to accept that sum as the purchase price, or in the alternative, to let Mr. Sharples know the least sum that she (Miss Gumbs) would take, and to give him instructions to accept a promissory note until the end of 1942 for that portion of the purchase price which was in excess of \$2,000;
- (7) on the 15th September, 1942, the plaintiff wrote a letter to the defendant Gumbs in which he stated that he could not get a mortgage, and in which he asked Miss Gumbs to let him have lot 198, Queens-town, for the price of \$2,000;
- (8) by his evidence the plaintiff showed (until corrected by his counsel) that he considered the contract of the 19th May, 1942, as being a mere offer.

The defendant Gumbs, acting in the exercise of her rights, by her agent Mr. R. G. Sharples, solicitor, did in fact on the 2nd December, 1942, treat the contract of the 19th May, 1942, as being at an end, And when Mr. Sharples so acted, he was merely acting as Miss Gumbs would have acted if she were present in this Colony (see Exhibit 63 dated the 16th November, 1942, and

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received by Mr. Sharples from Miss Gumbs before the end of November, 1942, and also Exhibit 77 dated 25th February, 1943, written by Miss Gumbs to Mr. Sharples).

There is no subsisting contract of sale between the plaintiff and the defendant Gumbs, the contract of sale of the 19th May, 1942, is at an end, there has been no subsequent contract between the plaintiff and the defendant Gumbs for the sale to the plaintiff of lot 198, Queenstown, Georgetown, and the defendant Gumbs can dispose, as she thinks best, of her property lot 198, Queenstown, without being subjected to interference from the plaintiff.

Counsel for the plaintiff has submitted that if the plaintiff is not entitled to a decree of specific performance, he is nevertheless entitled to damages. The defendant Gumbs has not broken her contract, and so she is not liable in damages to the plaintiff. Counsel for the plaintiff has further submitted that the sum of \$75 which was paid by the plaintiff on the 19th May, 1942, on account of the purchase price of \$3,000 under the contract of sale made that day, should be refunded to the plaintiff. On the authority of the judgement of the West Indian Court of Appeal in *Nadim Antar v. Valverde* (1942) L.R.B.G. 442, and of the judgment of the Full Court in *Doobay v. Moulai* (1942) L.R.B.G. 411, I hold that the defendant Gumbs is not bound, in law, to return to the plaintiff the said sum of \$75. In any event, if I had held the amount to be refundable, I would have had to order an account to be taken of the losses and expenses which the defendant Gumbs has suffered by reason of the abandonment by the plaintiff of the contract, and such losses and expenses might not have been less than the sum of \$75.

There will therefore be judgment on the plaintiff's claim, for the defendants with costs, and the interlocutory injunction granted on the 5th July, 1943, will be discharged.

The defendant Gumbs has filed a counterclaim in which she claims:

- (a) a just and true account of the rents received by the plaintiff on her behalf and a just and true account of her dealings and intromissions therewith;
- (b) payment of the sum found due to her on such account; and
- (c) delivery of the first named defendant's grosse transport.

The plaintiff has not rendered any account, and he has declined to take the opportunity of giving an account while giving evidence in these proceedings. There is no subsisting contract of sale between the plaintiff and the defendant Gumbs, and there is no justification or excuse for the detention of the grosse transport in favour of the defendant Gumbs for lot 198 Queenstown. There will therefore be judgment on the counterclaim in favour of the defendant Gumbs against the plaintiff with costs and I certify for counsel.

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The sum of \$1,300 was paid into Court on the 16th July, 1943, in obedience to the order of Court made on the 12th July, 1943, This money belongs to the plaintiff. The Registrar is directed to pay to the solicitor for the defendant Gumbs, out of the said sum of \$1,300, the taxed costs of the defendant Gumbs; and he is directed to pay to the solicitor for the defendant Nascimento, out of the said sum of \$1,300, the taxed costs of the defendant Nascimento. The balance, if any, will be paid out to the plaintiff or to his order.

Miss Aurelia Gumbs made her will in September, 1940 shortly before she left this Colony for Brooklyn, N.Y. United States of America. That will was handed by her to the plaintiff in a sealed envelope. Counsel for the plaintiff stated in Court while Mr. R. G. Sharples, solicitor, was being cross-examined by him, that he had taken the liberty of breaking seal and of reading the will. Miss Gumbs is still alive. Counsel stated that Mr. James Slater was a witness to the will, that the plaintiff was appointed executor, that the plaintiff's wife was bequeathed the south half of lot 198, Queens-town (on which the smaller cottage is situate), and that she was appointed residuary legatee. As soon as Miss Gumbs had left this Colony, the plaintiff appropriated to himself the south half of lot 198, Queenstown, and, in so doing, he took away from the larger cottage some land which was formerly annexed to it. In so doing, he annoyed Mr. and Mrs. M. S. Fitzpatrick, the then tenants, who removed. The cottage was not tenanted during November, 1940, and the Fitzpatricks refused to pay him the rent for October, 1940, but remitted it direct to Miss Gumbs. By his letters of the 10th December, 1941 and the 7th February, 1942, to Miss Gumbs he made it appear to her (1) that he was, only interested in her health in so far as her good health would enable her to work and thus earn money for his family (counsel for the plaintiff says that the plaintiff's wife is the residuary legatee); (2) that he was not prepared to wait for her death when his wife would get a half of lot 198, Queenstown, but he wanted Miss Gumbs to make an immediate gift to him of the whole lot. Miss Gumbs was justly hurt and annoyed, and decided to sell the property. Mr. Slater, who did not then know of the contents of the above letters, gave the plaintiff the first opportunity to acquire the property. Unfortunately for the plaintiff, at all material times he could not raise the money to effect the purchase, but he has only himself to thank and to blame, for if he had not written the letters above referred to, Miss Gumbs may never have decided to sell the property. Mr. R. G. Sharples was kind enough to write, in the interests of the plaintiff, a letter to Miss Gumbs on the 7th November, 1942, asking whether she could not see her way to sell lot 198, Queenstown to the plaintiff for the sum of \$2,500, but when, towards the end of November, 1942, he received a letter from Miss Gumbs dated the 16th Nov-

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ember, 1942, in which she stated "it is quite immaterial to me to whom the property may be sold. I am just interested in getting rid of it and to have some peace of mind and not to be pestered by Mr. Fernandes", he realised that Miss Gumbs had definitely formed an unfavourable opinion of the plaintiff, and that it was the desire of Miss Gumbs that no preference or special consideration should be given to the plaintiff in respect of the sale of the property. The plaintiff cannot justly blame Mr. Sharples because he resold the property to Mr. Gunning or to Mr. Nascimento. The sale to Mr. Nascimento was approved by Mr. Slater, and Miss Gumbs, the owner of lot 198, Queenstown, wrote Mr. Sharples on the 16th November, 1942, that "it is entirely up to him to advise you to accept or reject any offer received for the property."

Judgment for defendants on claim; judgment for defendant Gumbs on counter-claim.

Solicitors: *H. A. Bruton*, for plaintiff;
M. S. Fitzpatrick, for defendant Gumbs;
H. V. van B. Gunning, for defendant Nascimento.

EDITOR'S NOTE.—The plaintiff appealed to the West Indian Court of Appeal. On the 10th October, 1944, the appeal was dismissed with costs.

CHARLES LACHMANSINGH, Appellant (Defendant),
 v.
 LLOYD PETERS, P.C. No. 4711, Respondent (Complainant).

[1943. No. 249.—DEMERARA].

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

1943. OCTOBER 1; DECEMBER 17.

Criminal law and procedure—Receiving stolen property—Identity of stolen property—Identified at police station by owner before trial—Property identified found in possession of accused—Admission by accused—Allegation that property produced by police at trial was not property so identified—Immaterial.

Criminal law and procedure—Larceny charged—Case for prosecution closed—Defence to larceny called for—Slip made by magistrate—Case for defence closed—Magistrate immediately thereafter calls for defence to charge of receiving as indorsed by him on complaint—Defendant applies for adjournment—Granted—No defence led—Defendant convicted of receiving—Conviction upheld—Criminal Justice Ordinance, 1932 (No. 21).

Syringes were stolen from Brodie & Rainer, Limited. The appellant subsequently received some syringes from a messenger in the employment of that firm; the messenger informed him that he had "got them from the back store." Certain syringes were subsequently removed by the Police from the premises of the appellant and were taken to the Market Police Station: the appellant admitted that these were the syringes which he had received from the messenger. These syringes were identified by a representative of Brodie & Rainer, Limited, as being those which had been stolen.

At the trial of the appellant, the police produced syringes which they alleged were those taken from the appellant, but the company's representative, upon inspecting the exhibits, stated that they were not those stolen

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from the company, neither were they the syringes which were shown to him at the Market Police Station. The magistrate accepted the police evidence that the syringes produced in Court were the same as those identified at the Market Police Station as the property of Brodie & Rainer, Ltd., and he added "In any case I found that the defendant had admitted receiving the syringes which were present at the Market Police Station when he made his statement (to the Police), and I held that even if there was a substitution of the syringes after the police inquiries, the defendant could still be convicted."

Held, that in arriving at this conclusion the magistrate was right, for if he was satisfied that the syringes taken from the appellant by the police were rightly identified by the company's representative as those stolen from the company, then he could come to no other conclusion but that the appellant had received the stolen goods, and no subsequent substitution of other exhibits (if any substitution were in fact made, which the magistrate did not believe) could in any way affect those facts.

The appellant and two others were charged with stealing four syringes, the property of Brodie & Rainer, Ltd. The appellant was the third named defendant. In his reasons for decision the magistrate stated: "At the close of the case for the prosecution, I called on the defendants Alleyne, King and Lachmansingh in their respective order for a defence. I simply called each defendant's name and said 'defence', Counsel for each defendant in turn said that he did not propose to lead a defence. There and then I immediately informed Mr. C. L. Luckhoo for the defendant Lachmansingh that I made a *lapsus* in calling upon the defendants rapidly one after the other, and that as regards the defendant Lachmansingh, I intended to call on him for a defence to receiving the syringes knowing them to be stolen. Mr. Luckhoo, whilst admitting that I immediately corrected myself, claimed that as I had merely said 'defence' and that the charge was for larceny I could not correct myself because he had already said he was leading no defence. I rejected that contention and indorsed on the complaint the charge I considered established by the evidence and adjourned the proceedings from the 8th June 1943, to 11th June, 1943. The defendant led no defence to the charge of receiving on the latter day". The appellant was convicted of receiving stolen property knowing it to have been stolen. In his grounds of appeal the appellant stated that "the decision of the magistrate was erroneous in point of law because the magistrate erred in calling upon the appellant for a defence to the charge of receiving the syringes knowing them to be stolen after the case of the appellant had been closed; and the magistrate adopted a procedure which was not provided for by the Criminal Justice Ordinance 1932". On the 8th June, 1943, Mr. C. L. Luckhoo had asked for an adjournment to consider whether he would lead any defence to the substituted charge of receiving stolen property.

Held, that while it was true that the magistrate made a slip in procedure it was clear that he immediately corrected this slip; and that the appellant not only was afforded, but in fact adopted the means prescribed by the statute for securing him against surprise or embarrassment.

APPEAL by the defendant Charles Lachmansingh from a decision of the Magistrate of the Georgetown Judicial District convicting him of receiving three syringes, the property of Brodie & Rainer, Limited, knowing the same to have been stolen.

C. Lloyd Luckhoo, for the appellant.

S. E. Gomes, A. A. G., 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 for receiving stolen goods knowing them to have been stolen.

The main grounds of appeal are that there is no proof that

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the goods, the subject of the charge, were the property of the firm from whom they are alleged to have been stolen and that the learned Magistrate erred in procedure in that he called upon the appellant for a defence to a charge of receiving after the appellants case in answer to the charge of larceny originally laid had been closed.

In regard to the first of these grounds, it appears that certain syringes were stolen from Messrs. Brodie & Rainer, Limited, and the appellant subsequently received certain syringes from a messenger in the employment of that firm who informed him that he had "got them from the back store." The syringes were subsequently seized by the police and identified by a representative of the firm as those which had been stolen. At the trial the police produced syringes which they alleged were those taken from the appellant but the firm's representative upon inspecting the exhibits stated that they were not those stolen from the firm nor were they those shown him at the police station. The learned Magistrate in his reasons for his decision states that he accepted the police evidence that the syringes produced in Court were the same as those identified at the station, as the property of Messrs. Brodie & Rainer, Limited, as he could see no reason for substituting other syringes. He adds: "In any case I found that the defendant had admitted the receiving syringes which were pre-sent at the Market Police Station when he made his statement and I held that "even if there was a substitution of the syringes after the police enquiries, the "defendant could still be convicted."

In arriving at this conclusion, we think that the Magistrate was right, for if he was satisfied that the syringes taken from the appellant by the police were rightly identified by the firm's representative as those stolen from the firm then he could come to no other conclusion but that the appellant had received the stolen goods, and no subsequent substitution of other exhibits, if any substitution were in fact made (which the Magistrate did not believe) could in any way affect those facts. There is ample evidence to justify the learned Magistrate's findings of fact and on those findings there can be no doubt of the appellant's guilt.

In regard to the second ground of appeal, while it is true, as admitted by the learned Magistrate, that he made a slip in procedure, it is clear that he immediately corrected this slip and that the appellant not only was afforded, but in fact adopted, the means prescribed by the statute for securing him against surprise or embarrassment. In these circumstances, there is no substance in this ground of appeal which fails therefore, and must be dismissed with costs.

Appeal dismissed.

Re INFANTS CRUM EWING.

Re INFANTS CRUM EWING.

[1940. No. 313.—DEMERARA].

BEFORE SIR JOHN VERITY, C.J.: IN CHAMBERS.

1943. NOVEMBER 26; DECEMBER 18.

Infants—Property of—Guardian or trustee—Powers of—Under instrument creating appointment—Control of—By Court—In proper case—May be exercised—Whatever may be the extent of the powers of the guardian or trustee.

However wide the powers of a guardian or trustee of the property of an infant may be under the instrument creating the appointment, such powers may be controlled, in a proper case, by the Court.

ORIGINATING SUMMONS taken out by Edith Elise Louise Crum-Ewing for directions relating to the administration of that part of the estate of the late Manoel Pestano held by the applicant in trust for her four minor children, Martin Malcolm, Michael McAndrew, Paul Anthony and Barbara Patricia Crum Ewing, as beneficiaries under the will of the deceased. By clause 1 of the will the applicant, the widow of Eric Crum Ewing, was appointed sole executrix with power to sell movable property and to sell, transport, lease or otherwise deal with immovable property. By clauses 2, 3, 4, 5, and 6 of the will Manoel Pestano made various specific bequests. Clause 7 of the will was as follows: “the rest, remainder and residue of my property which I may die possessed of entitled to whether in possession, remainder or expectancy and whether movable or immovable and wheresoever situate, I give, devise, bequeath to the said Edith Elise Louise Crum Ewing, and her four minor children, viz:—Martin Malcolm, Michael Mc Andrew, Paul Anthony and Barbara Patricia, share and share alike, and I appoint the said Edith Elise Louise Crum Ewing sole guardian of the said children and trustee of their respective shares and I direct that she shall use such portions of the interest and capital of each and every of the said children’s respective shares for their maintenance and education as she may deem advisable and on each of the said children attaining the age of twenty-one years she shall hand over to him or her the balance if any, of his or her share, and I direct that the said Edith Elise Louise Crum Ewing shall have absolute discretion as to the realisation of any of my property and as to the making of investments in respect of any of the said children’s shares, and she shall not be limited to investing such children’s shares in Trust Funds for the time being allowed by law nor be liable for any loss incurred in respect of any investments made by her of any of the said children’s shares.”

J. Edward De Freitas, Solicitor, for the applicant.

C. Shankland, for the infants.

Cur. adv. vult.

VERITY, C.J.: This is a Summons for directions relating to the

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administration of that part of the estate of the late Manoel Pestano held by the applicant in trust for her infant children as beneficiaries under the will of the deceased.

In the course of the hearing a number of questions arose and have been disposed of by directions given from time to time and the only question remaining to be decided is as to the future administration of the balance of the trust estate which consists of certain immovable property and cash in the hands of the applicant's solicitors.

Counsel representing the infants' interests has submitted that the past dealings of the applicant demonstrated that it is not in their interests that administration should remain in her hands but without attempting to decide whether the Court has the power in the present proceedings to remove the trustee in whom the widest discretion is vested by the terms of the will, I am not of the opinion that, in regard to the immovable property, the interests of the infants require that the trustee should be deprived of the control conferred upon her by the will. She may not lawfully alienate this property without leave of the Court and the income therefrom, materially reduced by sales already authorised, is unlikely to exceed the sum required for the maintenance of the infants, the obligation for which vests upon the applicant as their mother.

In regard to the cash in the hands of the solicitors, however, other considerations arise. This sum is held by them under an order of the Court made on the application of the trustee and subject by such order to further directions. I have already held that all sums drawn by the applicant and her husband, including sums expended by them on a certain speculative gold mining venture, are chargeable against the personal interest of the applicant in the estate. The accounts presented on behalf of the applicant disclose an excess of such drawings amounting to the sum of \$1,938.99 and the cash in hand, amounting to \$3,100.16 forms therefore part of the trust fund free from any personal interest of the applicant.

In view of the applicant's past dealings with such funds the Court would not be justified in relaxing the control vested in it by previous orders and so placing in the absolute discretion of the trustee this comparatively large uninvested fund. I direct, therefore, that the balance be paid into Court after deducting the applicant's costs of these proceedings including the cost of retaining counsel to represent the infants' interests.

It is apparent, however, that it may be desirable from time to time to supplement the income from the trust property and I further direct that the Registrar shall, on the application to him by the trustee, when satisfied as to the reasonableness thereof and subject to the approval of a Judge, pay out to her from time to time such sums as may be necessary for the maintenance and advancement of the infants.

Directions given.

E. & S. L. SEWDIN v. E. C. BATSON.

ELEANOR SEWDIN AND S. L. SEWDIN, Appellants,
 v.
 EDWARD CHARLES BATSON, Respondent.

[1943. No. 122—DEMERARA.]

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

1943. DECEMBER 17, 21.

Local government—Village councillor—Qualification of—Resided in village—How interpreted—In ordinary meaning—Sleeping in particular place necessary to constitute residence—Mere possession of sleeping apartment not sufficient—Local Government (Village Councils) Ordinance. 1935 (No. 16), s. 3 (a).

Words—“Resided”—Meaning of—Local Government (Village Councils) Ordinance, 1935 (No. 16), s. 3 (a).

The word “resided,” as used in section 3 (a) of the Local Government (Village Councils) Ordinance, 1935 (No. 16), has no artificial or technical meaning but is to be interpreted in its ordinary sense.

The spending of the greater part of the day and having one’s meals at one’s business premises does not constitute residing there, within the meaning of section 3 (a) of Ordinance No. 16 of 1935.

The possession of a sleeping apartment does not necessarily constitute residence, within the meaning of section 3 (a) of Ordinance No. 16 of 1935, at the place where the sleeping apartment is situate. There cannot be such residence unless the person sleeps there.

POWELL v. GUEST 18 C.B.N.S. 71, explained.

APPEAL by Eleanor Sewdin and S. L. Sewdin from a decision of the Magistrate of the Berbice Judicial District given upon an election petition brought by Edward Charles Batson. The Magistrate adjudged the election of the appellants as councillors for the Rose Hall Village to be null and void.

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

C. A. Burton, for the respondent.

Cur. adv. vult.

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

This is an appeal against the decision of a Magistrate upon an election petition wherein he held that the appellants, who were the respondents to the petition, did not possess the residential qualification required by section 3 (a) of the Local Government (Village Councils) Ordinance, 1935.

The only ground of appeal argued was that the learned Magistrate erred in holding that the appellants had not during the twelve months immediately preceding the election resided in the village of Rose Hall.

Counsel for the appellants agrees that the question of residence is one of fact for the Magistrate but submitted firstly that the legal meaning of the word “resided” was wrongly determined by the learned Magistrate; secondly, that he did not decide as a fact that the appellants had at no time slept at the premises at

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Rose Hall nor that they had no sleeping accommodation there; and thirdly that had he so found the evidence would not have supported that conclusion.

As to the first question it was submitted that on the authority of *Powell v. Guest* (18 C.B. 71) the existence of sleeping accommodation is sufficient in itself to show residence when coupled with the fact that the persons concerned spend the greater part of the day and have their meals there, even though they do not in fact sleep there. We are not of the opinion that this is the interpretation which should be placed on the words used by Erie, C.J. in that case. He said "In order to constitute residence "a party must possess at least a sleeping apartment." This is not the same and is not to be construed as saying that the possession of a sleeping apartment constitutes residence. It merely says that no party can be said to reside where there is no sleeping apartment. The numerous cases cited by both sides tend to the conclusion that the word "resided," as used in such a section as that under consideration has no artificial or technical meaning but is to be interpreted in its ordinary sense. The learned Magistrate, therefore, did not err in his conclusion that if the appellants did not in fact use the building at Rose Hall for the purpose of residing therein in the ordinary meaning of that term then the fact that it contained an apartment fitted as a sleeping apartment did not confer upon them the requisite qualification. The fact that the party must at least possess a sleeping apartment implies that sleeping upon the premises is an essential quality of residence there and we are unable to accept the view put forward by counsel that the spending of the greater part of the day and having one's meals at one's business premises constitutes residing there, even though one returns home each night for sleep.

As to the second point the learned Magistrate clearly indicates that he believed the evidence adduced by the petitioner and disbelieved the appellants when they said that they slept at the premises at Rose Hall. This is equivalent in this case to a specific finding that they did not in fact sleep there and it follows that they did not reside there.

As to the third point, the question is one of fact for the Magistrate and although the appellants alleged that they slept on the premises at Rose Hall and although there is evidence that when the Magistrate visited the premises there was sleeping accommodation, there is also evidence that the appellants did not sleep there and that during the relevant period there was no such accommodation. We cannot say that there was no evidence upon which the learned Magistrate could reasonably have founded his conclusion on this question of fact and there is no ground for disturbing his finding.

The appeal is therefore dismissed with costs.

Appeal dismissed.

RAMRAJ v. G. M. WILLIAMSON.

RAMRAJ, Appellant (Defendant),

v.

GRACE MARGARET WILLIAMSON, AN INFANT, Respondent
(Plaintiff).

[1943. No. 214.—DEMERARA].

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

1943. DECEMBER 17, 21.

Appeal—Notice of—Notice of grounds of—Service of—Respondent an infant—Served on next friend with whom infant resides—Good service on infant—Rules of Court, 1900, Order 1, rule 2; Order 48, rule 4; Order 43, rule 24; Order 7, rule 8—Summary Jurisdiction (Appeals) Ordinance, cap. 16, ss. 4, 8.

Where the respondent to an appeal under the Summary Jurisdiction (Appeals) Ordinance, cap. 16, is an infant, service of the notice of appeal or of notice of grounds of appeal, upon the infant's next friend with whom it appeared that the infant resides, is good service upon the infant.

PRELIMINARY OBJECTION that notice of appeal and notice of grounds of appeal were not properly served upon the respondent who was an infant.

J. L. Wills, for the respondent

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

Cur. adv. vult.

The Chief Justice delivered the ruling of the Court, as follows:

In this appeal a preliminary objection has been raised by the respondent on the ground that notice of appeal was served upon the next friend of the infant respondent and not therefore upon "the opposite party" as required by section 4 of the Summary Jurisdiction (Appeals) Ordinance, Ch.16. A similar objection is raised in regard to service of the grounds of appeal under section 8 of the Ordinance.

In each case it is required that notice shall be lodged with the clerk and a copy thereof served upon the opposite party.

A great deal of argument was addressed on both sides to the question as to whether the next friend of an infant is a party to the action within the meaning of these sections but we think that the matter is to be decided rather on the question of whether service upon the next friend is good service on the infant.

In the first place the relevant sections do not require that the notice shall be addressed to the opposite party and the form referred to in each section does not so require. Read literally, indeed they appear to indicate that the notice is to be addressed to the appellant himself. It is sufficient, however, that the form of the notice shall substantially conform to that prescribed in the first schedule to the Ordinance and although addressed to the

RAMRAJ v. G. M. WILLIAMSON.

next friend and to the Magistrate, the notices in this case do substantially comply with this requirement and at the worst would be open only to such objection on the ground of error or defect as might be cured under section 26 of the Ordinance.

In the second place, it is apparent that a copy of the notice lodged was in fact served upon the next friend. The question is whether such service is good service on the infant.

By Order I, r.2, of the Rules of the Supreme Court as now subsisting, subject to certain rules foreign to the present matter, "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."

By Order XLVIII, r. 4, it is provided that "where personal service of any "pleading, summons, notice, order or other document is required by these "Rules, the service shall be effected as nearly as may be in the manner prescribed for the personal service of the writ of summons."

By Order XLIII, r.24, as now subsisting, notice of appeal from a Magistrate by way of notice of motion is a notice required by these Rules.

By Order VII, r.8, it is provided that service of a writ of summons on the father or guardian of an infant or upon the person with whom the infant resides shall be deemed good service on the infant.

We are of the opinion, therefore, that service of the notice of appeal upon the infant's next friend with whom it would appear also the infant resides is good service on the infant. It would appear to follow that service of the notice of grounds of appeal in like manner is also good.

The preliminary objection therefore fails and the hearing of the appeal will proceed.

Preliminary objection overruled.

Solicitor for appellant:

R.G. Sharples.

J. W. H. KALAMADEEN v. S. PERSAUD.

J. W. H. KALAMADEEN, Appellant (Defendant),
v.
SOOKDEO PERSAUD, Respondent (Plaintiff).

[1943. No. 237.—DEMERARA],

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

1943, DECEMBER 17, 21.

Appeal—From Magistrate's Court—Notice of Appeal—Service of—Upon opposite party—To be effected within 14 days after the pronouncing of the decision appealed against—Summary Jurisdiction (Appeals) Ordinance, cap. 16, s. 4 (1) (b).

Under section 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, a copy of the written notice of appeal must be served upon the opposite party within fourteen days after the pronouncing of the decision.

APPEAL by the defendant from a decision of a Magistrate of the Georgetown Judicial District.

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

J. L. Wills, for the respondent. The decision appealed against was pronounced on the 16th November, the notice of appeal was served on the 1st December. It was received that day by post.

No written judgment was delivered but the effect of the judgment is as stated in the headnote.

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

BOODRAM SINGH, Appellant (Defendant)
v.
DEMERARA COMPANY, LIMITED, Respondents (Plaintiffs).

[1943. No. 329.—DEMERARA].

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

1943. DECEMBER 22.

Appeal—From Magistrate's Court—Additional copies of record for use of Court—Lodged within prescribed time—Notice of grounds of appeal omitted from copies so lodged—Appeal struck out—Summary Jurisdiction (Appeals) Ordinance, cap. 16, s. 13 (2).

Where the copies of the record which were lodged by the appellant with the Registrar of the Supreme Court within the time limited by section 13 (2) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, did not contain copies of the notice of grounds of appeal the court ordered that the appeal be struck out with costs.

APPEAL by the defendant Boodram Singh from a decision of the Magistrate of the West Demerara Judicial District ordering him to deliver up possession to DEMERARA COMPANY, LIMITED, of

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certain premises held by the defendant as tenant at will of the plaintiffs (respondents).

L. A. Hopkinson (for *T. Lee*), for the appellant.

H. C. Humphrys, K.C., for the respondents: Section 13 (2) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, has not been complied with as the copies of the record lodged for the use of the Court did not contain copies of the notice of grounds of appeal. The appeal should be struck out: *SLATER v. WIETING & RICHTER, LTD.* (1942) L.R.B.G. 420.

L. A. Hopkinson, for the appellant: Leave is now asked to supply the missing copies forthwith.

No written judgment was delivered, but the effect of the judgment is as stated in the head-note.

Solicitor for respondents, *J. Edward de Freitas*.

JACOB CHEE - YAN - LOONG, Appellant (Defendant),
 v.
 DOUGLAS HAYNES, L.S.M. of Police No. 3128, Respondent
 (Complainant).

[1943. No. 379.—DEMERARA].

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

1943. DECEMBER 22.

Defence Regulations—Price control order—Breach of—Owner of shop where goods were sold, and shop assistant actually making the sale—Both liable—Jointly charged and convicted—Conviction properly made—Order No. 1275 dated 8th October, 1942, paragraph 11 (1); Order No. 130 dated 27th January, 1943.

A shop assistant sold a price-controlled article in excess of the maximum retail selling price contrary to paragraph 11 (1) of Order No. 1275 dated the 8th October, 1942, as amended by order No. 130 dated the 27th January, 1943 made under regulation 44 of the Defence Regulations, 1939.

The owner of the shop and the shop assistant were jointly charged with a breach of the said orders. They were both convicted and fined. The owner appealed.

Held, on the authority of *Buckingham v. Duck*, 120, Law Times Reports 84, 86, and of *Garnett & Co., Ltd. v. Slater* (1942) L.R.B.G. 354, that 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 44 of the Defence Regulations, 1939; that both the employer and the servant can be charged for the offence; and that they can be jointly charged in the same complaint.

APPEAL from a decision of the Magistrate of the Berbice Judicial District.

C. Lloyd Luckhoo, for the appellant.

S. E. Gomes, A. A.-G., for the respondent.

No written judgment was delivered, but its substance was as stated in the head-note.

WEST INDIAN COURT OF APPEAL

REPORTS OF DECISIONS

OF

THE COURT

SITTING IN

BRITISH GUIANA, GRENADA AND ANTIGUA

[1943].

JUDGES OF THE COURT:

H. W. B. BLACKALL, Esquire, (Chief Justice of Trinidad and
Tobago), PRESIDENT.

SIR ALLAN COLLYMORE, Kt. (Chief Justice of Barbados).

SIR JOHN VERITY, Kt. (Chief Justice of British Guiana).

CLEMENT MALONE, Esquire, (Chief Justice of the Windward
Islands and Leeward Islands).

WILMOT THEODORE STUART FRETZ, Esquire, (Judge
specially appointed, British Guiana)

E. A. C. TIAM FOOK v. M. HUSSAIN & ANR.
 IN THE WEST INDIAN COURT OF APPEAL.
 ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

EDWIN ADOLPHUS CHUNG TIAM FOOK, Appellant,
 v.
 MOHAMED HUSSAIN ALSO CALLED HASHIM SANKAR
 and
 JOHN GILBERT CHOONG, Respondents.

[1942. No. 6—BRITISH GUIANA.]

Before Their Honours H. W. B. BLACKALL, Chief Justice of Trinidad and Tobago (President); Sir ALLAN COLLYMORE, Chief Justice of Barbados; and Sir JOHN VERITY, Chief Justice of British Guiana.

1943. JUNE 21.

Appeal—Strict compliance essential—Unless specific provision to contrary—In order that appellant may avail himself of right of appeal—West Indian Court of Appeal Rules—No provision therein—For waiver, in discretion of Court, of strict compliance—Failure to furnish copies of order appealed against—Non-compliance with essential requirement of Rules—Appeal dismissed.

It is a well-established principle that in appeals, unless there be specific provision to the contrary, strict compliance is essential in order that the appellant may avail himself of the right of appeal.

There is no provision in the West Indian Court of Appeal Rules whereby strict compliance may be waived in the discretion of the Court.

Failure to furnish copies of the order appealed against is non-compliance with an essential requirement of the West Indian Court of Appeal Rules. Where there was such failure, the appeal was dismissed with costs.

APPEAL by Edwin Adolphus Chung Tiam Fook from an order made on the 23rd day of December, 1942, by Duke J. (Acting) refusing him leave to be admitted as a poor person to prosecute an appeal from a judgment of Duke, J. (Acting) reported at (1942) L.R.B.G. 172. The acting judge's reasons for refusing leave will be found at (1942) L.R.B.G. 404. The time limited by rule 6 of the West Indian Court of Appeal Rules for bringing an appeal, if an appeal lay, was 6 weeks from the 23rd December, 1942, the date of the refusal of the application. The time limited by the rules for filing copies of the record is 28 days from the date of the bringing of the appeal. Had the notice of appeal been filed on the 3rd February, 1943, the last day for bringing the appeal, the appellant would have had until the 3rd March, 1943, to file the copies of the record. The formal order refusing leave to be admitted as a poor person to prosecute the appeal was settled by the acting judge on the 13th January, 1943, but it was not perfected until the 20th February, 1943. On the 6th January, 1943, the appellant filed his notice of appeal motion from the order of the 23rd December, 1942. On the 3rd February, 1943, the time

limited for filing copies of record expired: on that date the appellant filed copies of the record, Included therein was a draft of the formal order of the 23rd December, 1943, which draft differed from the draft which was settled by the acting judge on the 13th January, 1943, and perfected on the 20th February, 1943.

S. L. Van Batenburg-Stafford, K.C., for the appellant.

H. C. Humphrys, K.C., for the respondents. There are four preliminary objections to the hearing of the appeal, and any one of them, if successful, would be fatal to the appeal: (1) In view of the non-compliance by the appellant with Rule 11 of the West Indian Court of Appeal Rules in not filing, within 28 days, copies of the several documents required to be filed, the appeal automatically stands dismissed under Rule 12 (4) of the Rules; (2) The West Indian Court of Appeal has no jurisdiction to entertain this appeal, as it is not an appeal from any of the Courts of the Colony; (3) The West Indian Court of Appeal cannot entertain an appeal from a judgment given by a Judge acting in the jurisdiction of the West Indian Court of Appeal. The order made by the learned trial judge was not an order of the Supreme Court of the Colony or of a judge of the Supreme Court, but was an order of the West Indian Court of Appeal made by virtue of the jurisdiction delegated by that Court to a judge. Therefore, if any appeal was to be brought from the decision of that Judge, it could only be to the Privy Council; (4) In any event, by virtue of Rule 18 of the West Indian Court of Appeal Rules, no appeal lies from an order of the Judge given in an application of this nature.

With respect to the first objection, the appeal record did not contain a copy of the judgment or order appealed from, but there appeared, instead, an unsigned order which differed materially from the order which was in fact entered. Rule 11 (1) (b) of the West Indian Court of Appeal Rules provides that within 28 days from the date when the appeal is brought, the appellant shall leave with the Registrar 6 copies of the judgment or order appealed from. That provision has not been complied with. [President: Before proceeding to hear any of the other objections, we will hear counsel for the appellant on the first objection].

S. L. Van Batenburg-Stafford, K.C., for the appellant. At the time when the notice of appeal motion was filed and at the time when the copies of the record were filed, the formal order refusing leave to be admitted to appeal *in forma pauperis* had not yet been perfected. The respondents have suffered no prejudice by reason of the non-compliance of the appellant with Rule 11 (1) (b) of the West Indian Court of Appeal Rules.

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

A preliminary objection has been taken on this appeal on the ground that there has been non-compliance with Rule 11 of the

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West Indian Court of Appeal Rules, 1920, in that the appellant failed to leave with the Registrar any copies of the Order appealed from.

In place of copies of this Order, there appears on the record a copy of a draft order, which differs materially from the Order as entered by the Judge, who made it.

Rule 12 provides that in the case of non-compliance with Rule 11, the appeal shall stand dismissed with costs.

It is submitted on behalf of the appellant that it was impossible to comply with Rule 11, because the Order appealed from had not been perfected within the prescribed time after the notice of appeal motion. But the notice of motion need not have been given until the Order had been perfected or, alternatively, an extension of time might have been sought.

It is further submitted by the appellant that the terms of the Order appear substantially in the draft order and in the judgment which are included in the record: that there is substantial compliance and it is sufficient to relieve the appellant from the consequences of Rule 12.

There is, however, no provision in the West Indian Court of Appeal Rules, such as appears at times in Rules of Court, *e.g.* Order LI, of the Rules of Court of the Supreme Court of British Guiana, whereby strict compliance may be waived in the discretion of the Court and it is a well established principle that in appeals, unless there be specific provision to the contrary, strict compliance is essential in order that the appellant may avail himself of the right of appeal.

Failure to furnish copies of the Order appealed against is noncompliance with an essential requirement of the Rules and, by reason thereof, the appeal stands dismissed with costs and cannot be entertained.

Appeal dismissed.

Solicitors: *H. A. Bruton*, for the appellant;
J. Edward de Freitas, for the respondents.

J. YOUNG v. J. WOLFE.
 IN THE WEST INDIAN COURT OF APPEAL.
 ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

JOSEPH YOUNG, Appellant (Defendant),
 v.
 JOSEPH WOLFE, Respondent (Plaintiff).

[1942 No. 4.—BRITISH GUIANA].

BEFORE THEIR HONOURS H. W. B. BLACKALL, Chief Justice of Trinidad
 and Tobago, (President); SIR ALLAN COLLYMORE, Chief Justice of
 Barbados; and SIR JOHN VERITY, Chief Justice of British Guiana.

1943. JUNE 16, 17, 23.

Appeal—New case not allowed to be raised in Appeal Court—Where inconsistent with that originally raised in primary Court—Even though evidence taken in that court might support new case.

Appeal—Claim for goods sold and delivered—Application for amendment—To include alternative claims for accounts and for damages for negligence—Unreasonable and unfair to respondent—Refused.

An appellant is not entitled to raise on his appeal a new case inconsistent with that which he originally raised in the primary Court even though the evidence taken in that court might support the new case.

Ex parte Reddish, In re Walton (1877) 5 Ch.D. 882, applied.

In the court below there was a counter-claim for the price of goods sold and delivered, During the hearing of the appeal the appellant sought an amendment of his counter-claim so as to include alternative claims for accounts and for damages for negligence.

Held, that the application must be refused as to allow any such amendment would be unreasonable and unfair to the respondent.

APPEAL by the defendant Joseph Young from a judgment of STAFFORD, J. (Acting).

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

C. A. Burton, for respondent Joseph Wolfe.

Cur. adv. vult.

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

This is an appeal from a judgment of the Supreme Court of British Guiana on a claim by the respondent for a declaration of trust and consequential orders, and a counter claim by the appellant for the price of goods sold and delivered.

During the hearing of the appeal the appellant sought an amendment of his counter claim so as to include alternative claims for accounts and for damages for negligence.

This application was refused on the ground that, as was held in *Ex parte Reddish, In re Walton* (1877) 5 C. D. p. 882, an

J. YOUNG v. J. WOLFE.

appellant is not entitled to raise on his appeal a new case inconsistent with that which he originally raised in the primary court even though the evidence taken in that court might support the new case. To have allowed any such amendment as was sought in the present case at the hearing of the appeal would have been unreasonable and unfair to the respondent. An application to amend in respect of the amount claimed was refused as being unnecessary.

In view of the admission of the appellant that he held the property in question upon trust for the respondent the declaration and order of the learned trial judge is not resisted but the appellant argues that the respondent was not entitled to costs for, had he paid the amount claimed by the appellant to be due for goods sold, the appellant was at all times willing to reconvey the property and had he done so this action would have been unnecessary.

The trial judge found however that the appellant had failed to prove that he had acquired title to the property as the result of any agreement with the respondent. With this conclusion we agree. The appellant therefore was not entitled to refuse reconveyance or to impose any condition. Upon his attempting to do so the respondent entitled to bring an action to compel transfer and the learned judge properly allowed him his costs on this issue.

In regard to the appellant's counter claim for the price of goods sold and delivered the respondent replied that there was no sale to him of the goods in question but that they were entrusted to him for sale on the appellant's behalf. The learned trial judge accepted this version of the transaction and in view of the general tenor of the correspondence between the parties we are not prepared to hold that he was not justified in doing so. The letters, written as they were by persons obviously unable to express themselves with clarity and precision may be ambiguous and may not be entirely inconsistent with either construction but the trial judge had the advantage of seeing and hearing the parties as they gave their evidence. He believed the respondent and we cannot say that he was wrong or even that we ourselves would have come to any other conclusion.

It is true that on his findings of fact the learned judge held that the goods were supplied in pursuance of a joint venture but, whether that be so or whether it be one of agency or whatever may be its nature, it was clearly not a case of goods sold and delivered and on this, his only claim, the appellant has failed.

It would appear, however, that the learned trial judge misdirected himself as to the evidence in regard to the sum of \$88 which he found to have been remitted by the respondent to the appellant in that he stated in his judgment that "there is no evidence as to how much of this represented the proceeds of sales and how much was money remitted as the plaintiffs personal money in payment of his account for goods supplied to

S. N. HOOKUMCHAND v. C. HOOKUMCHAND.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

SURIG NARAIN HOOKUMCHAND, Appellant (Defendant).

v.

CHRISTMAS HOOKUMCHAND, Respondent (Plaintiff).

[1942. No. 8.—BRITISH GUIANA].

BEFORE THEIR HONOURS H. W. B. BLACKALL, Chief Justice of Trinidad and Tobago (President); SIR ALLAN COLLYMORE, Chief Justice of Barbados; and WILMOT THEODORE STUART FRETZ, Judge specially appointed, British Guiana.

1943. JUNE 25, 28.

Solicitor—Engaged in action—Appeal to West Indian Court of Appeal—Still solicitor—West Indian Court of Appeal Rules, rule 25; Rules of Court, 1900, Order 6, rule 1.

Appeal—West Indian Court of Appeal—Notice of Appeal motion—Service of—On person who was solicitor for respondent in proceedings in Supreme Court—Service upon respondent—West Indian Court of Appeal Rules, rule 11 (1).

Appeal—Involving construction of documents—Duty of Appellant—To supply Court with, copies.

Appeal—Duty of appellant—To bring before Appeal Court—Whole of evidence upon which order appealed from was founded.

Appeal—West Indian Court of Appeal—Issue between parties—True construction of documents—Documents construed by trial judge—Required for hearing of appeal—Copies not left with the Registrar—Appeal dismissed—West Indian Court of Appeal Rules, rules 11 (1) (g), 12 (4).

By virtue of rule 25 of the West Indian Court of Appeal Rules, Order 6, rule 1 of the Rules of Court, 1900 (which provides that a solicitor engaged in an action is, unless allowed by the Court or a Judge to cease from acting, bound to conduct the same until the final determination of the action, whether in a Court of first instance or on appeal) applies to proceedings in the West Indian Court of Appeal.

Service of notice of appeal motion upon the person who was solicitor for the respondent in proceedings in the Supreme Court of British Guiana is service upon the respondent within the meaning of rule 11 (1) of the West Indian Court of Appeal Rules.

It is the duty of an appellant, on the hearing of an appeal involving the construction of documents, to supply the Court with copies.

Cannot v. Oppenheim (1889) 38 W.R.1. applied.

It is the duty of an appellant to bring before the Court of Appeal the whole of the evidence upon which the order appealed from was founded.

Ex parte Firth (1882) 19 Ch. D. 419, applied.

Under paragraph (g) of Rule 11 (1) of the West Indian Court of Appeal Rules, all documents including correspondence and exhibits required for the hearing of an appeal must be left with the Registrar within 28 days from the date when the appeal is brought, in default of which the appeal shall stand dismissed under Rule 12 (4).

The appellant omitted to leave with the Registrar copies of a contract of sale of property which the appellant alleged was purchased for him, and copies of documents relating to an alleged assignment pleaded alternatively in the grounds of appeal. In his judgment the trial judge stated that the defendant (appellant) contended that the entering of his name in the contract of sale constituted a completed gift to him of all rights thereunder, and

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he proceeded to examine and construe the contract and other documents tendered as exhibits.

Held, that the documents which were not left with the Registrar were required for the hearing of the appeal, and that by virtue of Rule 12 (4) the appeal stood dismissed with costs.

APPEAL by the plaintiff SURIG NARAIN HOOKUMCHAND from a judgment of VERITY, C.J., British Guiana, reported at (1942) L.R.B.G. 134.

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

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

Cur. adv. vult.

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

Certain preliminary objections have been taken on behalf of the respondent in this case and, as the points raised were not free from difficulty, the Court took time to consider them.

It was submitted, in the first place, that under Rule 11 (1) of the West Indian Court of Appeal Rules it is incumbent upon the appellant to serve notice of appeal upon the respondent, personally, and that the service so effected was out of time. The notice was sent by registered letter addressed to the respondent at Armadale and was posted at Georgetown at 2.15 p.m. on November 30, 1942. As the Order appealed against was entered on October 19, 1942, and as a letter posted at Georgetown in the afternoon would not, in the ordinary course of business, be delivered at Armadale the same day, it was contended on behalf of the respondent that the service was invalid as it was effected more than six weeks after the Order appealed against. The appellant, in reply, submitted that although notice of motion under Rule 6 (2) must be filed with the Registrar within six weeks from the making of the Judge's Order, the appellant has, under Rule 11 (1), a further 28 days from the date of tiling within which to serve a copy of the notice of appeal upon the respondent.

In the present instance, the appellant in addition to posting a copy to the respondent served the latter's solicitor (Mr. Dinally) with a copy on November 30, 1942, which was admittedly within the time limit, even upon the respondent's interpretation of the Rules. The respondent has, however, objected that service upon Mr. Dinally was invalid on the ground that, although the latter acted as solicitor for the respondent in the Court below, his authority from his client came to an end at the conclusion of the proceedings therein, in the absence of any specific extension of his authority, and that the appellant had no notice of any such extension.

The question whether the authority of the solicitor on the record continues as long as the right of appeal exists, was raised in *De La Pole v. Dick*, (1885), 29 Ch. D., 357, but as the

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case was decided on other grounds, the Court refrained from expressing any opinion on the point, and no case has been cited to show that the matter has since been settled by judicial decision in England, But under Order VI, Rule 1 of the Rules of the Supreme Court, 1900, of this colony, a solicitor engaged in an action is, unless allowed by the Court or a Judge to cease from acting, bound to conduct the same until the final determination of the action, whether in a Court of first instance or on appeal. This Rule, in our opinion, applies to proceedings in this Court by virtue of Rule 25 of the West Indian Court of Appeal Rules and we therefore hold that service on the solicitor in this case was good. Service on the respondent himself was therefore superfluous, so it is unnecessary for us to decide whether it was out of time.

The remaining point raised by the respondent is that the appellant failed to comply with Rule 11 (1) in that he did not supply certain documents required for the hearing including the contract of sale of the property, which the appellant alleges was purchased for him, and documents relating to the alleged assignment pleaded alternatively in the grounds of appeal. Under paragraph (g) of Rule 11 (1) all documents including correspondence and exhibits required for the hearing of the appeal, must be left with the Registrar in default of which the appeal shall stand dismissed under Rule 12 (4).

The question to be decided then is whether any of the documents which the appellant omitted to leave with the Registrar is required for the hearing of this appeal. It was held in *Cannot v. Oppenheim* (38. W. R. 1889—90, p. 1) that it is the duty of an appellant, on the hearing of an appeal involving the construction of documents, to supply the Court with copies and it has been further held that it is his duty to bring before the Court of Appeal the whole of the evidence upon which the order appealed from was founded (*Ex parte Firth*, 1882, 19 Ch. D., 419.) Now, the learned trial judge stated in his judgment that the defendant (appellant) contended that the entering of his name in the contract of sale constituted a completed gift to him of all rights thereunder, and he proceeded to examine and construe the contract and other documents tendered as exhibits. It appears to us then that this case is one to which the principles laid down in the authorities mentioned apply and that the appellant's omission to supply the documents in question makes operative Rule 12 (4).

The appeal therefore stands dismissed with costs.

Appeal dismissed.

Solicitors: *R. G. Sharples*, for the appellant;
 W. D. Dinally, for the respondent.

BOOKER BROS. & Co., LTD. v. C. C. BLACKETT.

IN THE WEST INDIAN COURT OF APPEAL.

OK APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

BOOKER BROS., Mc CONNELL & COMPANY, LIMITED,
Appellants (Defendants)

v.

CHRISTOPHER CORNELIUS BLACKETT, Respondent
(Plaintiff)

[1942. No. 3—BRITISH GUIANA].

BEFORE THEIR HONOURS H. W. B. BLACKALL, Chief Justice of Trinidad
and Tobago (President); SIR ALLAN COLLYMORE, Chief Justice of
Barbados; and SIR JOHN VERITY, Chief Justice of British Guiana.

1943. JUNE 15, 28.

*Negligence—Presumption of—Puncheons falling off dray cart—Res ipsa loquitur.**Negligence—Two rows of puncheons on dray cart—Bottom row upright—Top row on
sides—Single rope tied across top puncheons—Evidence of negligence.**Appeal—Damages—Assessment of—When disturbed by Appeal Court—When trial
judge relied upon some wrong principle of law—When amount so extremely high as to be
entirely erroneous. Damages—Only an estimate.*

The respondent, who appeared to have been engaged in a somewhat leisurely conversation in Main Street, Georgetown, was struck in the back by a puncheon falling off a passing dray cart belonging to the appellants and driven by their servant. According to the driver's evidence, the accident was due to his straightening up, after having slightly swerved to the left of the road in order to avoid an oncoming bus and car which were approaching him abreast.

Held, that although the swerving or straightening out of the draycart affords no presumption of negligence, the fact that this caused the puncheons to fall off does raise a presumption that they were not properly secured, and that the doctrine of *res ipsa loquitur* applied to this case.

There were two rows of puncheons on the dray cart with the bottom row upright and the top row on their sides, the whole being secured by a single rope tied across the top puncheons.

Held, that to fasten heavy puncheons in this fashion constituted negligence.

In order to justify the Appeal Court disturbing an assessment of damages, it will generally be necessary that the Court should be convinced either that the trial judge ruled upon some wrong principle of law or that the amount was so extremely high as to make it in the judgment of the Court an entirely erroneous estimate of the damages to which the plaintiff is entitled.

Flint v. Lovell, 104 L. J. K. B. 202, applied.

An assessment of damages is necessarily an estimate, and even if the amount awarded was one which the Appeal Court might, not itself have given, that circumstance alone would not necessarily justify that Court in making any amendment of the judge's award.

Owen v. Sykes (1936) 105 L. J. K. B. 32, applied.

Appeal by Booker Bros., Mc Connell & Co., Ltd., from a judgment of Fretz, J., awarding \$200 damages to Christopher

BOOKER BROS. & Co., LTD. v. C. C. BLACKETT.

Cornelius Blackett for injuries sustained through the negligence of the appellants' servant.

H. C. Humphrys, K.C., for appellants.

C. V. Wight, for respondent.

Cur. adv. vult.

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

This is an appeal against the decision of Fretz, J. awarding \$200 damages to the respondent for injuries sustained through the negligence of the appellants' servant. On 27th November, 1940, the respondent who appears to have been engaged in a somewhat leisurely conversation in Main Street, Georgetown, was struck in the back by a puncheon falling off a passing dray cart belonging to the appellants and driven by their servant. According to the driver's evidence the accident was due to his straightening up, after having slightly swerved to the left of the road in order to avoid an oncoming bus and car which were approaching him abreast.

It was submitted on behalf of the appellants that there was no affirmative evidence of negligence, that the trial judge misapplied the doctrine of *res ipsa loquitur* and that the decisions in *Byrne v. Boadle* (2 H. & C., 722) and *Scott v. London and St. Katherine Docks Co., Ltd.* (3 H. & C., 595) upon which the learned judge relied are inapplicable to the facts of the present case. In *Byrne v. Boadle* the plaintiff was walking in the public street when a barrel of flour fell upon him from a window in the defendant's premises and injured him. It was held that this was sufficient *prima facie* evidence of negligence to cast upon the defendant the onus of proving that the accident was not caused by his negligence. In *Scott's* case the plaintiff while passing in front of defendants' warehouse was injured by the fall of six bags of sugar therefrom and it was held that where a thing is shown to be under the management of the defendant or his servants and the accident is such that in the ordinary course does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care.

Mr. Humphrys for the appellant sought to distinguish these cases from the present one on the ground that while the barrels and bags were under the respective defendant's entire control, this was not so as regards the appellants' puncheons and he submitted further that the doctrine of *res ipsa loquitur* does not apply to accidents on public highways. The negligence upon which the cause of action is based did not however consist of the manner in which the dray cart was driven on the highway but of the way in which it was loaded and the loading was done upon the appellants' premises where they were fully under their control. Further, although the swerving or straightening out of

BOOKER BROS. & Co., LTD. v. C. C. BLACKETT.

once in the course of his judgment without dissenting from it, it may be presumed that he adopted it.

Can it be said then that the trial judge was not justified in coming to the conclusion that some injury was caused to the respondent? As to this it appears to us that although there was not sufficient evidence to support certain items in the respondent's claim, *e.g.* that there were internal injuries to his kidneys, there was evidence to show that his back was bruised and swollen and that he had a slight fever for a couple of days.

As regards the question of damages it has been laid down that in order to justify the Appeal Court disturbing an assessment of damages it will generally be necessary that the Court should be convinced either that the trial judge ruled upon some wrong principle of law or that the amount was so extremely high as to make it in the judgment of the Court an entirely erroneous estimate of the damages to which the plaintiff is entitled (*Flint v. Lovell*, 104 L.J. K.B., 202). An assessment of damages in such cases as the present is necessarily an estimate and even if the amount awarded was one which the Appeal Court might not itself have given that circumstance alone would not necessarily justify that Court in making any amendment of the judge's award (*Owen v. Sykes* (1936) 105 L.J.R., 32).

In the present case after hearing full argument we have come to the conclusion that although the damages are more than we would have been willing to award the learned judge did not make such an entirely erroneous estimate of the damages as would on the authorities justify variation by this Court. The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *J. Edward deFreitas; H. A. Bruton.*

O. FAUSETT & ANR. v. E. MARK.
 IN THE WEST INDIAN COURT OF APPEAL.
 ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.
 OUTRIDGE FAUSETT AND EDWARD ROSS, Appellants
 (Defendants).
 v.
 ERNEST MARK, Respondent (Plaintiff).

[1943 No. 1—BRITISH GUIANA].

Before Their Honours H. W. B. BLACKALL, Chief Justice of Trinidad and Tobago (President); Sir ALLAN COLLYMORE, Chief Justice of Barbados; and Sir JOHN VERITY, Chief Justice of British Guiana.

1943. JUNE 22, 23, 30.

Executor—Two executors appointed—Will proved by one only—Probate not renounced by other—Still remains an executor—Death of proving executor—Executor of proving executor not executor of original testator.

Appeal—Defendants claiming to act and acting as executors and sued as such—Status of defendants as executors not in issue at the trial—Relief claimed by plaintiff against them on that footing—Trial of action on that basis—Judgment in favour of plaintiff against defendants on that footing—Defendants ordered as executors to transport land to plaintiff—Appeal by defendants—Status of defendants as executors not questioned in notice of appeal motion—Questioned by counsel for respondent (plaintiff) in his reply—Defendants not executors—Misconception by both parties in Court below as to status of defendants as executors—Trial judge misled as to real issue—By plaintiff and defendants—Appeal allowed and action dismissed—No costs to either party in Court of Appeal or in Court below.

Upon the death of a sole executor or the last surviving of several executors, representation of the original testator's estate is continued and kept alive by the executor of the sole or last surviving executor of the original testator.

An executor who does not prove the will is still an executor, and remains so unless and until he renounces probate.

Harriet Susanna Butts died in 1923 leaving two executors, John Ernest Butts and Catherine Douglas of whom the latter only proved the will, power being reserved to grant probate to John Ernest Butts whenever he should apply for the same. Catherine Douglas died in 1932 leaving a will which was proved by her executor, George Fausett. He died in 1935 leaving a will which was proved by the appellants (defendants) Outridge Fausett and Edward Ross, who were the executors named in the will of George Fausett. In March, 1941, John Ernest Butts proved the will of Harriet Susanna Butts.

In relation to those facts which were admitted, the plaintiff and the defendants drew the conclusion of law that the defendants were legal personal representatives of Harriet Susanna Butts. Upon that assumption, the appellants (defendants) intermeddled with the assets of the estate of Harriet Susanna Butts, collected rent, and otherwise acted as her personal representatives, they purported to enter into an agreement for the sale to Dhanwanti of certain property belonging to the estate, and they advertised transport thereof. The respondent (plaintiff) entered opposition to the passing of the transport. The reasons for his opposition were based upon the assumption that the appellants (defendants) as legal personal representatives of Harriet Susanna Butts were legally capable of passing title, and his objection was to their doing so to any person but himself.

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In the action brought by the respondent (plaintiff) to enforce the opposition he sued the defendants in the capacity of legal personal representatives of Harriet Susanna Butts, and his claim was based upon the reasons set out in his notice of opposition. Those reasons did not include an allegation that the defendants were not legal personal representatives of Harriet Susanna Butts. By the Rules of the Supreme Court (Deeds Registry) 1921 the plaintiff was precluded from adding to those reasons or relying upon any different reasons in the opposition suit.

The trial judge gave judgment in favour of the plaintiff. He declared the opposition to be well-founded, and he ordered the defendants to pass transport without further advertisement in favour of the plaintiff. The defendants appealed. On the hearing of the appeal counsel for the respondent (plaintiff), in the course of his reply to the arguments on behalf of the appellants (defendants), contended that the appellants (defendants) were not the legal personal representatives of Harriet Susanna Butts and that the appellants (defendants) had therefore no *locus standi*. This point was not raised in the notice of opposition or in the pleadings of the Court below; and it was not raised in the notice of appeal motion.

Held, (1) that the position of the appellants (defendants) as disclosed by the evidence should be determined before a proper conclusion could be reached as to whether or not the order of the trial judge was correct or not;

(2) that although John Ernest Butts did not take out probate until March, 1941, the co-executor Catherine Douglas who alone proved the will in the first instance was neither a sole executor nor the last surviving executor;

(3) that upon the death of Catherine Douglas the office devolved upon John Ernest Butts, her co-executor, even though he had not proved the will himself;

(4) that at no time did George Fausett, Catherine Douglas' executor, or his executors the appellants (defendants), become the personal representatives of the estate of the original testator Harriet Susanna Butts by virtue of a chain of representation;

(5) that as the appellants (defendants) were not legal personal representatives of Harriet Susanna Butts they could not be ordered, as if executors, to transport title to property of the said estate in favour of the respondent (plaintiff) or of any one else: and further that the opposition was not well-founded as it was founded upon a basis which had no existence in law;

(6) that although the submission that the appellants (defendants) was not raised either in the Court below or in the notice of appeal motion, it would not be proper for the Appeal Court to base its decision upon mistaken conceptions of law held by the parties in this case (plaintiff and defendants) in relation to facts either admitted or proved beyond controversy;

Connecticut Fire Insurance Co. v. Kavanagh (1892) A.C. 480, applied.

(7) that the appeal must therefore be allowed, the judgment of the Court below set aside and judgment entered therein for the defendants (appellants);

(8) that the respondent (plaintiff) misconceived the status of the appellants (defendants) and his own rights in relation to them, and the appellants likewise misconceived the situation; that all parties proceeded to trial along entirely wrong lines and, though doubtless unwittingly, misled the trial judge as to the real issue; that each party contributed in like measure to the creation of a state of affairs in which the trial judge became involved in error and neither party is entitled to any costs;

Donald Campbell & Co. v. Pollak (1927) A.C. 813. and *Re Taxation of Costs and Re T.A.M. a solicitor* (1937) 3 A.E.R. 113, applied.

(9) that the appellants (defendants) have no interest in the property which they had advertised in favour of Dhanwanti, and they have no authority to transport it on behalf of the estate of Harriet Susanna Butts or any one else.

Appeal by the defendants Outridge Fausett and Edward Ross from a judgment of Duke, J. (Acting) reported at (1942) L.R.B.G. 320.

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J. A. Luckhoo, K.C., and A. J. Parkes, for the appellants.

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 a judgment in favour of the plaintiff in an opposition suit in which an order was sought restraining the appellants, who were the defendants in the suit, from proceeding with the sale of certain parcels of land. The appellants, purporting to act as the personal representatives of Harriet Susanna Butts, advertised the sale of certain lots of land which formed part of the estate of the deceased and the main ground of opposition by the respondent was that these lots had previously been sold to him by the devisees with the concurrence of John Ernest Butts purporting to act as executor of the deceased and as guardian of one of the devisees who was at that time an infant.

The facts as found by the learned trial judge are that the original owner of the lots in question died in 1923 leaving two executors, the said John Ernest Butts and Catherine Douglas of whom the latter only proved the will, power being reserved to grant probate to the other whenever he should apply for the same. Catherine Douglas died in 1932 leaving a will which was proved by her executor. He died in 1935 leaving a will which was proved by the appellants who were the executors named therein. By her will the original testator left the land in question in two undivided half shares to her infant sons the elder of whom came of age in 1940. Shortly after he came of age he purported to enter into an agreement with the respondent for the sale of his half share in the land, which agreement was signed also by John Ernest Butts who up to that time had not proved the original testator's will. Shortly after that agreement the same executor joined with the second devisee, who was then still a minor, in an agreement which purported to sell the minor's half share in the land to the respondent also. These agreements were dated 23rd September, 1940, and 15th January, 1941, respectively. In March, 1941, John Ernest Butts proved the will. Before the agreements for sale were implemented by transport, the appellants purporting to act as personal representatives of the original testator, entered into an agreement for sale of the same lots to another party and in pursuance thereof advertised transport to her. The respondent then gave notice of opposition and issued the writ in this suit.

The trial judge found that the agreements to sell to the respondent were valid and issued an injunction restraining the proposed sale by the appellants and further ordered the appellants to pass transport without further advertisement in favour

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of the respondent. He also made an order for costs against the appellants and refused them any indemnity for costs out of the estate.

Against these orders the unsuccessful parties have appealed, the main grounds of appeal as argued being that the respondent had no right of opposition inasmuch as the agreements under which he claimed interest in the property are invalid; that all the parties necessary to a final determination of certain of the issues were not before the Court; that the learned judge had no power to order the appellants to transport to the respondent without fresh advertisement which would have enabled other parties to oppose and that in any event there were no grounds on which the appellants, personally, should have been mulcted in costs.

Counsel for the respondent in the course of his reply contended that the doctrine of a chain of representation by virtue of which the appellants purported to act as the personal representatives of the original testator, is inoperative in this colony and that the appellants had therefore no *locus standi*. Although this point was not raised either in the notice of opposition or in the pleadings of the Court below it is necessary that the position of the appellants as disclosed by the evidence should be determined before a proper conclusion can be reached as to whether or not the order of the learned trial judge or any part thereof is incorrect.

Counsel argued that the law as to executors in this Colony by virtue of section 3 of the Civil Law Ordinance, Cap. 7, rests upon the Common Law of England as altered or modified by local statute and not in so far as the same may have been modified or extended by English statute. He submitted further that the doctrine of a chain of representation whereby the executor of an executor becomes the personal representative of the original testator is not a doctrine of common law but rests upon the statute of 25 Edward III, Statute 5, and therefore is not operative in this Colony. The general principle as stated in the text books from Blackstone's Commentaries to Hailsham's edition of Halsbury's Laws of England is a wide one, so wide indeed that Blackstone says that the executor of the executor becomes "to all intents and purposes" the executor of the original testator. The terms of the Statute of Edward III cited in this connection are by no means so wide, being confined in the main to conferring upon such an executor certain rights of action. It may be justly assumed from this that the doctrine itself is older than the statute, but that from time to time between the reign of Edward III and the passing of the Administration of Estates Act, 1926, it has been found necessary in England to extend or modify the common law rule by statute. We are of opinion, therefore, that the doctrine in its original form is operative in this Colony, although as was pointed out by the learned author of *Dalton's*

Civil Law of British Guiana, the task of defining the precise extent of the powers of an executor in the chain of representation may not be an easy one. The basic principle of the doctrine would appear, however, to be that upon the death of a sole executor or the last surviving of several executors representation of the original testator's estate is continued and kept alive by the executor of the sole or last surviving executor of the original testator. The doctrine is so stated both in *Halsbury's Laws of England*, 2nd Edition, Vol. XIV. p. 168 and *Williams on Executors* 12th Edition, p. 152. The reason for the restriction of the doctrine to the case of a sole executor or last surviving executor doubtless is that during the lifetime of any original executor there is no need for the representation to be kept alive by reference to any other person for on the death of one of several executors the office devolves upon the remaining executor or executors by survivorship. (*Halsbury, loc. cit.*)

In the present case the original testator constituted by her will two executors of whom John Ernest Butts is still alive, and although he did not take out probate until March, 1941, the co-executor who alone proved the will in the first instance was in our view neither a sole executor nor the last surviving executor, for an executor who does not prove the will is still an executor and remains so unless and until he renounces probate. So well established is this that in *Re Pawley, etc.* (1900) 1 Ch. p. 64, Kekewich, J. described it as a matter of common knowledge and in that case held that where under the Land Transfer Act, 1896, the "personal representatives" of an estate were required to join in conveyance, the signature of an absent executor who had not been granted probate must nevertheless be secured. (This position has since been remedied in England by the Conveyancing Act, 1911.) The fact that an executor who has not taken out probate remains an executor unless he has formally renounced probate is recognised, moreover, in the Court of Probate Act, 1858, sec. 16 of which makes provision for clearing off such an executor if upon citation he fails to appear, while the Administration of Estates Act, 1926, makes provision for the situation which has arisen in the present case. These statutes, however, are not in force in this Colony where the position in this respect remains as it was in England prior to the statutes to which we have just referred. The position and the effect of the amending Legislation are illustrated by the cases cited by counsel for the respondent, *In the goods of Nodding* (2 Sw. & Tr. p.15) and *In the goods of Reid* (1896) 65 L J. Pr. p 60, in each of which it was held to be necessary that a non-proving executor should be cleared off in the manner prescribed by the Act of 1858 before steps could be taken on the footing that he was not still an executor of the deceased.

Applying these principles to the facts of the present case, it

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seems clear that Catherine Douglas, although she was the only proving executor of the original will was not the sole executor nor the last surviving executor of the original testator; that upon her death the office devolved upon John Ernest Butts, her co-executor, even though he had not proved the will himself, and that at no time did George Fausett, Catherine Douglas' executor, or his executors, the appellants, become the personal representatives of the estate of the original testator by virtue of a chain of representation.

It is clear from the evidence, however, that they believed themselves to be in that position and upon that assumption intermeddled with the assets of the estate, collected rent and otherwise acted as the personal representatives of the original testator, and that upon that assumption they purported to enter into an agreement for the sale of the property with the consent of the devisees and, it would appear, with the concurrence of the real executor after he had himself proved the will.

While it is true that by such intermeddling each of the appellants may be subject to liability as executor *de son tort* this would give them no right of disposition over the property of the estate nor could they be ordered, as if executors, to transport title therein to the respondent or anyone else.

We have to consider then what is the position that has arisen. It is clear that at the time when he gave notice of opposition and instituted this suit the respondent had misconceived the position of the appellants. The reasons for his opposition are based upon the assumption that the appellants as executors of George Fausett and personal representatives of Harriet Butts were legally capable of passing title and his objection is to their doing so to any person but himself. He has sued them in the capacity of executors of George Fausett and personal representatives of the estate of Harriet Butts and his claim, as is required by the Rules of Court (Deeds Registry) 1921, is based upon the reasons set out in his notice of opposition. He is precluded from adding to these reasons or relying upon any different reasons in this suit. The suit as well as the opposition are however based upon a complete misconception of the legal position of the appellants and the proceedings were started and have been continued upon an entirely wrong basis from which the trial judge was led by both parties to arrive at an erroneous conclusion.

It is true that the appellants cannot lawfully transport this property to the person to whom they have purported to sell it but the reason they cannot do so is that they have no interest therein to transport and not any of the reasons set out by the respondent, which cannot in the circumstances arise.

The learned judge therefore erred not only in ordering the appellants to transport the property to the respondent but also in declaring the opposition to be well-founded for it was founded on a basis which has no existence in law.

Although the principal ground upon which we are of the opinion that this appeal must be decided was not raised either in the Court below or in the notice of appeal motion, it is a case in which it would not be proper for the Appeal Court to base its decision upon mistaken conceptions of law held by the parties in relation to facts either admitted or proved beyond controversy. The facts upon which this particular question of law arises are those which are admitted, and as was said by Lord Watson in the *Connecticut Fire Ins. Co. v Kavanagh* (1892) A.C. p.480 "it is not only competent but expedient in the interests of justice" that the Court of Appeal should give effect to the law, whether the point has been raised at the time or not.

The appeal must therefore be allowed, the judgment of the Court below set aside and judgment will be entered therein for the defendants (appellants).

We should make it clear, however, that this does not mean that the appellants are at liberty to transport this property to Dhanwanti or indeed to anyone else. They have no interest therein to transport and no authority to do so on behalf of the estate of Harriet Butts or anyone else. Of this the Registrar of Deeds will doubtless take cognisance and the Registrar of this Court will be directed to bring this judgment to his notice.

There remains the question of costs both here and in the Court below. It is true that in the difficult position which had arisen, largely through the inter-meddling of the appellants, the respondent misconceived their status and his own rights in relation to them. But it is also true that the appellants likewise misconceived the situation. All parties therefore proceeded to trial along entirely wrong lines, and though doubtless unwittingly, misled the trial judge as to the real issue. He was misled by the respondent on the one hand to enter a judgment which he could not lawfully make on the uncontroverted evidence before him and by the appellants he was asked to dismiss the suit on the basis of a right in the appellants which does not exist in law. Each then contributed in like measure to the creation of a state of affairs in which the trial judge became involved in error and neither is entitled in our view to any costs. We are fortified in our conclusion in this regard by the decision of the House of Lords in *Donald Campbell & Co. v. Pollak* (1927) A.C. p. 813 and of the Court of Appeal in *re Taxation of Costs re T.A.M., a solicitor*, (1937) 3 A.E.R., p.113. Neither case is precisely on all fours with the present, but the principle is clear, that where the main ground has not been raised by the appeal motion or in the Court below and where the trial judge has been invited by both sides to a conclusion to which in law he cannot properly arrive, neither party should be entitled to costs either of the appeal or of the original trial.

Judgment is therefore directed to be entered for the defendants

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in the Court below without costs and there will be no order as to the costs of this appeal, each party, therefore, bearing his own.

We would wish to add that so long ago as 1921 Mr. Justice (now Sir Llewelyn) Dalton wrote in the work to which we have referred: "It is apparent then that some of the principal powers of the executor of an executor are given by statute and not by common law. Unless and until therefore these statutory powers are enacted in this Colony such an executor here is in a very difficult position." More than 21 years have elapsed since then without statutory effect being given to the learned author's suggestion. We therefore desire to endorse it and express the hope that action will be taken by the Legislature at no distant date to bring the law of this Colony in this respect into line with that in force in England.

Appeal allowed.

Solicitors: *R. S. Persaud; J. E. Too-Chung.*

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF THE WINDWARD
ISLANDS AND LEEWARD ISLANDS.K. G. POLAND, *et al*, Appellants (Defendants).
v.
EMANUEL J. Mc MILLAN, Respondent (Plaintiff).

[1942. No. 1.—GRENADA].

BEFORE THEIR HONOURS H. W. B. BLACKALL, Chief Justice of Trinidad
and Tobago (President); SIR ALLAN COLLYMORE, Chief Justice of
Barbados; and SIR JOHN VERITY, Chief Justice of British Guiana.

1943, JULY 24.

*Evidence—Driver of motor car—Admission by—No proof of authority to make—Not evidence against owner.**Evidence—Inadmissible evidence—Whether admitted with or without objection—Duty of Court to reject it when giving judgment—Rejected on appeal.**Insurance—Motor car—Whether implied warranty of road worthiness.**Insurance—Motor car—Policy of insurance—Condition in—“The insured shall take all reasonable steps to safe-guard from loss or damage and maintain in efficient condition the vehicle”—Duty may be delegated—Delegated to a competent person—Duty of insured performed.*

The admission of the driver of a motor car cannot be evidence against the owner of the car, in the absence of proof that he was an agent to make it.

Burr v. Ware Rural District Council (1939) 1 All E.R. 688, applied.

Where inadmissible evidence has been received (whether with or without objection) it is the duty of the Judge to reject it when giving judgment and if he has not done so, it should be rejected on appeal.

Jacker v. International Cable Co. 5 T.L.R 13, applied.

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In a contract of insurance with respect to a motor car, there was a condition reading as follows: "The insured shall take all reasonable steps to safeguard from loss or damage and maintain in efficient condition the vehicle".

Held, that the insured could delegate this work, and so long as he took reasonable care in selecting a competent person to perform the work, his obligation under the condition was at an end.

Woolfall & Rimmer, Ltd., v. Moyle (1941) 3 All E.R. 305, applied.

Jones & James v. Provincial Insurance Co., Ltd. (1929) 46 T.L.R. 71, distinguished.

Barrett v. London General Insurance Co. (1935) 1 K.B. 238, not followed.

Trickett v. Queensland Insurance Co. (1936) A.C. 159, applied.

Appeal by the defendants from a judgment of the Supreme Court of the Windward Islands and Leeward Islands (Grenada Circuit).

The judgment of the West Indian Court of Appeal was as follows:

This is an appeal from a judgment of Malone, J. dated 21st April, 1942, awarding £1,122 9. 10 and costs to the respondents.

The action was brought by the plaintiff-respondent against certain Lloyd's underwriters, for an indemnity in respect of sums which he had been held liable to pay to one Joseph Gibbs as damages for bodily injury done to him through the plaintiff's negligence while travelling as a passenger in the plaintiff's motor bus on 24th October, 1940. In answer to the claim the defendants pleaded *inter alia* certain provisions of the contract of insurance which they contended absolved them from liability to indemnify the plaintiff.

The trial Judge found as a fact that between 10th July and 24th October, 1940, the plaintiff had his motor bus inspected by motor mechanics, that every morning he saw that the driver examined the brakes and that when the bus left his premises at Grand Bacolet on the date of the accident the brakes were in order. The bus had been inspected and passed by the official Inspector of Motor Vehicles as recently as September, 1940, and the driver (Rupert Munroe) was a licensed driver. There has been no allegation that either he or the motor mechanics employed by the plaintiff were other than competent. It was further proved that on the day prior to the accident 27 bags of cocoa were taken in the bus without mishap from Grand Bacolet to St. George through what is to common knowledge mountainous country, and that on the day itself the bus travelled more than 20 miles over similar country before the accident took place.

Evidence was given on behalf of the defence by a witness (Mr. Clarence Renwick), who examined the brakes the following day and found both the service and emergency brakes inoperative. In the course of his evidence this witness stated that Munroe had said to him on that occasion: "when I left on 24th October to go to Hermitage my foot brakes were alright but I had no hand brake." No objection was taken to this evidence at the trial and it was treated by the learned Judge as an admission by the driver that

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he was aware at some stage of the journey subsequent to the starting point, that the emergency brake was not in working order.

The driver's admission cannot however be evidence against the plaintiff in the absence of proof that he was an agent to make it, and as there was no proof of this we are of opinion, following the decision in *Burr v. Ware Rural District Council* (1939) 1 All E.R. 688) that his statement was inadmissible. It was submitted on behalf of the appellants that as no objection was taken to its admission at the time and it was acted upon by the trial Judge, it should not be rejected by this Court, but we are unable to accept this contention, for where inadmissible evidence has been received (whether with or without objection) it is the duty of the Judge to reject it when giving judgment and if he has not done so, it should be rejected on appeal (*Jacker v. International Cable Co.* 5 T.L.R. 13).

Excluding then Munroe's statement to Renwick we proceed to condition 6 of the Policy the material part of which reads:—

“The insured shall take all reasonable steps to safeguard from loss or damage and maintain in efficient condition the vehicle.”

It is contended on behalf of the appellants that, on the authority of *Jones & James v. Provincial Insurance Co., Ltd.* (1929, 46 T.L.R. 71), the insured failed to take all reasonable steps. We agree however with the learned trial Judge that there is no true analogy between that case and the present one, for in the case cited the insured deliberately removed the foot brake from his car, while in the present one the evidence merely shows that immediately after the accident the brakes were found to be inoperative.

It was submitted on the authority of *Barrett v. London General Insurance Co.* (1935, 1 K.B. 238) that there is an implied condition in a motor policy that the vehicle shall be roadworthy, and Mr. Renwick has suggested that the trial Judge overlooked *Dixon v. Sadler* (1839, 5 M & W 405), referred to in that case, in which Parke, B. held that a vessel should be properly equipped at each stage of the navigation. As then in the present case the trial Judge found that the driver became aware that the hand brake was not in working order at one stage of the journey, it was contended that the plaintiff was not entitled to recover. As to this it suffices to say in the first place that the learned Judge's finding on this point was based upon the inadmissible evidence of Munroe, and in the second, that the dicta of Goddard, J. in *Barrett's* case were dissented from in *Trickett v. Queensland Insurance Co.* (1936, A.C. 159) where the Privy Council expressed the view that an argument based on the identity of the conditions which govern the seaworthiness of a ship at sea and the roadworthiness of a car on land, is unsound. It appears to us therefore that the doctrine of

an implied warranty of roadworthiness, based as it is upon an analogue which the Privy Council regard as misleading, cannot be supported. As then the condition in *Barrett's* case exempted the insurers against liability in respect of any accident while driving the car in an unsafe condition, while the condition in the present one merely requires the insured to take all reasonable steps to maintain the vehicle in an efficient condition, the decision in question does not in our view assist the appellant.

Lastly, it was argued that the obligation placed upon the insured by condition 6 applies to his agents and servants to the same extent as they do to himself. This appears to be contrary to the principle laid down in *Woolfall and Rimmer Ltd v. Moyle* (1941, 3 All E.R. 305). The condition in that case was in the following terms:—

“The assured shall take all reasonable precautions to prevent accidents and to comply with all statutory obligations,” and it was contended by the insurers that as the assured’s foreman (through whose default the accident occurred) was negligent in carrying out the task entrusted to him, his employers were debarred from claiming from the underwriters notwithstanding that they had selected a competent foreman for the work. This contention was rejected by the Court of Appeal on the ground that the delegation of the work was reasonable and as the assured had taken reasonable precautions in selecting a competent foreman, their obligation under the conditions was at an end. Lord Greene, M.R. in the course of his judgment in that case stated that a policy of this kind is not to be approached with the idea that a large part of the benefit of the insurance which any employer would obviously wish to get, and which is at the outset given in wide terms, is going to be eliminated by a thing called a “condition” tucked away at the end of the policy in the context which it was found; and Goddard, L.J. in the same case observed that if the Court were to read the condition in the way Counsel for the appellants invited them to read it, it seemed to him that it would follow that the underwriters were saying “I will insure you against your liability for negligence on condition that you are not negligent.”

It appears to us that the present case is governed by the above and that the appeal should be dismissed with costs.

Appeal Dismissed.

R. A. ABBOTT v. S. R. MENDES, LTD.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF THE WINDWARD ISLANDS AND
LEEWARD ISLANDS. (ANTIGUA CIRCUIT).

ROBERT ALFRED ABBOTT, Appellant (Defendant),

v.

STEPHEN R. MENDES, LTD., Respondents (Plaintiffs).

[1940. No. 1.—ANTIGUA].

BEFORE THEIR HONOURS H. W. BLACKALL, Chief Justice of Trinidad and Tobago, (President); SIR JOHN VERITY, Chief Justice of British Guiana; and CLEMENT MALONE, Chief Justice of the Windward Islands and Leeward Islands.

1943, JULY 31.

Antigua—Acknowledgment of debt—Within 6 years—Not in writing—Sufficient to prevent operation of Statute of Limitations.

Statute of Limitations—Debt—Acknowledgment of—Unconditioned and uncontrolled—Sufficient to prevent operation of Statute.

The Antigua Contracts in Writing Act, 1837 (No. 68 of 1837) which, reproducing the provisions of section 1 of Lord Tenterden's Act, 1828, (9 Geo. 4, c. 14), provides that no acknowledgment or promise by words only is sufficient to deprive a party of the benefit of the Statutes of Limitation's, is void by the operation of section 11 of the Leeward Islands Act 1871 as being repugnant to the Mercantile Law Amendment Act 1876 (cap. 13 of the Leeward Islands) which latter Act expressly declares certain sections of the Imperial Statutes of Limitation to be in force in Antigua but omits therefrom Lord Tenterden's Act.

An oral acknowledgment of a debt within 6 years is sufficient in the presidency of Antigua to prevent the operation of the Statute of Limitations.

Byam v. Anthony, Supreme Court of the Windward and Leeward Islands, 11th February, 1943, considered and approved.

In order to take a case out of the Statute of Limitations there must, upon a fair construction of the acknowledgment read in the light of the surrounding circumstances, be an admission that the party making it owes the debt,

Spencer v. Hemmerde (1922) 2 A.C. 507, applied.

If there is such an acknowledgment the law implies an intention to pay unless the debtor guards his acknowledgment and accompanies it with an express declaration to prevent any such implication. The fact that the debtor disputes certain items in an account is not however sufficient to negative the implication (*Colledge v. Horn*, 3 Bing, 119), nor is it necessary to penetrate the debtor's state of mind for the debtor as a rule has no intention to bind himself further than he is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure.

The appellant orally admitted to the respondent's agent that, apart from a few items in a lengthy account, he owed the debt. In the course of discussion, the appellant promised the respondent's agent that he would bring proof that two or three items for gasoline were incorrect, but he never carried out his promise and he did not give evidence at the hearing.

Held, that the law concerns itself only with the unconditioned and uncontrolled character of the acknowledgment and not with its intention in truth; and that there was an oral acknowledgment sufficient to prevent the operation of the Statute of Limitations.

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APPEAL by the defendant from a judgment of the Supreme Court of the Windward Islands and Leeward Islands (Antigua Circuit).

The judgment of the West Indian Appeal was as follows:

This is an appeal from a judgment of the late Chief Justice of the Windward Islands and Leeward Islands Antigua Circuit in the favour of the plaintiff in an action for the recovery of the price of goods sold and delivered and car hire. The particulars set out in the statement of claim disclose that of the total sum of £76 17. 5½ one item only, for car hire to the amount of £4 10. arose within six years before the date of the writ. The defendant pleaded that the claim is barred by the Statute of Limitations. After hearing evidence tendered on behalf of the plaintiff and argument addressed to him on both sides the learned Chief Justice entered judgment for the plaintiff for the whole amount claimed. Against this judgment the defendant has appealed and has moved that the judgment of the Lower Court be rescinded and that judgment be directed to be entered for the plaintiff for £4 10. only, it being submitted that the rest of the claim is statute barred. The second ground of appeal is that the trial judge erred in holding that because the last item was not statute barred the right to sue on the whole account arose within six years before the commencement of the suit.

It was however argued on behalf of the respondent both here and in the Court below, that the whole debt is taken out of the statute by an acknowledgment of the debt by the appellant within six years before suit, and if this contention be correct the question raised in the second ground of appeal does not arise. It is desirable therefore that this point should first be considered, more especially as it gives rise to an interesting question as to the law in force in Antigua on this subject which may not be without importance to the mercantile community.

The evidence upon which the respondent relies in proof of an unconditional acknowledgment of the debt by the appellant within the statutory period is that of Wilfred Alexander Gomes who related that the appellant came to the respondent's store in or about the month of February, 1939, and disputed the amount of the account "saying certain items he had never received namely gasoline charges." The witness added that the appellant "disputed one item charging 3 gallons gas and there were others which he would have to look in account." (Sic). He stated further that the appellant "never denied the main items" and under cross-examination stated that the appellant "did not dispute the account generally but only 2 or 3 gasoline account." The accuracy of this witness' testimony is not challenged by the appellant who refrained from giving or adducing evidence.

It is contended that from this there arises by implication an unconditional acknowledgment of the debt from which there

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may be inferred a promise to pay, and that although the full amount of the debt was not acknowledged, for certain items therein were in fact disputed, the acknowledgment is nevertheless sufficient to take the debt out of the statute and that the correct amount due can be determined by the evidence.

The first question for us to decide is whether in Gomes' evidence there is to be found an acknowledgment of the debt, and if so whether according to the law in force in Antigua, such an acknowledgment is required to be in writing.

It will be convenient first to consider the second of these questions for there is in the present case no acknowledgment in writing. The question has recently been dealt with in the Supreme Court of the Windward and Leeward Islands on appeal in *Byam v. Anthony* (11th February, 1943). In that case it was held that Act No. 68 of 1837 of Antigua (The Contracts in Writing Act 1837) which, reproducing the provisions of section one of Lord Tenterden's Act, (9 Geo. 4, c. 14), provides that no acknowledgment or promise by words only is sufficient to deprive a party of the benefit of the Statutes of Limitations, is void by the operation of section 11 of the Leeward Islands Act 1871, as being repugnant to the "The Mercantile Law Amendment Act" (Cap. 13 of the Leeward Islands) which latter Act expressly declares certain sections of the Imperial Statutes of Limitations to be in force in this Colony but omits therefrom Lord Tenterden's Act.

We are of the opinion that the conclusion arrived at in *Byam v. Anthony* is well founded and that the principles upon which it was based are applicable to the question now under consideration. By section 10 of the Leeward Islands Act 1871 the General Legislative Council is empowered to make laws for the Leeward Islands or any part thereof on (*inter alia*) the subject of mercantile law. Section 11 of the Act provides that any Island enactment relating to any of the subjects named in the preceding section may at any time be repealed or altered by the General Legislature and shall, without any formal repeal, be void in so far as it is repugnant to any law passed by the General Legislature. In pursuance of the powers conferred by section 10 the General Legislature in 1876 enacted the Mercantile Law Amendment Act (Cap. 13 of the Leeward Islands) which, as has been observed, omitted all reference to the first section of Lord Tenterden's Act. The effect of this omission is that by a reversion to the state of the law in England prior to 1828 an oral acknowledgment is sufficient to avoid the operation of the statute in so far as it relates to the limitations of actions. The Contracts in Writing Act passed by the Island Legislature of Antigua in 1837, however, imposes the necessity for a written acknowledgment and in so far as it does so, it is in our view, repugnant to the Mercantile Law Amendment Act passed by the General Legislature, and is therefore void.

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It is a well established canon of interpretation that if two enactments are irreconcilable the earlier stands impliedly repealed by the latter, and where a statute contemplates in express terms that its enactments will repeal earlier Acts by their inconsistency with them the earlier Acts may be more readily treated as repealed. In the present instance the Leeward Islands Act expressly contemplates the repeal by implication of island enactments inconsistent with them of the General Legislature, and we are of opinion therefore, that the provisions of Lord Tenterden's Act as reproduced in the Antigua Act of 1837 are void by reason of their repugnance to the provisions of the Mercantile Law Amendment Act of 1876, and that an oral acknowledgment of a debt within six years is sufficient in this Presidency to prevent, the operation of the Statute.

We now turn to consider whether there has been such an acknowledgment in the present case. The principle and rule of law on this point have been the subject of numerous judicial decisions not always easy to reconcile, and were exhaustively discussed in the well-known case of *Spencer v. Hemmerde* (1922, 2 A.C. 507). In order to take a case out of the Statute there must, upon a fair construction of the acknowledgment read in the light of surrounding circumstances, be an admission that the party making it owes the debt.

If there is such an acknowledgment the law implies an intention to pay unless the debtor guards his acknowledgment and accompanies it with an express declaration to prevent any such implication. Thus if the debtor, says "I acknowledge the debt but I refuse to pay it" the refusal negatives any implied promise. The fact that the debtor disputes certain items in an account is not however sufficient to negative the implication (*Colledge v. Horn* 3 Bing 119) nor is it necessary to penetrate the debtor's state of mind for, as Lord Sumner observed in *Spencer v. Hemmerde*, the debtor as a rule has no intention to bind himself further than he is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure.

Applying these principles to the present case it appears to us that the appellant's conversation with Mr. Gomes to which reference has already been made amounted to an admission that apart from a few items in a lengthy account, he owed the debt. In the course of discussion the appellant promised Mr. Gomes to bring proof that two or three items for gasoline were incorrect but as he has never carried out his promise or gave any evidence at the hearing it may be assumed he is unable to do so. As to the appellant's real intentions we are quite prepared to believe that he would have evaded payment if he could possibly do so, for his conduct throughout indicates that he is not incommoded by a

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sense of moral obligation. Fortunately however for the respondent the law in these cases concerns itself only with the unconditioned and uncontrolled character of the acknowledgment and not its intention in truth. The appeal is accordingly dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL APPEAL NO. 50 OF 1941.

WILLIAM RALPH GUEVARA, Appellant

v.

ROBERT WOODBURN, Respondent.

FROM

THE WEST INDIAN COURT OF APPEAL.

(TRINIDAD AND TOBAGO).

Judgment of the Lords of the Judicial Committee of the Privy Council,
delivered the 8th February, 1943.

PRESENT AT THE HEARING:

LORD ATKIN.

LORD RUSSELL of Killowen.

LORD PORTER.

SIR GEORGE RANKIN.

SIR MADHAVAN NAIR.

Judgment delivered by LORD ATKIN.

W. R. GUEVARA v. R. WOODBURN.

WILLIAM RALPH GUEVARA, Appellant,

v.

ROBERT WOODBURN, Respondent,

ON APPEAL FROM THE WEST INDIAN COURT OF APPEAL
(TRINIDAD AND TOBAGO).

BEFORE LORD ATKIN, LORD RUSSELL of Killowen, LORD PORTER,
SIR GEORGE RANKIN and SIR MADHAVAN NAIR.

1943. FEBRUARY 8.

Negligence—Plaintiff's negligence not contributing to accident—Defendant's negligence only effective cause of injury to plaintiff—Defendant liable in damages.

In Port-of-Spain, Trinidad, two roads, Roberts Street and French Street, cross at right angles, Roberts Street running east and west, French Street north and south. Roberts Street on the west side of the junction is 28 feet 3 inches wide, narrowing to 20 feet 2 inches as it leaves the junction. French Street is 26 feet 10 inches continuously.

About 10.30 p.m. on October 12, 1938, the plaintiff, a man aged 61, was riding his bicycle from north to south down French Street, intending to cross the junction and continue down the street. A short distance before he left the northern end of French Street, he observed the glare of the lights of a motor vehicle on the west side of Roberts Street, but did not look in that direction until he reached a line about level with the kerb of Roberts Street. He then observed the defendant's jitney, which at that time he noticed was being driven fast and on the wrong side of the road about 60 to 70 feet away from him. He proceeded across the road at his ordinary speed, 8 to 10 miles an hour, and had reached a spot 4 feet from the corner of the two streets on the S.E. side when the motor vehicle, which had not changed its course or speed, drove into him, hitting him 25 feet up Roberts Street, and causing injuries to his right knee, from which he has not now fully recovered.

Held, (1) (that assuming that the plaintiff was negligent in starting to cross the road and that his negligence must be deemed to be continuous), the plaintiff had at the time of impact arrived at what should to him have proved safe territory; that he was only 4 feet from the opposite edge of the road he was crossing, and should have been as safe there as any pedestrian or cyclist travelling westwards in that portion of Roberts Street;

(2) That the defendant's driver could, at any moment of time before the actual impact by the slightest correction of his course towards his correct side, have avoided the collision, for he had 16 feet margin the other side;

(3) That the defendant's driver's negligence was the only effective cause of the injury to the plaintiff: in other words, the plaintiff's negligence, although possibly continuing to the end, did not contribute to the collision, which was entirely due to the defendant's driver's wicked persistent rush on the wrong side of the road; and

(4) That the plaintiff was entitled to recover damages from the defendant for personal injuries caused by the negligent driving of a motor vehicle by the servant of the defendant.

Judgment of West Indian Court of Appeal in *Guevara v. Woodburn* (1940) L.R.B.G., 157 reversed.

Appeal by the plaintiff from a decision of the West Indian Court of Appeal who reversed a decision by the Chief Justice of Trinidad and Tobago giving judgment for the plaintiff for \$1,773.38 and costs. The action was brought for damages for

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personal injuries caused by the negligent driving of a motor vehicle by the servant of the defendant. The facts appear from the judgment.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by Lord Atkin, as follows:

This is an appeal by the plaintiff from a decision of the West Indian Court of Appeal who reversed a decision by the Chief Justice of Trinidad and Tobago giving judgment for the plaintiff for 1,773.38 dollars and costs. The action was brought for damages for personal injuries caused by the negligent driving of a motor vehicle by the servant of the defendant. The defendant called no evidence at the trial and the facts are, as stated by the Chief Justice, uncontroverted. In Port of Spain, Trinidad, two roads, Roberts Street and French Street, cross at right angles, Roberts Street running east and west, French Street north and south. Roberts Street on the west side of the junction is 28ft. 3 ins. wide, narrowing to 20ft. 2 ins. as it leaves the junction. French Street is 26ft. 10 in. continuously. About 10.30 p.m. on October 12, 1938, the plaintiff, a man aged 61, was riding his bicycle from north to south down French Street, intending to cross the junction and continue down the street. A short distance before he left the northern end of French Street he observed the glare of the lights of a motor vehicle on the west side of Roberts Street, but did not look in that direction until he reached a line about level with the kerb of Roberts Street. He then observed the defendant's jitney, which at that time he noticed was being driven fast and on the wrong side of the road about 60 to 70 feet away from him. He proceeded across the road at his ordinary speed, 8 to 10 miles an hour, and had reached a spot four feet from the corner of the two streets on the S. E. side when the motor vehicle, which had not changed its course or speed, drove into him, hitting him 25 feet up Roberts Street, and causing injuries to his right knee, from which he has not now fully recovered. Of the amount of damages awarded by the trial judge there is no complaint. The plaintiff was able to state the position of the defendant's vehicle when he first saw it and the point of impact. From the defendant's position to the point of impact is 70 ft.; from the point where the plaintiff was when he first saw it to the point of impact is 20 ft. The learned Chief Justice, after finding negligence on the part of the defendant's driver, which was obviously indisputable, proceeded:

"I find also on the evidence that in taking the crossing in the circumstances indicated by the plaintiff, he (the plaintiff), although Tiding on his correct side at a reasonable speed, was negligent in the sense of being careless of his own safety and in not appreciating the situation created by the rapid approach of the defendant's jitney. To that extent the plaintiff may be said to have contributed to the accident."

He then proceeds to say that he cannot however accept the submission that it was a case of contemporaneous negligence for

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which both parties were to blame, and after pointing out the different courses that were open to the driver, including crossing over to his correct side, he concludes:

“The evidence before me in my view points strongly to the conclusion that by the exercise of reasonable care and skill he could have avoided the accident. Moreover, I am of opinion that it was the negligence of the defendant’s driver and not the plaintiff’s negligence which was the decisive cause of the accident. Accordingly the defendant is liable to the plaintiff in damages.”

The learned Judges in the Court of Appeal, accepting the trial Judge’s view that both parties had been negligent, came to the conclusion that the negligences were simultaneous and continued up to the moment of impact, and that the plaintiff had therefore brought the loss upon himself. Their Lordships cannot agree with this decision. They think that the plaintiff might well have escaped any finding of negligence. The suggestion is that he might have seen the approaching vehicle as distinguished from the glare of its lights a few feet before he actually lifted his eyes to it: and it is to be supposed that it is thought that a prudent man would have decided to stop and let it pass. But the jitney would then have been 70 to 80 feet away, and a man might reasonably suppose that he could safely cross to a position of safety seeing that he was in full sight of the motor vehicle, and had only to cross 10 feet of the road to get out of the way of the vehicle’s correct course. At the place where he did in fact look it would have been highly dangerous not to proceed, for he would then be stopping at a place where he would almost certainly have been hit if the driver had diverted his vehicle to his correct side. But both Courts have agreed that there was some negligence on the part of the plaintiff, and their Lordships do not propose to reverse that finding. But on the assumption that the plaintiff was negligent in starting to cross the road and that his negligence must be deemed to be continuous, the fact remains that he had at the time of impact arrived at what should to him have proved safe territory. He was only 4 feet from the opposite edge of the road he was crossing, and should have been as safe there as any pedestrian or cyclist travelling westwards in that portion of Roberts Street. It seems obvious that the defendant’s driver could at any moment of time before the actual impact by the slightest correction of his course towards his correct side have avoided the collision, for he had 16 feet margin the other side. It would appear that the learned Judges of the Court of Appeal have ignored the considerations which led the learned Chief Justice to the conclusion that it was the defendant’s driver’s negligence which was the decisive cause of the injury. This clearly means that the it was only effective cause; and is a finding which in their Lordships’ opinion is correct and the only possible finding on the proved facts. In other words, the plaintiff’s negligence, though possibly continuing to the end, did not contribute to the collision, which was entirely

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due to the defendant's driver's wicked persistent rush on the wrong side of his road. In these circumstances their Lordships will humbly advise His Majesty that the appeal be allowed, the judgment of the Court of Appeal be set aside, and the judgement of the Chief Justice be restored. The appellant must have the costs of the appeal to the Court of Appeal and such costs of his appeal to the Privy Council as are appropriate to appeals *in forma pauperis*.

Appeal allowed.

L. BACKLER, LTD., v. K. LALL.

L. BACKLER, LTD., Plaintiffs,

v.

KISHORIE LALL, Defendant.

[1942. No. 406.—DEMERARA.]

BEFORE DUKE, J. (Acting).

1943. JANUARY 4, 9, 16, 23, 29; FEBRUARY 6, 8, 13, 16,
17, 18, 19, 22, 23.

Company—Foreign Company—No office in colony; no rent paid for office here—Agent in Colony to solicit orders—Not paid by salary but by commission—Place of business not established by company in Colony—Companies (Consolidation) Ordinance, cap. 178, s. 247; Companies (Fees and Forms) Order, 1933.

Contract—When term can be implied—Not where in opinion of Court the parties should have reasonably contemplated such a term—Where necessary to imply such a term in order to give to transaction such business efficacy as parties must have intended.

Contract—Sale of goods—Between Canadian exporter and British Guiana importer—Whether term can be implied—That exporter under obligation to importer to insure goods sold against war risk—Not necessary to imply such a term in order to give to transaction such business efficacy as parties must have intended.

Sale of goods—Contract of—Term in—War Risk Buyer's Account—Meaning of—War Risk the concern of buyer alone—If buyer desired to cover war risk by insurance, he must take out policy.

Contract—Implied term—Cannot contradict express term—Express term—War Risk Buyer's Account—Term cannot be implied—That seller under obligation to buyer to insure against war risk.

Contract—Usage or custom of trade—Tacitly incorporated in contract—If express terms of writing are not so inconsistent with custom as to exclude it—Usage may expound but must not contradict term of contract—Express term of contract—War Risk Buyer's Account—Usage or custom of trade that seller under obligation to buyer to insure against war risk—Cannot prevail against express terms of contract.

Sale of goods—Contract of—Goods sent by seller to buyer by route involving sea transit—In circumstances in which it is usual to insure—Seller to give such notice to buyer as may enable him to insure goods during sea transit, and if seller fails so to do, goods to be deemed to be at his risk during their sea transit—Unless otherwise agreed—Express term in contract—War Risk-Buyer's Account—War risk concern of buyer alone—Seller expressly released by buyer from having any concern with war risk—No notice given by seller to buyer—Goods not at risk of seller during sea transit—Sale of Goods Ordinance, cap. 65, s. 34 (3).

The plaintiffs, a Canadian company, had authorised a local firm of manufacturers' representatives to solicit orders on their behalf in this Colony. The plaintiffs did not own or pay rent for any office in this Colony. They paid no salary to any person in this Colony; the remuneration of their representatives here being derived solely from commissions

Held, that the plaintiffs had not established a place of business within the Colony.

A term is only implied in a contract where it is necessary to imply the term in order to give to the transaction such business efficacy as the parties must have intended. This does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties.

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It maybe more convenient for the exporter in Canada, than it is for the importer in this Colony, to effect a policy of insurance against war risk. But it is not necessary to imply such a term in order to give the transaction for the sale of goods by the Canadian exporter to the British Guiana importer, such business efficacy as the parties must have intended. It is not sufficient to imply a term that, in the opinion of the Court, the parties should have reasonably contemplated such a term.

In a contract for the sale of goods between a Canadian exporter and a British Guiana importer, the term cannot be implied that the exporter is under an obligation to insure the goods sold against war risk.

In a contract between a Canadian exporter and a British Guiana importer, for the sale of goods, the words "War Risk Buyer's Account" appeared.

Held, that these words did not mean that the seller was to effect an insurance against war risk at the buyer's expense, but that they meant that war risk was the concern of the buyer alone, and that if he desired to cover war risk by insurance, he must take out the policy.

C. Groom, Ltd. v. Barber (1915) 1 K.B. 316, applied.

No term can be implied in a contract which contradicts an express term of the contract.

A contract for the sale of goods provided that the seller was under no obligation to effect an insurance against war risk. The purchaser sought to have the term that the seller was under such an obligation, implied.

Held, that even if the evidence were sufficient to establish the implied term, it could not prevail against the express terms of the contract.

A usage or custom of trade is tacitly incorporated in a contract, though not expressed in it, provided the express terms of the writing are not so inconsistent with the custom as to exclude it. A usage or custom of trade may expound but must not contradict the terms of the contract.

A contract for the sale of goods provided that war risk insurance was the concern of the buyer alone, and that, if he desired to cover war risk by insurance, he must take out the policy. The buyer sought to establish a custom or usage of trade whereunder the seller was under a duty to the buyer to insure the goods against war risk.

Held, that the custom or usage of trade set up by the buyer contradicted the express terms of the contract; and that, even if it were established, it could not prevail against the express terms of the contract.

A contract for the sale of goods contained the term *War Risk Buyer's Account*.

Held (1) that it was expressly agreed between the seller and the buyer that war risk was the concern of the buyer alone, and that the seller was expressly released by the buyer from having any concern with war risk;

(2) that the obligation of the seller under section 34 (3) of the Sale of Goods Ordinance, cap. 65, (which provides that "unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do so, the goods shall be deemed to be at his risk during that transit") to give such notice to the buyer as may enable him to insure the goods against war risk during their sea transit is excluded because it was "otherwise agreed" between the seller and the buyer by virtue of the term *War Risk Buyer's Account* in the contract of sale.

ACTION by the plaintiffs L. Backler, Limited, against Kishorie Lall claiming the sum of \$212.06, the price of goods sold and delivered.

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

D. P. Debidin, solicitor, for defendant.

Cur. adv. vult.

Duke, J. (Acting): This is an action in which the plaintiffs L. Backler, Limited (a company incorporated under the laws of the Dominion of Canada) claim from the defendant Kishorie Lall the

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sum of \$212.06 (the equivalent of Canadian \$192.78) being the price of goods sold and delivered by the plaintiffs to the defendant.

The solicitor for the defendant has raised the preliminary objection that the plaintiffs are not entitled to sue in this Colony as they are not registered under section 247 of the Companies (Consolidation) Ordinance, cap. 178. and the Companies (Fees and Forms) Order, 1933. No company is required to register under section 247 (2) unless it “establishes a place of business within the Colony.”

In the Scottish case of *Lord Advocate v. Huron and Erie Loan & Savings Co.*, which is referred to in the English and Empire Digest, vol. 10, Companies, pp. 1198, 1199, note 8509 (m), the facts were as follows:

A land investment company incorporated and having its head office in Canada employed as agents in the United Kingdom. Scottish legal firms who issued advertisements inviting application for investment in the Company's debentures to be lodged with them, and instructing that money invested should be paid into a Scottish bank. The debentures were executed in Ontario, Canada, and issued to investors in Scotland through the agents. Attorneys of the company in Scotland exercised on its behalf certain powers with regard to transfers of debentures, confirmation and probate. The company did not own or pay rent for any office or pay a salary to any official in the United Kingdom; the remuneration of its representatives in Scotland being derived solely from commissions and fees of transference. It was held that the company had not established a place of business in the United Kingdom within the meaning of section 274 of the Companies Act, 1908.

In the present case the plaintiffs had authorised Harold E. White & Co. to solicit orders on their behalf in this Colony. They did not own or pay rent for any office in this Colony. They paid no salary to any official in this Colony: the remuneration of their representatives here being derived solely from commissions. The plaintiffs were doing business in this Colony, but, on the authority of *Lord Advocate v. Huron & Erie Loan & Savings Co.* (if any authority is indeed needed) I hold that they had not established any place of business within the Colony. It is unnecessary for me to determine whether if the company had established a place of business within the Colony, non-registration under section 247 (2) of the (Companies Consolidation) Ordinance, cap. 178, would have been a bar to the right to sue. The preliminary objection fails.

On the 2nd December 1941, the defendant, through Harold E. White & Co., (who were then the representatives of the plaintiffs in this Colony to solicit orders on their behalf), ordered certain goods from the plaintiffs who carry on business in the city of Montreal, Canada. The order form was signed by the defendant and it contained the following printed words:

WAR RISK BUYER'S ACCOUNT. All fluctuations in freight rates either way for Buyer's Account. All orders accepted subject to confirmation. The seller assumes no responsibility for delay in shipment and transshipment beyond their control.

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The other terms of the contract were:

Shipment as soon as possible. Sight draft Canadian currency.

The order was secured through a salesman of Harold E. White & Co. It was taken by him to Mr. Harold E. White, a partner of the firm, who forwarded it, along with others, to the plaintiffs. It would seem that these were the first orders which had been secured by Harold E. White & Co. on behalf of the plaintiffs since Harold E. White & Co. had been appointed their agents in this colony. The subject of war risk insurance was not mentioned by Harold E. White & Co. in their covering letter, or in any previous communication to the plaintiffs.

Prior to the 2nd December, 1941, and subsequent to the outbreak of the present war, the defendant had ordered goods from Canada through Harold E. White & Co. and that order had the words "War Risk Buyer's Account" printed upon it in prominent characters. The defendant says that the order of the 2nd December, 1941, was signed by him in the presence of Mr. White: that was not so. Had the defendant signed the order in the presence of Mr. White, some colour might have been lent to his statement that, at the time of the signing of the order, he had a conversation with Mr. White who then told him that the words "War Risk Buyer's Account" meant that the seller would insure against war risk and charge the cost on the invoice to the buyer. There was no such conversation at the time the order was signed, nor at any time before it was sent away to the plaintiffs.

On the 7th December, 1941, Japan committed an act of war at Pearl Harbour against the United States of America who thereupon became a belligerent in this present war on the side of the British Empire and of our Allies.

Notwithstanding the entry of the United States of America into the present war neither the defendant nor Harold E. White & Co. wrote the plaintiffs requesting them, to take out a policy of insurance covering war risk at the defendant's expense.

On the 24th January, 1942, the goods ordered by the defendant from the plaintiffs were posted by the plaintiffs at Montreal, Canada, for transmission to the defendant by parcel post. The best evidence of confirmation of the order by the plaintiffs was the circumstance that the order was filled by them, and the goods posted to the defendant.

The sum of \$2.88 was paid by the plaintiffs to the Post Office for insurance on the goods. The goods (12 dozen felt hats) were packed in 24 cartons, and the insurance was at the rate of 12 cents a carton. The rate of insurance upon any parcel valued in a sum not exceeding \$50, is 12 cents. The insurance effected by the plaintiffs did not include insurance against war risk.

On the 26th January, 1942, the plaintiffs mailed the defendant a copy of the detailed invoice dated 22nd January, 1942, and informed him that they had drawn a sight draft on him for Cana-

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dian \$192.78, the amount of the invoice, through Barclays Bank, and that when this draft was paid, the defendant would receive his customs invoices. The sum of \$192.78, included \$7.20 for postage and the \$2.88 for insurance. This letter was received by the defendant on the 7th February, 1942.

The goods were lost by enemy action while on board one of the Lady boats travelling from Halifax, Canada and from Boston, Massachusetts, U.S.A. to this Colony. The exact date of the sinking of that ship has not been given in evidence.

It has been suggested, but not established, that the goods were insured by the Post Office, only while they were on the North American continent. It is clear, however, that they were not insured against war risk, whether on land or on sea. It will be appreciated that, in the present war, there is war risk on land, as well as on sea.

On the 2nd March, 1942, and the 7th May, 1942, Harold E. White & Co., wrote to their principals, the plaintiffs, informing them that they should have insured the goods against war risk.

In their letter of the 2nd March, 1942, Harold E. White & Co., said, *inter alia*:

We acknowledge your letter of February 17th received on the 28th by air mail, and note that you have been shipping all orders to British Guiana by mail and insured by the Post Office, only while on the North American Continent, that is, it is not insured against war risk and marine risk. Now, gentlemen, there is no use explaining this to our customers at all, and we must ask you to be sure and insure against war and marine risks. The point is just this: if you do not insure against war and marine risks, you cannot claim on the consignees, and even if you started a suit on them, you would lose out, because it is an understood thing in commission business that goods going by water must be insured against marine risk, and if they are not insured against war risk, you are in a worse position.....we have only been paying 1% war risk on nearly all our goods, and around 50 cents on \$100 marine risk; including freight and all, a great deal of our goods arrive here with not more than 20% freight charges, marine and war risks, therefore see in future that you have these insured so that you will be protected as well as the customers out here against any loss.

Had Harold E. White & Co., written to the plaintiffs a similar letter on the subject of war risk insurance when they were transmitting the defendant's order of the 2nd December, 1941, this litigation would not have been, as the plaintiffs would certainly have met the convenience of their customers in the Colony and effected insurance against war risk without regard as to whether they were under a duty to insure against war risk or not.

On the 10th March, 1942, the plaintiff's shipped goods to Sabga Bros., and to J. Ramdan, and through the medium of Bush Service Corporation (Canada), Limited, international shipping and forwarding agents, of 417, St. Peter Street, Montreal, the goods were insured against war risk.

By letter dated the 19th March, 1942, the plaintiffs (referring to shipments by them to Sabga Bros, and J. Salamalay which were shipped under contracts of sale similar to the one the subject-matter of this action and which were not insured

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by the plaintiffs against war risk and were lost by enemy action while on board the C.N.S. "Lady Hawkins") wrote Harold E. White & Co., who were then their agents as follows:

Due to the fact that we only had these shipments insured by the Post Office it is a complete loss to us. There is no recourse from the Post Office as these were not lost on land.

On the 23rd April, 1942, Harold E. White & Co. wrote the plaintiffs as follows:

We regret very much to hear that these are a total loss to you on account of your not having insured them.

The solicitor for the defendant urges that the letter of the 19th March, 1942, shows how the plaintiffs themselves regarded the contract of sale. The plaintiffs, however, subsequently appointed attorneys in this Colony to bring proceedings against, among other persons, Sabga Bros., J. Salamalay and the defendant.

By letter of the 7th April, 1942, (received on the 18th April, 1942) the plaintiffs wrote Harold E. White & Co., as follows:

We regret to inform you that, due to war conditions, the shortage of materials and the great difficulty in getting labour, we are forced to cancel all orders on hand, and refuse future orders until further notice, We hope that our friendship will continue, and, when we will once more be in a position to export merchandise, we will only be too pleased to have you as our Agent again.

On the 15th April, 1942, the plaintiffs wrote Harold E. White & Co. that they had not received payment from, among other importers in the Colony, the defendant K. Lall, Sabga Bros, and J. Salamalay and asking them to make inquiries.

By letter dated the 17th April, 1942, the defendant informed the plaintiffs that he had received, on the 7th February, 1942, their letter of the 26th January, 1942, with invoice attached, and he further stated:

Up to date of writing we have no evidence that these goods have reached the Colony, and respectfully ask that you inform us, as early as convenient, what has been the fate of the shipment in so far as you are able to determine.

On the 28th April, 1942, Harold E. White & Co. replied to the plaintiffs' letter of the 15th April, 1942, and they stated that they believed that the drafts unpaid by Sabga Bros, and J. Salamalay were those in respect of the goods that were lost on the "Lady Hawkins".

By letter of the 7th May, 1942, Harold E. White & Co. informed the plaintiffs that the following, among other, shipments had not arrived in the Colony, and had been lost by enemy action:

<u>Invoice.</u>	<u>Importer.</u>	<u>Amount.</u>	<u>P.O. Way Bill.</u>
Jan. 22	K. Lall	\$192.78	No. 6, 2/2/42
Feb. 17	J. Salamalay	\$131.52	No. 9, 16/2/42

Harold E. White & Co. concluded their letter as follows:

As you did not insure these goods against war risk, you have no hold on the customers out here, as we have already warned you.

On the 21st April, 1942, the plaintiffs wrote to the defendant

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regretting that up to then they had not received payment from him of the sum of \$192.78, and they continued:

We have been informed that your delay in payment is apparently due to the fact that the merchandise shipped to you was lost in transit, We would like to bring to your attention the conditions on your original order, which read as follows:—

“War risk buyer’s account. The seller assumes no responsibility for delivery (*sic*) in shipment and transshipment, beyond their control”.

We further wish to bring to your attention the fact that, by law, the shipper assumes no responsibility for the delivery of the merchandise, the obligation of the shipper being at an end the moment he delivers the shipment to a transport company, or, as in this case to the Post Office. After such delivery, the responsibility for the merchandise is assumed by you, as buyer.

In your case, our records show that we have delivered your merchandise to the Montreal Post Office, who have given us a receipt, and we are enclosing a photostatic copy of said original receipt.

Under the circumstances, we must therefore ask you to let us have payment of the amount outstanding.

On the 4th June, 1942, Mr. I. Popliger, K.C., barrister and solicitor, of Montreal, Canada, wrote to the defendant demanding payment of the sum of \$192.78, and informing him that if that sum, with \$4 the cost of the letter, was not received by him by return of mail, the plaintiffs’ claim would be sent to his legal correspondent in this Colony with instructions to institute immediate legal proceedings.

On the 29th July, 1942, the plaintiffs executed a power of attorney in Canada appointing Joseph Edward de Freitas and Hugh Cecil Benjamin Humphrys as their joint and several legal and lawful attorneys, for them on behalf and in the name of the plaintiff’s, to institute legal proceedings against the following, among other, parties and for the amounts set opposite their respective names:

Sabga Bros. ...	...\$	67 96
J. Salamalay ...	...\$	228 52
J. Ramdan ...	...\$	148 50
K.Lall ...	...\$	192 78

On the 6th August, 1942, Cameron & Shepherd, solicitors, on behalf of the plaintiffs, sent the defendant a letter of demand for the sum of \$192.78 and informing him that on failure to pay the same on or before the 14th August, 1942, legal proceedings will be taken against him for the recovery of the same.

On the 8th August, 1942, the defendant replied in the following terms:

We.....have to report:

- (1) That no goods have been received by us from Messrs. L. Backler, Ltd., of Canada;
- (2) The draft forwarded by them through Messrs. Barclays Bank for \$192.78 was dishonoured by us with their Local Agent (Messrs. Harold White & Co.’s) approval;
- (3) Messrs. Barclays Bank did not press for payment in view of the non-arrival of goods;
- (4) Even if we had paid the Sight Draft for \$192.78, the Bank informed us that they were unable to provide us with Insurance Certificate, as none had been received by them. We would therefore have had no means of claiming payment from the Insurance Company;

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- (5) The terms under which goods were ordered included “War Risk Buyer’s Account”—implying that shipment was to be insured against war risk, cost to be borne by us.

In view of the particulars given above we trust you will see with us, that we have no desire to defraud Messrs. L. Backler, Ltd., and our attitude in this matter has been influenced, primarily, by the advice received from Messrs. L. Backler, Ltd., Local Agents, Messrs. Harold White & Co. of Water and Holmes Streets, to whom we respectfully refer you for further information in this matter.

On the 10th September, 1942, the power of attorney which was executed by the plaintiffs on the 29th July, 1942, was recorded in the Deeds Registry of British Guiana at Georgetown.

On the 26th November, 1942, the defendant’s solicitor wrote the plaintiffs’ solicitors a letter in which he stated, *inter alia*:

I must repeat what my client has already pointed out in his letter to you that “the terms under which goods were ordered included *War Risk Buyer’s Account*—implying that shipment was to be insured against war risk to be borne by us.” My client has placed no conditions or limitations upon the insurance to be taken out by your client.

On the 3rd December, 1942, plaintiffs’ solicitors replied as follows:

With reference to your letter of 26th ultimo, your client, as you may perhaps know, is one of 12 merchants who ordered goods from our clients.

It was originally arranged that a test case should be brought, which we welcomed, but these merchants after consultations with various legal advisers decided to try and arrange a compromise instead of fighting the matter.

Their legal advisers no doubt considered that our legal courts would follow the English case of *C. Groom, Ltd., v. Barber* (L.J. K.B. Vol. 84), in which case it was decided that the words “War Risk for Buyer’s Account” meant that any war risk *insurance* was the buyer’s concern, and advised them accordingly.

We are surprised therefore that your client has not paid in the suggested compromise of \$174.94 especially as we have been told that everyone has decided to do so. Until everyone does so (and only one other has not done so) the compromise will not be accepted.

Unless therefore the amount is paid by Saturday, the 5th instant, we shall have to institute proceedings against him.

The writ in this action was filed on the 14th December, 1942. In his evidence the defendant stated that he was over-charged \$1.50 a dozen, on 6 dozen felt hats: that is, that the amount should be reduced by Canadian \$9 or by \$9.90, British Guiana currency. This appears to be so, and the plaintiffs’ claim will therefore be reduced from \$212.06 to \$202.16.

The solicitor for the defendant has made the following submissions:

1. that it was an implied term of the contract of sale made between the plaintiffs and the defendant on the 2nd December, 1941, that the plaintiffs should insure the goods sold against war risk;
2. that on or before the 24th January, 1942, (on which date the goods were posted by the plaintiffs to the defendant), there was a custom or usage of trade that, in every contract of sale between a Canadian exporter and an importer in this Colony, the exporter was under a duty to the importer to insure the goods against war risk, even though the contract of sale was silent upon the point and even though the importer did not request, authorise or instruct the exporter to effect such insurance;
3. that according to the expressed terms of the contract of sale of the 2nd December, 1941, the plaintiffs were under an obligation to the defendant to effect a policy of insurance against war risk, and to charge the cost to the defendant;

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4. that, under section 34 (3) of the Sale of Goods Ordinance, chapter 65, at the time the goods were lost by enemy action, the risk on the goods attached to the plaintiffs and had not yet passed to the defendant.

A terra is only implied in a contract where it is necessary to imply the term in order to give to the transaction such business efficacy as the parties must have intended. In *Luxor, Ltd v. Cooper*, (1941) A.C. 137, Lord Wright said:

This does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties.

It has been suggested, throughout the trial of this action, that it is not possible, in any event, to effect insurance against war risk in this Colony. Mr. Adamson, however, said in his evidence that when Bookers Drug Stores export goods from this Colony to the West Indies, the goods are insured against war risk.

It is, however, contended that, in view of the difficulty of communication between Canada and this Colony as a result of the war it would not be possible for the importer in this Colony to supply to the insurer all the information which the latter would require with respect to the name of the ship, the freight on the goods, the port and date of departure, the route, or as to transshipment of goods: and that, consequently, it was for the exporter, who had all the information, to insure against war risk and not for the importer. The documents which have been produced in this case show that policies of insurance have been effected abroad where the name of the ship has not been stated; and that those policies amply provide for deviation and transshipment. Goods are usually insured at 10 or 20 per centum above the actual cost. There are insurance companies in this Colony, and the defendant has not shown that it is not possible to do in this Colony what is being done continuously on the North American continent. It may be more convenient for the exporter in Canada, than it is for the importer in this Colony, to effect a policy of insurance against war risk. But it is not necessary to imply such a term in order to give the transaction such business efficacy as the parties must have intended. It is not sufficient to imply a term that, in the opinion of the court, the parties should have reasonably contemplated such a term. Consequently, the term cannot be implied. It is interesting to observe that the following appears at page 319 of the report of *C. Groom, Ltd v. Barber* in (1915) 1 K.B.

The statement made on behalf of the buyers that they could not have insured against war risk until the name of the vessel was known was contrary to the experience of the (London Local Appeal) Committee (of the United Kingdom Jute Goods Association) and could not be upheld (by the Committee).

In support of the alleged usage documentary evidence was

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produced, and the following witnesses were examined on behalf of the defendant:

Samuel Solomon Khouri, merchant;
 Rahman Baccus Gajraj, assistant manager of H. B. Gajraj, merchant;
 Harold Edward White, partner of Harold E. White & Co., commission agents and manufacturers' representatives;
 Dallas Viret Kidman, commission agent and manufacturers' representative;
 James Lancelot Rayman, merchant;
 Ali Ramdan, manager of J. Ramdan, merchant;
 Algernon Good, travelling salesman for Davis & Lawrence Co., in respect of the West Indies and the Guianas;
 John Alleyne Adamson, manager of Bookers Drug Stores;
 Eric Sievewright Stoby, manager of Eric S. Stoby & Co., Ltd., commission agents and manufacturers' representatives: and
 The defendant Kishorie Lall.

It was submitted on behalf of the defendant that, as the plaintiffs called no evidence in opposition to that adduced by the defendant, the Court should therefore consider the custom as proved. The Court does not agree with this submission. It is within the province, and it is the duty, of the Court to examine the evidence, and the circumstances under which each witness deposed, for the purpose of ascertaining whether the alleged custom or usage of trade really exists.

Further, the question for determination in this case is not whether the alleged custom or usage of trade exists at the present time but whether it existed on the 2nd December, 1941, (the date of the order given by the defendant to the plaintiffs) or alternatively, on the 24th January, 1942, (the date upon which the goods were posted by the plaintiffs to the defendant). I shall therefore omit from my consideration the mass of evidence (both oral and documentary) as to war risk insurance being effected by Canadian exporters on goods shipped to this Colony on or after the 1st March, 1942. That evidence is not relevant for the purpose of determining whether there was a custom or usage of trade in December, 1941, or January, 1942.

When the defendant signed his order on the 2nd December, 1941, the United States of America was a neutral country: but on the 24th January, 1942, it was a belligerent on the side of the British Empire and our Allies. When the first Canadian National Steamer trading between Canada and America on the one hand, and this colony on the other hand, was sunk (and this was the steamer which was conveying the goods to the defendant) it was but natural that importers, as well as exporters, should, at a flash, realise that there was a real danger to loss of cargo through war risk, and that insurance against war risk was not primarily or exclusively for the purpose of enriching insurers who issued policies of insurance against war risk.

Having made these preliminary observations, I shall now proceed to examine the evidence (so far as it is relevant) which was led at the trial. Mr. Khouri had never dealt with Canada prior to the year 1941. From the invoices produced by him, it appears

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that the first consignment of goods to him from Canada was shipped on the 12th June, 1941. Prior to the 1st March, 1942, goods were ordered from the following firms, and were shipped prior to that date as follows:

	<u>Date of Invoice.</u>
Dominion Textile Co., Ltd. ...	12. 6.1941
do.	26. 6.1941
do.	18. 7.1941
M. E. Binz & Co., Ltd. ...	14.8.1941
Dominion Textile Co., Ltd. ...	28. 8.1941
Canadian Cottons, Ltd. ...	13.10.1941
Alfred Lambert, Inc. ...	16.10.1941
Empire Cotton Mills, Ltd... ..	19.11.1941
M. E. Binz & Co., Ltd. ...	26. 2.1942
Gotham Hat Co., Ltd, ...	22.12.1941
Gross Woollens, Ltd. ...	8.10.1941
Canadian Hat and Cap Manufacturers	Date not stated.

All the above shipments, except the last three, were insured by the sellers in Canada against war risk. The goods from Dominion Textile Co., Ltd., were ordered through their local agents, J. B. Leslie and Co, and although it is true that the orders which were produced by Mr. Khouri did not disclose that there were any special instructions to the sellers to insure against war risk, this Court has no evidence as to whether or not it was the policy of Dominion Textile Co, Ltd, for their own protection, to insure goods against war risk: or what correspondence, if any, had passed on the subject of war risk insurance between J. B. Leslie and Co., and Dominion Textile Co., Ltd, before, or after, the outbreak of the present war between Germany and the British Empire. Mr. Khouri is mistaken in believing that war risk insurance of goods shipped from Canada only commenced on the outbreak of the present war. The documentary evidence in this case shows that, at least as early as the 7th March, 1939, it was the policy of St. Maurice Valley Paper Co, Ltd, for their own protection, to insure against war risk; the rate was at that time, nominal, 1/5 of 1 per centum. The goods from M. E. Binz & Co, Ltd., were ordered through their local agents T. Geddes Grant Ltd., who represent, in this Colony, more Canadian exporters than any other manufacturer's representatives carrying on business here. Mr. Khouri has not produced all the orders relating to the invoices from M. E. Binz & Co., Ltd, but he has produced two of them, both bearing date the 24th September, 1941, in which the following words are impressed on the order forms by means of a rubber stamp:

War risk insurance to be effected by sellers for buyer's account at rate ruling at date of shipment.

When M. E. Binz & Co, Ltd, accepted the orders from Mr, Khouri, they thereby agreed to take out a policy of insurance against war risk. It is fair to presume that those words were impressed by T. Geddes Grant, Ltd., on all orders which they

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secured from merchants in this Colony for goods to be supplied by the Canadian exporters whom they represented. There was, in fact, a practice among those exporters to insure against war risk, but that practice was the result of special agreements between the importers and those Canadian exporters who are represented in this Colony by T. Geddes Grant, Limited. The goods from Canadian Cottons, Limited, were ordered through their local agent, Mr. D. V. Kidman: and the observations which I have already made with reference to Dominion Textile Co., Ltd., apply with equal force. So also with reference to Alfred Lambert, Inc., whose representatives in this Colony are Eric S. Stoby & Co., Ltd; and with reference to Empire Cotton Mills, Ltd., whose local agents are Harold E. White & Co.

The goods (felt hats) which were ordered from Gotham Hat Co., Ltd., were so ordered on the 6th December, 1941, and they were shipped by parcel post on the 24th December, 1941, in 56 parcels each containing ½ dozen felt hats. Eric S. Stoby & Co., Ltd., are the local agents of that company. The invoice shows that postage and insurance amounted to \$39: but there is nothing to indicate that the insurance included war risk protection. The same remarks apply also to Gross Woollens, Limited: the order has not been produced, and the policy, or certificate, of insurance has not been produced. The goods ordered from the Canadian Hat and Cap Manufacturers were ordered through Mr. D. V. Kidman, they were not insured against war risk, they were lost on the "Lady Hawkins" by enemy action, and payment therefor has been demanded from Mr. Khouri.

Mr. R. B. Gajraj's evidence amounts to this. H. B. Gajraj dealt direct with certain exporters in Canada, and, through local agents, with others. After the outbreak of war, all the firms in Canada with whom H. B. Gajraj used to deal directly wrote saying that, on account of the outbreak of war they would have to effect war risk insurance on all shipments. Mr. Gajraj stated that shippers are only instructed to effect a policy of insurance against war risk when the goods are paid for in Canada, under letter of credit, as soon as they are delivered to the steamship company. Mr. Gajraj further said that he would expect that, as a matter of prudence, the seller, as a matter of protection, would insure against war risk. The issue in this case is however what all exporters are under obligation to do.

Mr. Harold White's evidence was that, during the present war, it had been the custom for exporters from Canada to insure against war risk, without receiving any instructions so to do; and he added that the exporter insured for his own protection and in his own interest as well as for the protection of the importer in this Colony. Mr. White did not produce correspondence which he had with his various principals in Canada, at the outbreak of war, on the subject of war risk insurance. The evidence

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of Mr. D. V. Kidman and of Mr. Eric S. Stoby was to the same effect. Mr. Good's evidence was to a similar effect: he, however, emphasised that he was a travelling salesman and that questions of construction of contracts of sale and of policy would be determined by those who are in a position of authority over him.

Mr. Adamson gave evidence that it was the policy of Bookers Drug Stores that all goods should be insured against war risk, and that he sees that that policy is carried into effect. His evidence is on similar lines to that of Mr. Gajraj.

Mr. Ramdan said that goods which he had ordered from the plaintiffs on the 25th November, 1941 were shipped by them on the 10th March, 1942, and that the plaintiffs insured the goods against war risk. When those goods were shipped, the goods which were posted to the defendant by the plaintiffs, had already been lost by enemy action.

Mr. Rayman gave evidence that he had imported goods direct from the Canadian exporters named hereunder and that, without any instructions, they had insured the goods against war risk:

		<u>Date of Invoice.</u>
Northrop & Lyman Co., Ltd.	...	16. 5.1941
do.	...	13.11.1941
Frank W. Horner Ltd.	...	29.12.1941
Northrop & Lyman Co., Ltd.	...	28. 1.1942

Northrop & Lyman Co., Ltd., is one of the Canadian exporters from whom Bookers Drug Stores obtain their supplies, without the intervention of a local agent.

On the evidence called in this Court, I am unable to find that on the 24th January, 1942, there was a custom or usage of trade that, in every contract of sale between a Canadian exporter and an importer in this Colony, the exporter was under a duty to the importer to insure the goods against war risk, even though the contract of sale was silent upon the point and even though the importer did not request, authorise or instruct the exporter to effect such insurance. It must be remembered that if an exporter insures the goods against war risk, he can recover against the insurer, if the goods are lost by enemy action, and he will be saved the difficulty, the expense and the unpleasantness of seeking, in such an event, to recover the cost from the importer. But the circumstance that he does so insure, does not necessarily mean that he is under obligation so to do: he may be insuring for his own protection.

In *C. Groom, Ltd. v. Barber* (1915) 1 K.B. 316, a contract of sale on c.i.f. terms contained the condition: "War risk for buyer's account," and it was held that these words did not mean that the seller was to effect an insurance against war risk at the buyer's expense, but that they meant that war risk was the concern of the buyer alone, and that if he desired to cover war risk by

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insurance he must take out the policy. In the course of his judgment, Atkin, J. (at page 322) said:

In this contract there are the words “war risk for buyer’s account”. It was said that the seller was bound to take out a policy covering war risk but entitled to charge the buyer with the expense of it. That would mean that at all times, even in times of peace, a war risk policy must be taken out at the expense of the buyer. I am satisfied that no seller or buyer contemplated such a thing, and if the buyer were charged with the expense of such a policy he would, in ordinary times of peace, be the very first person to object. To my mind these words mean that war risk is the buyer’s concern, and if he wants to cover war risk he must get it done.

It might be contended that the condition meant that the proper course of business was that the buyer was entitled to ask the seller, when he was taking out the usual policy, to take out one also covering war risk at the buyer’s expense. If it could mean that, I am satisfied in this case that the buyer never requested the seller to take out a war risk policy on those terms.

On the authority of that case, I hold that the words “War Risk Buyer’s Account” in the contract of sale made between the plaintiffs and the defendant on the 2nd December, 1941, did not mean that the seller was to effect an insurance against war risk at the buyer’s expense, but that they meant that war risk was the concern of the buyer alone, and that if he desired to cover war risk by insurance he must take out the policy.

No term can be implied in a contract which contradicts an express term of the contract. The term which the defendant seeks to imply contradicts an express term of the contract. The contract provides that the seller was under no obligation to effect an insurance against war risk: while the suggested terra is that the seller is under an obligation to effect an insurance against war risk. Even if the evidence were sufficient to establish the implied term, it could not therefore prevail against the express terms of the contract.

In *Robinson v. Mollett* (1875) 44 L.J.C.P. 362, the judges were summoned to the hearing of the appeal before the House of Lords, and the following judges attended: Blackburn, J., Mellor, J., Brett, J., Cleasby, B., Grove, J., and Amphlett, B. At the conclusion of the argument, the question as to whether judgments of the Court of Common Pleas (39 L.J.C.P. 290) and Exchequer Chamber (41 L.J.C.P. 65) were right, was submitted to the judges. Blackburn, J., and Amphlett, B. delivered opinions that the judgments of the Court of Common Pleas and Exchequer Chamber were right: while Mellor, J., Brett, J., Cleasby, B., and Grove, J. delivered opinions that the judgments were not right. The House of Lords approved of the reasoning in the opinions of Mellor, J., Brett, J., Cleasby, B., and Grove, J. The difference of opinion between the judges, however, consisted in the application of legal principles, and not as to what those principles were. Blackburn, J. said (at page 367);

The...question remains whether the custom is incorporated in the orders. And this, I think, is a question of great difficulty. The orders are in writing, and by the general rule of the law of evidence, the writing is conclusive as

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to the terms of the authority (it was a case of principal and agent) and what is not in the writing cannot be part of the terms. To this there is an exception, that customs of trade are tacitly incorporated in the contract, though not expressed in it, provided the express terms of the writing are not so inconsistent with the custom as to exclude it.

And Mellor, J. said (at page 369):

Evidence (as to usage) is admissible only to explain mercantile expressions and to add incidents or to annex usual terms and conditions which are not inconsistent with the written terms between the parties.

In *DeBeeche v. South American Stores, Limited*, (1935) A.C. 148, 158, Viscount Sankey, L. C. said:

Undoubtedly, the line between admissible and inadmissible evidence of usage or custom is difficult to draw, and some of the cases are hard to reconcile with any clear principle. Without endeavouring to give an exhaustive definition of what evidence may be admitted, there are in cases like the present, three conditions precedent to its being accepted:—(1) the evidence must not conflict with a statutory definition; (2) the evidence must be of a usage common to the place in question; and (3) the evidence must expound and not contradict the terms of the contract.

The custom or usage of trade set up by the defendant contradicts the express terms of the contract. So that, even if it were established, it could not prevail against the express terms of the contract.

Section 34 (3) of the Sale of Goods Ordinance, cap. 65 is as follows:—

Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do so, the goods shall be deemed to be at his risk during that transit.

It was expressly agreed between the plaintiffs and the defendant that war risk was the concern of the buyer alone. The plaintiffs were expressly released by the defendant from having any concern with war risk. And I hold that, assuming that the subsection relates to war risk as well as to ordinary marine insurance, and assuming that it was usual to insure against war risk, the obligation on the seller to give such notice to the buyer as may enable him to insure the goods against war risk during their sea transit, is excluded because it was “otherwise agreed” between the plaintiffs and the defendant by virtue of the term “war risk buyer’s account”, in the contract of sale.

As the submissions made by the solicitor for the defendant cannot be supported, there will be judgment for the plaintiffs against the defendant for the sum of \$202.16 with costs, and I certify for counsel.

Judgment for plaintiffs.

Solicitor for plaintiffs: *J. Edward deFreitas.*

E. BRATHWAITE v. F. BROWNE.

EDWARD BRATHWAITE, Appellant (Defendant),
 v.
 FLORENCE BROWNE. Respondent (Complainant).

[1942. No. 321.—DEMERARA].

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

1943. FEBRUARY 25, 26.

Bastardy—Complaint for—Dismissed—Another complaint—To be determined upon evidence adduced.

The hearing of a bastardy summons, where a previous summons has been dismissed, is not dependent upon the production of fresh evidence in the sense required under different circumstances by the decision in *Johnson v. Johnson* (1900) P. 19.

Where a bastardy summons has been dismissed, a fresh information may be filed, and the magistrate was at liberty to decide upon any evidence adduced on the hearing of the fresh information.

APPEAL by the defendant Edward Brathwaite from a decision of the magistrate of the Georgetown Judicial District adjudging him to be the father of a bastard child of the complainant Florence Browne. The child was born on 2nd May, 1940. On the 13th June, 1941, Florence Browne filed an information against Edward Brathwaite for a bastardy summons in respect of the said child. In the information and at the hearing which took place on the 31st July, 1941, it was erroneously stated that the child was born on 2nd June, 1940. There was no corroboration of the testimony of Florence Browne, and the information of the 13th June, 1941, was dismissed by the magistrate without a defence being called for.

On the 14th August, 1941, Florence Browne filed another information for a bastardy summons against Edward Brathwaite in respect of the said child. In this information, as in the information of the 13th June, 1941, it was alleged that Edward Brathwaite had contributed to the support of the child within 12 months next after birth. The information of the 14th June, 1941, was heard on the 11th September, 1941, when the evidence for the complainant and of three witnesses who did not give evidence on the 31st July, 1941, was taken. The case was then adjourned for the defence. On the 9th October, 1941, Edward Brathwaite gave evidence, and he relied upon the dismissal of the information of the 13th June, 1941.

On the 6th August, 1942, the magistrate, on the information of the 14th August, 1941, adjudged the defendant Edward Brathwaite to be the putative father of the child. In his reasons for decision, the magistrate stated: "I gave due weight to the previous decision, but took into account the fresh evidence called

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in the present case, which I believe. And I held that while the complainant appeared to have had promiscuous sexual habits, that fact did not debar her from obtaining an order where the evidence carried the reasonable conviction that the defendant and no other man was the father of the child.”

The grounds of appeal were: (1) that the additional evidence called on the hearing of the information of the 14th August, 1941, was not “fresh evidence,” and (2) that the case had already been heard and decided by a competent tribunal on the 31st July, 1941, and an order refused, and the matter was therefore *res judicata*.

A. J. Parkes, for the appellant. On the hearing of the second complaint there was no “fresh evidence” within the meaning of *Johnson v. Johnson* (1900) P. 21: see *Wills v. Glasgow*, Full Court, *Gazette* 9th August, 1941. The additional evidence called was not evidence which could not have been called on the hearing of the first complaint. Further, the first complaint was dismissed on the merits; the complainant could have appealed against the order of dismissal. He referred to *R. v. Machen* (1849) 117 E.R. 29, 31; *R. v. Howard* (1938) 2KB. 544; *McGregor v. Telford* (1915) 3 K.B. 237; and section 35 (3) of the Summary Jurisdiction (Procedure) Ordinance, cap. 14.

J. L. Wills, for the respondent. The decision in *Johnson v. Johnson* (1900) P 21 does not apply to proceedings under the Bastardy Ordinance, cap. 147. The dismissal of a bastardy summons operates as a non-suit. He referred to *R. v. Clarke* (1864) 28 J.P. 102; *R. v. Harrington* (1864) 9 L.T.N.S. 721; and *R. v. Howard* (1938) 2 K.B. 544, 547, 548.

Cur. adv. vult.

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

In this case it is clear from the record that there was no dismissal of the original application upon its merits in such a way that the learned Magistrate should have held the matter to be *res judicata*. It is equally clear on the authorities that the applicant was therefore entitled to bring fresh proceedings. The hearing of fresh proceedings, in such circumstances, is not dependent upon the production of fresh evidence in the sense required under different circumstances by the decision in *Johnson v. Johnson* (1900) P., p.19. The learned Magistrate was therefore right to entertain the application and was at liberty to decide upon any evidence then adduced.

Against his findings upon that evidence no argument has been addressed. The appeal is therefore dismissed with costs.

Appeal dismissed.

C. CAMERON v. D. CHESTER.
 CATHERINE CAMERON, Plaintiff,
 v.
 DUCHESS CHESTER, Defendant.

[1942. No. 22.—BERBICE.]

BEFORE DUKE, J. (Acting).

1948. MARCH 2, 3, 4, 5.

Interpretation—Rule made under authority of an Ordinance—Not to be inconsistent with provisions of any enactment—Interpretation Ordinance, cap. 5, s. 21 (1) (c)—Does not apply to Rules of Court—Provisions of any Ordinance relating to practice and procedure—Express power by Rules of Court to alter, amend or repeal—Supreme Court of Judicature Ordinance, cap. 10, s. 50 (2).

Prescriptive title—Declaration of—Civil Law of British Guiana Ordinance, 1916 (No. 15), s. 4 (1)—Procedure—By petition, motion or summons in such manner as may be prescribed by any Ordinance or Rules of Court—Rules of the Supreme Court (Declaration of Title), 1923—Procedure by way of petition prescribed—By rule 11 right to proceed by way of action not affected—Alteration or amendment of Ordinance 15 of 1916, s. 4 (1) by Rule 11—Rule 11 not invalid.

Practice—Jurisdiction of Court—May be exercised—Though no appropriate rules of procedure have been made—Judge will adopt such procedure as is convenient, and give such directions as justice and common sense call for.

Prescriptive title—Declaration of—May be made—In proceeding instituted by way of action—No appropriate rules of procedure made—But right to institute an action not suspended until such Rules made—Court still has jurisdiction—Procedure adopted and directions given by judge—Dominant object of—To ensure due notice to persons who may be adversely affected by making of declaration—To give those persons an opportunity to enter appearance in action in same manner as if they were served with writ of summons, and to be treated as defendants thereafter—Directions which may be given.

Section 21 (1) (c) of the Interpretation Ordinance, cap. 5, which provides that no rule made under the authority of an Ordinance shall be inconsistent with the provisions of any enactment does not apply to Rules of Court.

By section 50 (2) of the Supreme Court of Judicature Ordinance, cap. 10, there is express power by Rules of Court to alter, amend or repeal the provisions of any Ordinance relating to practice and procedure.

Rule 11 of the Rules of the Supreme Court (Declaration of Title), 1923, (which provides that nothing in those Rules shall affect the right of any person to institute a suit for a declaration of title to property by prescription) cannot be deemed invalid, and is not subject to objection, because it altered or amended section 4 (1) of the Civil Law of British Guiana Ordinance, 1916 (No. 15) which provided that a declaration of title, by prescription, to immovable property may be issued by the Supreme Court “upon petition, motion or summons in such manner as may be prescribed by any Ordinance or Rules of Court.”

Wight v. Daily Chronicle Ltd. and Webber, (1923) L.R.B.G. 57, 59, 63, 64, Full Court per Major, C.J., applied.

The Jurisdiction of a Court may be exercised although no appropriate rules of procedure have been made.

Where no rules of procedure have been prescribed, the judge will adopt whatever procedure is convenient and will give such directions as justice and common sense alike call for.

A. G. (Ontario) v. Daly, (1924) A.C. 1011, applied.

In re Gajraj, (1925) L.R. B.G. 21, Major, C.J, followed.

Fernandes v. daSilva, (1927) L.R.B.G. 87, 92, Full Court per DeFreitas, C J., applied.

In a proceeding instituted by way of writ of summons, the Supreme Court has jurisdiction to make a declaration of title to immovable property, by prescription.

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Transport Reece to Neilson, (1917) L.R.B.G. 136, Hill, J., explained, *Incorporated Trustees of the Church in the Diocese of Guiana v. McLean*, (1939) L.R.B.G. 182, 185, Langley, J., followed.

Wills v. Eleazar, (1941) L.R.B.G. 12, 16, Camacho, C.J., not followed.

No Rules of Court have been made with special reference to an action instituted for a declaration of title to immovable property for prescription. But that does not mean that the Court has no jurisdiction to entertain such an action, or that the right to institute an action is suspended until such Rules of Court have been made.

In an action instituted for a declaration of title to immovable property, by prescription, the Court will do its best to ensure that all persons who may be adversely affected by the making of the declaration are given due notice of the filing of the action and are afforded an opportunity to enter appearance in the action in the same manner as if they were served with the writ of summons, and to be treated as defendants thereafter.

In such an action a judge in chambers, if satisfied that the justice of the case so requires, may, for instance, make all or any of the following orders:

- (a) for service of the writ of summons upon any person or persons who may be adversely affected thereby;
- (b) for publication (in the locality where the subject matter of the action is situate, or in a daily newspaper circulating in that locality, or in the *Gazette*, or in any other manner) of a notice, in such form as the judge may direct, of the relief asked for by the plaintiff;
- (c) for the entry of appearance in the action by any person (not served with the writ of summons) who wishes to oppose the issue of a declaration of title in favour of the plaintiff for the land the subject-matter of the action; and
- (d) for adding as a defendant the name of any person who enters appearance.

Such orders and directions may be given by a judge in chambers even before the service of the writ of summons.

At the trial of an action for a declaration of title to immovable property, by prescription, the Court, on the conclusion of the evidence led on *viva voce* examination on behalf of the plaintiff and of the defendant who had disputed the title and the possession of the plaintiff, was satisfied that the plaintiff had made out a *prima facie* case. But, as the Court thought that there might be persons, not parties to the action, who might wish to be heard in opposition to the issue of the declaration of title, the Court only made an order *nisi* in favour of the plaintiff to be made absolute on a day specified in the order unless good cause be shown to the contrary. In that order, the Court directed that all persons having or claiming any right or title to the immovable property should appear in Court on the specified day and establish their claim or otherwise show good cause why the order *nisi* should not be made absolute: failing which, they would be for ever thereafter barred therefrom. The Court gave directions for service of the order *nisi* upon the immovable property, and also upon persons who, from the evidence led at the trial, might be disposed to claim adversely to the plaintiff.

ACTION by the plaintiff Catherine Cameron against the defendant Duchess Chester for a declaration of right to possession of lot 5, part of Plantation No. 29, West Coast, Berbice, an injunction, damages for trespass, and for a declaration of prescriptive title.

Mungal Singh, for the plaintiff.

E. A. Luckhoo, O.B.E., for the defendant.

Cur. adv. vult.

DUKE, J. (Acting): The plaintiff Catherine Cameron claims from the defendant Duchess Chester:

- (a) an Order of the Court declaring that the plaintiff was in continuous and undisturbed possession for a period of over 30 years *nec vi nec clam nec precario* of:

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A piece or parcel of land, to wit, lot number 5 (five) laid down and defined on a plan by William Downer, Sworn Land Surveyor, dated November, 1842, and deposited in the Registrar's Office of British Guiana at New Amsterdam on the 29th day of June, 1849, being part of the west half of Plantation Lot Number 29 (twenty-nine) adjoining Plantation Lot Number 30 (thirty) or Union situate on the west coast in the county of Berbice and Colony of British Guiana, the said lot number 5 (five) measuring 2 two) Rhymland roods in facade by the whole depth of the said Plantation Lot Number 29 (twenty-nine), the said lot number 5 (five) being shown as lot number 4 (four) and coloured pink on a plan by D. C. S. Moses, Sworn Land Surveyor, dated the 10th day of January, 1941, and recorded in the Office of the Department of Lands and Mines.

- (b) an Order of the Court declaring that the plaintiff is entitled to the quiet, peaceable and undisturbed possession of the said land;
- (c) an Order of the Court declaring that the plaintiff has acquired and is entitled to a prescriptive title to the said land, and that the Registrar of the Supreme Court of British Guiana he directed to convey a legal title of the said land to the plaintiff;
- (d) an injunction restraining the defendant, her servants and/or agents from committing any further acts of trespass on the said land;
- (e) any other order which to the Court may seem just;
- (f) the sum of \$15 as damages against the defendant for the said trespass, and
- (g) the costs of these proceedings.

Section 4 (1) of the Civil Law of British Guiana Ordinance, 1916, (No. 15) was as follows:

Title to immovable property may be acquired by sole and undisturbed possession for thirty years, of which not less than three years shall be after the first day of January, nineteen hundred and seventeen, provided that such sole and undisturbed possession shall be established to the satisfaction of the Supreme Court of British Guiana, and that the said Court may issue declaration of title in regard to the said property . . . upon petition, motion or summons in such manner as may be prescribed by any Ordinance or Rules of Court.

Section 50 of the Supreme Court Ordinance, 1915, (No. 10) so far as material to the present case, was as follows:—

- (1) The Judges, or a majority of them, of whom the Chief Justice shall be one, may make Rules and Orders of Court relating to all or any of the following matters, that is to say:—
 - (b) for regulating the pleading, practice, and procedure of the Court. .
 - (c) for regulating matters relating to the costs of proceedings in the Court. .
 - (d) for prescribing any forms to be used in proceedings in the Court. .
 - (e) for regulating the practice and procedure in the Registrar's Office of British Guiana, including the branch thereof formerly known as the Provost Marshal's Office, in any matters in which the practice and procedure is not prescribed by any Ordinance,
 - (f) or regulating, prescribing, and doing any other thing which may be regulated, prescribed or done by Rules of Court.
- (2) No such Rule or Order shall be deemed invalid or be subject to objection by reason that it alters, amends or repeals the provisions of any. . . statute (not being an Act of Parliament, with respect to which no such power is given by that or any other Act of Parliament), relating to any matter hereinbefore in this section mentioned.

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- (3) All such Rules and Orders shall be subject to the approval of the Governor and Court of Policy, and shall come into operation on the date of their publication with such approval in the *Gazette*.
- (4) His Majesty may at any time disallow all or any of such Rules and Orders.
- (5) Disallowance by His Majesty under this section shall take effect upon and from the day on which the proclamation notifying the same is published in the *Gazette* and shall not affect any proceedings taken before such publication.
- (6) Any copy of the Rules purporting to have been printed for the Government of British Guiana shall be *prima facie* evidence in all Courts and for all purposes of the due making and tenor of such Rules.

The expression "Rules of Court" in section 4 (1) of the Civil Law of British Guiana Ordinance, 1916 (No 15), and in section 50 (1) (f) of the Supreme Court Ordinance, 1915 (No. 10) is to be interpreted in accordance with section 8 of the Interpretation Ordinance, 1891 (No. 14) which was as follows:

- (1) In every Ordinance passed after the commencement of this Ordinance, unless the contrary intention appears, the expression "Rules of Court" when used in relation to any Court, shall mean rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of such Court.
- (2) the power of the said authority to make Rules of Court as above defined shall include a power to make Rules of Court for the purposes of any Ordinance passed after the commencement of this Ordinance, and directing or authorizing anything to be done by Rules of Court.

Rules of Court for the purposes of section 4 (1) of the Civil Law of British Guiana Ordinance, 1916, (No. 15) were made by the judges on the 22nd March, 1923, and were approved on the 14th June, 1923, by the Governor and Court of Policy, under the authority of section 8 of the Interpretation Ordinance, 1891, (No. 14) and of section 50 of the Supreme Court Ordinance, 1915 (No. 10). These Rules are cited as the Rules of the Supreme Court (Declaration of Title) 1923, and are published in the *Gazette* of the 23rd day of June, 1923, at page 261 and in the Regulations for 1923, at page 125.

The word "statute" in section 50 (2) of the Supreme Court Ordinance, 1915 (No. 10) must be interpreted, in accordance with section 5 (22) of the Interpretation Ordinance, 1891 (No. 14) as meaning;

Any Ordinance or Act of Parliament for the time being in force in this Colony. . .

Section 4 (1) of the Civil Law of British Guiana Ordinance, 1916, (No. 15) enacted that a declaration of title, by prescription, to immovable property may be issued by the Supreme Court—

upon petition, motion or summons in such manner as may be prescribed by any Ordinance or Rules of Court.

Rule 2 of Rules of the Supreme Court (Declaration of Title) 1923, is as follows:

Application to the Court for a declaration of title under the provisions of section four, subsection one, of the Civil Law of British Guiana Ordinance, 1916, shall be made by petition intituled in the matter of the property to which it relates and in the matter of the Ordinance.

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This rule therefore selected from the forms of application (petition, motion and summons) specified in the Ordinance, the proceeding by way of petition as being the mode in which an application for a declaration of title should ordinarily be made.

Rule 11, however, provides that:

Nothing in these rules shall affect the right of any person to institute a suit for a declaration of title to property by prescription.

By section 2 of the Supreme Court Ordinance, 1914 (No. 10), now the Supreme Court of Judicature Ordinance, cap. 10, the expression "action" includes a suit. Section 21 (1) (c) of the Interpretation Ordinance, 1891 (No. 14), now chapter 5, provides that:

Where an Ordinance, whether passed before or after the commencement of this Ordinance, confers power on any authority to make rules, the following provisions shall, *unless the contrary intention appears*, have effect with reference to the making of such rules. . . no rule shall be inconsistent with the provisions of any enactment. In this section the expression "rules" includes rules and regulations, regulations and bye-laws.

In *Wight v. Daily Chronicle, Ltd., and Webber* (1923) L.R.B.G. 57, 59, 63, 64, Sir Charles Major, C.J., delivering the judgment of the Full Court, pointed out that that section did not relate to Rules of Court, and held that there was:

express power by Rule of Court to repeal any provisions of any Ordinance relating to practice and procedure.

It is true that section 4 (1) of the Civil Law of British Guiana Ordinance 1916 No. 15) did not provide that a declaration of title may be issued by the Supreme Court, on a proceeding instituted by way of a Writ of Summons: it specifically provided that the mode of application shall be by way of petition, motion or summons, as may be prescribed by Rules of Court. However, even though Rule 11 of the Rules of Supreme Court (Declaration of Title), 1923 (saving, as it does, the right of any person to institute proceedings, by way of Writ of Summons for a declaration of title to property by prescription under Order 2, rule 1 of the Rules of Court, 1900, as enacted by the Rules of Court, 1910) alters or amends the provisions of section 4 (1) relating to the prescribing by Rules and Court, of the manner in which an application for declaration of title to property by prescription may be made, that rule, by virtue of section 50 (2) of the Supreme Court Ordinance, 1915 (No. 10) and section 5 (22) of the Interpretation Ordinance, 1891 (No. 14) cannot be deemed invalid, and it cannot be subject to objection, on the ground of any such alteration or amendment.

Order 2, rule 1 of the Rules of Court (as enacted in 1910) is as follows:—

Save and except where proceeding by way of petition or otherwise is prescribed or permitted by any Ordinance or Rule of Court or by the Common Law of this Colony, any person who seeks to enforce any legal right against any other person or against property, shall do so by a proceeding to be called an action.

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Had Rule 11 of the Rules of the Supreme Court (Declaration of Title) 1923, not been enacted, it could have been argued that Order 2, rule 1, would have had the effect of abrogating the right to claim a declaration of title to property by prescription, by way of a proceeding instituted by Writ of Summons. The framers, however, of Rules of the Supreme Court (Declaration of Title) 1923, were aware of the terms of the Rules of Court, 1910, and that by rule 2 of the Rules of 1923 the "proceeding by way of petition" was "prescribed or permitted": and, further, that by section 4 (1) the Civil Law of British Guiana Ordinance, 1916 (No. 15) the proceeding by way of petition, motion or summons was prescribed, in respect of an application for a declaration of title to property by prescription. They, however, wished to make it clear that, on the coming into force of the Rules, any person would have the right to institute an action for a declaration of title to property by prescription. They, therefore, inserted Rule 11 in the Rules of 1923. Rule 11 has not been disallowed by His Majesty. This Court is therefore bound to give full effect to it. I therefore hold that, in a proceeding instituted by way of Writ of Summons, the Supreme Court has jurisdiction to make a declaration of title to property by prescription.

In arriving at this conclusion, I have paid due regard to the fact that in *Wills v. Eleazar* (1941) L. R. B. G. 12, 16, Camacho, C. J. held that a declaration of title to property by prescription may not be sought in any other way than by means of a petition. But it does not appear that the attention of the learned Chief Justice was drawn to Rule 11 of Rules of the Supreme Court (Declaration of Title) 1923. And, further, he relied on an opinion expressed by Hill, J. in *Transport, Reece to Neilson* (1917) L. R. B. G. 136 that the only procedure for obtaining a declaration of prescriptive title was by way of petition. However, the actual words used by Hill, J. were:—

The only procedure at present (*i.e.* on the 22nd November, 1917) applicable would be by petition for a declaration of title until the necessary method to give effect to the procedure is passed, *i.e.* either by Ordinance or Rules of Court.

It will be observed that at that time Rule 11 of Rules of the Supreme Court (Declaration of Title) 1923, had not yet been passed. The learned Judge correctly interpreted section 4 (1) in 1917, but the enactment of Rule 11 of the Rules of 1923, deprived that interpretation of any binding authority.

In *Incorporated Trustees of The Church in The Diocese of Guiana v. McLean* (1939) L.R.B.G. 182, 185, Langley, J., said that the procedure by way of petition under Rule 2 of Rules of the Supreme Court (Declaration of Title), 1923,

is intended only for simple cases where evidence by affidavit is sufficient to meet the case. In cases where complications and difficulties are likely to arise, this procedure should not be adopted. *The saving contained in Rule 11 makes the intention quite clear and indicates alternative remedies.*

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No Rules of Court have been made with special reference to an action instituted for a declaration of title to property by prescription. But that does not mean that the Court has no jurisdiction to entertain such an action, or that the right to institute an action is suspended until such Rules of Court have been made. As Sir Anthony De Freitas, C.J., delivering the judgment of the Full Court, said in *Fernandes v. Da Silva* (1927) L.R.B.G. 87, 92:

The jurisdiction of a Court may be exercised although no appropriate rules of procedure have been made.

In *A.G. (Ontario) v. Daly* (1924) A.C. 1011 it was held by the Privy Council that there is power in a Colonial Supreme Court (as in the High Court in England) to issue an order of *mandamus* to an inferior court, and that although no rules had been made regulating the method in which that power was to be exercised, that did not prevent the Court from making full use of its powers. Where no rules of procedure have been prescribed, the judge will adopt whatever procedure is convenient and will give such directions as justice and common sense alike call for. Prior to the coming into force of Rules of the Supreme Court (Declaration of Title) 1923, Sir Charles Major, then Chief Justice, gave directions as to the procedure to be followed between the date of the presentation of a petition for declaration of prescriptive title and the hearing of the petition: and see *in re Gajraj* (1925) L.R.B.G. 21, *per* Sir Charles Major, C.J.

In an action instituted for a declaration of title by prescription, the Court will do its best to ensure that all persons who may be adversely affected by the making of the declaration are given due notice of the filing of the action and are afforded an opportunity to enter appearance in the action in the same manner as if they were served with the Writ of Summons, and to be treated as defendants thereafter. It is provided by rule 13 of Order 14 of the Rules of Court, 1900, that:

the Court or a Judge may. at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or Judge to be just, order.....that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action be added.

This rule is of general application and is of special importance in the case of an action instituted for a declaration of title to property by prescription.

In such an action a judge in chambers, if satisfied that the justice of the case so requires, may, for instance, make all or any of the following orders:

- (a) or service of the writ of summons upon any person or persons who may be adversely affected thereby;
- (b) for publication (in the locality where the subject matter of the action is situate, or in a daily newspaper circulating in that locality, or in the *Gazette*, or in any other manner) of a notice, in such form as the judge may direct, of the relief asked for by the Plaintiff;

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(c) for the entry of appearance in the action by any person (not served with the Writ of Summons) who wishes to oppose the issue of a declaration of title in favour of the plaintiff for the land the subject matter of the action; and

(d) for adding as a defendant the name of any person who enters appearance.

Such orders and directions may be given by a judge in Chambers even before the service of the writ of summons. And they would carry into effect the spirit of Order 14, rule 13 of the Rules of Court, 1900, which requires the Court or a judge to add as defendants the names of any persons "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action," namely, for a declaration of title to immovable property by prescription.

By transport dated the 3rd April, 1843 No. 3249 Jesse Cameron acquired title for lot 5, part of Plantation No. 29, West Coast, Berbice, the said lot 5 being 2 Rhymland roods facade and of the whole depth of the estate and laid down on a diagram by the Sworn Land Surveyor, William Downer dated November, 1842.

Jesse Cameron died on 29th July, 1898 at the age of 110 years. It is said that he had left a will. This will was not deposited in the Registrar's Office prior to the 1st day of January, 1920, on which date the Deceased Persons Estates' Ordinance, 1917 (No. 10) came into force: and it has not been probated on or after the 1st January, 1920. It has not been tendered or admitted in evidence in this Court.

Alexander Cameron, a son of Jesse Cameron, always had his house on lot 5, and it was stated in evidence by the plaintiff that the house is 66 years old. Mary Jack, the daughter of the defendant, is 54 years of age, and she states that the house was on lot 5 before her time.

I do not believe the evidence called on behalf of the defendant in which it is sought to establish:—

- (1) that lot 5 was in the possession of Mary Chester, born Cameron, sister of Alexander Cameron, from the date of the death of Jesse Cameron on the 29th July, 1898 up to the date of her death on the 1st April, 1907;
- (2) that lot 5 was in the possession of Martha Chester and the defendant Duchess Chester, the daughters of Mary Chester, from the 1st April, 1907 until the date of the death of Martha Chester in 1930; and
- (3) that lot 5 has been in the possession of the defendant Duchess Chester from the date of the death of Martha Chester in 1930, up to the present time.

From the evidence I am satisfied that Alexander Cameron erected a house on lot 5 not later (and probably earlier) than the year 1889; and that whatever may have been the nature of his

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possession during the lifetime of his father, he assumed and exercised sole, exclusive and undisturbed possession of lot 5 from the 29th July, 1898, up to the date of his death on the 13th January, 1916.

Alexander Cameron died testate, and his will was deposited in the Registrar's Office at New Amsterdam on the 5th February, 1916 as No. 6 of 1916. He bequeathed certain property to his 7 children and the residue to his wife Esther Cameron who survived him. In the will the testator referred to, and dealt with, the following items of property:—

- (1) Five rods of land at No. 29—3 rods lying between lands owned by Thomas Joseph on the one side and London Joseph on the other: the remaining 2 rods lie between lands owned by Douglas Jack on the one side and Mary Jack on the other.
- (2) One rod of land situate at Trafalgar No. 30 and lying between lands owned by Donald Carmichael on the one side and Robert Mars on the other.
- (3) Two stallion and two mare donkeys.
- (4) Four oxen.
- (5) One cow.
- (6) One house and land at No. 29 Village.

The last item obviously refers to the house and land of the testator Alexander Cameron at lot 5, part of No. 29 Village, West Coast, Berbice. The will was made on the 10th day of January, 1916, and therein he dealt with lot 5, as his own property.

Apart from the 7 children named in the will, Alexander Cameron had another child, Alexander Junior, who predeceased his father unmarried and intestate.

The 7 children named in the will were:—

- (1) Jonathan: he died unmarried and intestate;
- (2) Adelaide: she was married to one Trotman. She died leaving one child born out of wedlock, Edward O'Donoghue; and he resides at the petitioner's house at lot 5, No 29 Village;
- (3) Margaret; she is married to one Joseph and she lives at No. 30 Village, West Coast, Berbice;
- (4) Charlotte; she was married. She died leaving two children born out of wedlock, Harold Warren and Ina Sutton; and they reside at the petitioner's house at lot 5, No 29 Village;
- (5) Harper; he is alive. He has been living in concubinage with Mary Jack, daughter of the defendant, since the year 1916;
- (6) Catherine: the plaintiff herein; and
- (7) Princess: she is married to William Sears; and she and her husband reside at the petitioner's house at lot 5, No. 29 Village.

In her evidence the plaintiff stated that neither Edward O'Donoghue, Margaret Joseph, Harold Warren, Ina Sutton nor Princess Sears claims any interest in lot 5. In his evidence William Hears stated that his wife Princess Sears claims no interest in lot 5. In his evidence Harper Cameron, who gave evidence on behalf of the defendant, stated that he does not claim any interest in lot 5.

It is not clear from the will whether the "one house and land at No. 29 Village" was bequeathed to the 7 children, or whether it was bequeathed to Esther Cameron under the residuary clause:

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but, for the purposes of this case, it is not necessary for me to determine this point.

From the evidence I am satisfied that from the 13th January, 1916 (the date of the death of Alexander Cameron) Esther Cameron the widow of Alexander Cameron, assumed and exercised sole, exclusive and undisturbed possession of lot 5, up to the date of her death on the 24th June, 1931; and that from the 24th June, 1931, (the date of the death of Esther Cameron) the plaintiff Catherine Cameron, the daughter of Alexander and Esther Cameron, assumed and exercised sole, exclusive and undisturbed possession of lot 5, up to the present time (subject to what is stated hereunder).

In April, 1942, the defendant Duchess Chester, by her agent Mary Jack, entered into possession of part of lot 5, and shied padi on the rice-field which had already been ploughed and shied by the plaintiff. In October, 1942, the defendant, by her agent, reaped the padi and obtained the sum of \$24 from the sale of the padi.

The plaintiff was in possession of lot 5. The defendant violated the possessory rights of the plaintiff, and has profited thereby. Unless this Court gives adequate relief to the plaintiff the defendant will, from time to time, continue to interfere with the plaintiff's possession of lot 5. The Court will therefore make:—

- (b) An Order declaring that the plaintiff is entitled, as against the defendant, to the quiet, peaceable, and undisturbed possession of lot 5, part of W½ of Pln No. 29, West Coast, Berbice;
- (d) An Order for an injunction restraining the defendant, her agents and/or her servants from trespassing on any portion of the said lot 5;
- (f) An Order for the recovery by the plaintiff from the defendant of the sum of \$15 as damages for trespass.

Rules 3 and 4 of the Rules of the Supreme Court (Declaration of Title) 1923, contain provisions as to notice, and service, of a petition for declaration of title to property by prescription. Rule 3 provides that notice of the presentation of the petition:

shall be published simultaneously in the *Gazette* and a daily newspaper circulating in the County where the subject-matter of the petition is situate on three consecutive Saturdays

Such publication gives presumptive notice to all persons who may be affected by the petition: the petitioner is not required to prove actual notice except under rule 4. That rule provides for the service upon each owner and occupier of land adjacent to that mentioned in the petition, of a copy of the petition and of any affidavit tiled in support thereof and of the notice of presentation of the petition; and that the Court may, on the application of the petitioner in a summary manner, dispense, either wholly or in part, with such service.

The land in respect whereof the plaintiff Catherine Cameron seeks a declaration of title by prescription was surveyed as recently as the 10th January, 1941, and no objection was raised by the

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adjacent proprietors to the boundaries as demarcated by the surveyor on the ground. If a petition had been presented by Catherine Cameron, the Court would, therefore, on the application of the petitioner, have dispensed with service under Rule 4.

Neither party took out a summons in this action for an order that notice be advertised in the *Gazette* or in a newspaper or in any other manner, that the plaintiff was seeking a declaration of title to lot 5 by prescription; and neither party asked that other persons be joined as co-defendants.

Although I am satisfied that the plaintiff has made out a *prima facie* case for the issue in her favour of a declaration of title to lot 5 by prescription, it may be that there are persons, not parties to this action, who may wish to be heard in opposition. I shall, therefore, at this stage, only make an order *nisi* in favour of the plaintiff for the declaration of title to lot 5 by prescription. This Order will be made absolute on Friday the 19th March, 1943 at 9.30 a.m. at the Court House, Colony House, New Amsterdam, Berbice, unless good cause be shown to the contrary on the said 19th March, 1943. And I order all persons having or claiming to have any right or title to lot 5, part of W½ of Plantation No. 29, West Coast, Berbice to appear and establish their claim or otherwise show good cause as aforesaid before the Supreme Court of British Guiana sitting at the Court House, Colony House, New Amsterdam, Berbice, on the 19th March, 1943, at 9 30 a.m. or be forever barred therefrom.

At the trial of this action it was disclosed that Harry Gravesande, a great grandson of Jesse Cameron claims to be entitled to an interest in lot 5. It was disclosed that Edward O' Donoghue, Harold Warren, Ina Sutton, grand children of Alexander Cameron, and Princess Sears, daughter of Alexander Cameron, all reside in the house of the plaintiff on lot 5; and that Harper Cameron, a son of Alexander Cameron, claims no interest in lot 5; but that Margaret Joseph, a daughter of Alexander Cameron, resides not in the plaintiff's house on lot 5 but at Pln. No. 30, West Coast, Berbice. In the circumstances of this case, in which all possible opposers reside in or near No. 29, West Coast, Berbice and would know within 24 hours the full purport of this judgment it is not necessary for me to direct a notice to be published in the *Gazette* or in a newspaper. It would be sufficient for me to direct, and I so direct:

- (a) that Harry Gravesande be appointed to represent the heirs and representatives of Jesse Cameron, deceased and that a sealed and certified copy of the Order of the Court herein be served upon him as such on or before the 12th March, 1943;
- (b) that Margaret Joseph be appointed to represent the heirs and representatives of Alexander Cameron, deceased, and that a sealed and certified copy of the Order of the Court herein be served upon her as such on or before the 12th March, 1943;

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(c) that a sealed and certified copy of the Order of the Court herein be affixed to the front door of the main dwelling house on lot 5, part of W¹/₂ of Pln. No. 29, West Coast, Berbice, on or before the 12th March, 1943.

I order that judgment be entered for the plaintiff against the defendant in accordance with the terms hereof with costs.

Judgment for plaintiff.

GANASEE, Plaintiff,
v.
ANNIE LAM, Defendant.
[1940. No. 11.—BERBICE.]
BEFORE DUKE, J. (Acting):
1943. MARCH 15, 16, 17.

Evidence—Estate of deceased person—Claim against—Uncorroborated evidence of living person—May be acted upon—Where it brings conviction to tribunal which has to try the question.

Evidence—Books of account—Kept in course of business—Reasonable degree of regularity—Satisfactory to Court—Evidence in support of claim or defence—Evidence Ordinance, cap. 25, s. 15.

Books alleged to be books of account were not permitted to be used by defendant under section 15 of the Evidence Ordinance, cap. 25. in support of her defence, as they were not kept with so reasonable a degree of regularity as to be satisfactory to the Court.

The statement of a living man is not to be disbelieved because there is no corroboration, but the Court must take into account the necessary absence through death of one of the parties of the transaction, and, in considering the statement of the survivor, it is natural to look for corroboration in support of it; but if the evidence given by the living man does bring conviction to the tribunal which has to try the question, then there is no rule of law which prevents that being acted upon.

ACTION by the plaintiff Ganasee claiming from the defendant Annie Lam in her own right and in her capacity as the administratrix of the estate of John Lam, deceased, specific performance of a verbal agreement of sale by the said John Lam to the plaintiff of the land comprised within Grant No. 3640.

H. Matadial (for *J. A. Luckhoo. K.C.*), for the plaintiff.

C. V. Wight, for the defendant.

Cur. adv. vult.

DUKE, J. (Acting): This is an action in which the plaintiff Ganasee claims from the defendant Annie Lam in her own right and in her capacity as the administratrix of the estate of John Lam, deceased, Letters of Administration having been granted to her on 5th May, 1933.

(a) An order of the Court declaring that:

a tract of Crown land situate, lying and being on the left bank of the Courantyne River, commencing at a paal about 500 roods below the

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mouth of Moleson Creek, and extending thence in facade N. 51°50' E. 25 roods by a mean depth N. 38°10' W. of 300 roods in the County of Berbice and Colony of British Guiana, and containing twenty-five Rhymland acres as shown on a diagram by F. U. Tronchin. Government Surveyor, dated the 25th day of May, 1903, a duplicate of which diagram together with a duplicate of the said grant is deposited in the Office of the Department of Lands and Mines, subject to the terms and conditions of the Grant of the said tract of land No. 3640,—is held by the defendant in trust for the plaintiff:

- (b) an order of the Court compelling the defendant to give and pass to and in favour of the plaintiff a legal and valid transport of the said property;
- (c) an Order that on failure by the defendant to give and pass the said transport to the plaintiff within 14 days from the date of the said order, the Registrar of the Supreme Court of British Guiana be ordered to do so;
- (d) in the alternative, the sum of \$2,500 as damages for breach of contract;
- (e) any other order as the Court may deem just;
- (f) costs.

John Lam was married to his wife Annie Lam on the 14th May, 1900, in community of goods.

By Crown Grant No. 3640 dated the 12th February, 1904, Badal, male, No. 68123 ex *Sheila* 1894, acquired title for the above described property. On the 28th January, 1916, Badal and John Lam swore to affidavits that on the 29th May, 1915, Badal had sold to John Lam, and John Lam had purchased from Badal, the above described property for the sum of \$170. Transport of the land was passed in favour of John Lam on the 20th June, 1916, No. 74.

John Lam died intestate on the 27th March, 1933. Letters of Administration in respect of his estate were granted on the 5th May, 1933, to his widow, the defendant Annie Lam.

The plaintiff Ganasee has been in possession of the 25 Rhymland acres of land comprised within Grant No. 3640, from the 20th June, 1916, up to the present time. The defendant alleges that the plaintiff was in such possession because he was a tenant; whereas the case for the plaintiff is that he was in possession because John Lam had agreed to sell the land to him for \$400.

The defendant Annie Lam gave evidence that her husband John Lam, now deceased, had rented the 25 acres of land to the plaintiff Ganasee, at the annual rental of 25 bags of padi and that the rental was small as Ganasee had to upkeep the land. Her daughter, Clarice Lam, deposed that the plaintiff was a tenant, that he paid his rent in padi; that the rent was 25 bags of padi per annum, and that she made entries in books of account of the plaintiff for 1937 and 1938 showing that the plaintiff paid rent for those years, and that the rent was 25 bags of padi per annum. William Barry, who was a shop assistant of the late John Lam for about 8 years prior to his death deposed that he had collected rent from the plaintiff in padi.

By section 15 of the Evidence Ordinance, cap. 25, the Court may permit any party to a civil cause or matter to use his books of account, kept in the course of his business, *as evidence in support of his claim or defence*, if they appear to have been kept in

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the course of business with so reasonable a degree of regularity as to be satisfactory to the Court. The books produced by Clarice Lam, even if they are books of account, do not appear to have been kept in the course of business with so reasonable a degree of regularity as to be satisfactory to the Court. They are not therefore admissible for the purposes of section 15: they may, however, be used for the purpose of refreshing the memory of the witness Clarice Lam.

The plaintiff has considerably improved the 25 acres of land included within Grant No. 3640. He has dug a middle walk trench, a side line trench and cross trenches. The land has a facade of 25 Rhymland roods and a mean depth of 300 Rhymland roods. The plaintiff has converted what was, for the most part jungle land into land suitable for rice cultivation. He has also planted portions of the land with coconut trees, mango trees, star-apple trees, and other economic fruits.

In *Beckett v. Ramsdale* (1885) 55 L.J. Ch.241, C. A. Sir J. Hannen (at page 224) said:—

The statement of a living man is not to be disbelieved because there is no corroboration, but we must take into account the necessary absence through death of one of the parties to the transaction, and, in considering the statement of the survivor, it is natural to look for corroboration in support of it; but if the evidence given by the living man does bring conviction to the tribunal which has to try the question, then there is no rule of law which prevents that being acted upon.

I have taken into account that John Lam, one of the parties to the agreement set up by the plaintiff, is dead. Nevertheless, after considering the evidence given on behalf of the plaintiff and of the defendant, I am convinced that the plaintiff Ganasee spoke the truth when he deposed that John Lam had agreed to sell to him the land comprised in Grant No. 3640 for the sum of \$400; and further, that he was not in possession of that land as a tenant of John Lam or of the defendant; as alleged by the defendant, and her witnesses.

In any event, the evidence of the plaintiff Ganasee is corroborated by that of Rampersaud who stated that John Lam had told him that he had no land at Moleson's Creek which he could give out for rice cultivation, as the land which he had there he had purchased for the plaintiff Ganasee, and if he Rampersaud wanted any land he must go to Ganasee.

The purchase price of \$400 having been fully paid by the plaintiff, there will be judgment for the plaintiff against the defendant;

- (a) that the agreement of sale made between Ganasee and John Lam whereby John Lam agreed to sell to Ganasee the 25 Rhymland acres comprised in Grant No. 3640, for \$400 ought to be specifically performed by the defendant Annie Lam in her own right and in her capacity as the administratrix of the estate of John Lam, deceased;

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- (b) that the defendant do, within 14 (fourteen) days of the date of this judgment, instruct the Registrar of Deeds to advertise transport of the 25 Rhymland acres of land comprised in Grant No. 3640 in favour of the plaintiff Ganasee, and do, within 14 (fourteen) days after the date of the third advertisement, pass transport of the said land in favour of the plaintiff Ganasee; and
- (c) that, upon failure by the defendant to instruct the Registrar of Deeds as aforesaid, or to pass the transport as aforesaid, the Registrar of the Supreme Court is hereby authorised, empowered and directed to do any such act in the name and on behalf of the defendant Annie Lam in her own right and in her capacity as the administratrix of the estate of John Lam, deceased.

The costs and expenses of the transport will be borne by the plaintiff Ganasee. The plaintiff will recover from the defendant in her own right and in her capacity as the administratrix of John Lam, deceased, his costs (certified for counsel if necessary) of and incidental to this action.

The plaintiff will have liberty to apply.

Judgment for plaintiff.

Solicitors: *E. A. Luckhoo, O. B. E.; A.G. King.*

NEDD OXIAS BEATON. Plaintiff,
 v.
 RICHARD QUINTIN, Defendant.

[1941. No. 26.—BERBICE.]

BEFORE DUKE, J. (Acting) IN CHAMBERS:

1943. MARCH 20.

Practice—Hearing—Action ripe for—Request for hearing—Not made by plaintiff within ten days after—Dismissal of action for want of prosecution—Application by defendant for—May not be made.

Practice—Summons to dismiss action for want of prosecution—Termination of action involved—Not a proceeding—Rules of Court, 1900, Order 32, rule 5 (2).

Practice—Pending action—Meaning of—Action in which some proceeding may still be taken—Action deemed altogether abandoned and incapable of being revived—Rules of Court, 1900, Order, 32, rule 5(2)—No longer a pending action—No proceeding may be taken therein.

Practice—Action deemed altogether abandoned and incapable of being revived—Dismissal of action for want of prosecution—Application for—Refused—Action no longer a pending action.

Practice—Dismissal of action for want of prosecution—Application for—When may be made—Non-delivery of statement of claim—Non-compliance with an order as to discovery—Rules of Court, 1900, Order 25, rule 1 and Order 27, rule 21.

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Where a plaintiff does not, within ten days after the action has become ripe for hearing, request the Registrar to enter the action on the hearing list (as provided by the Rules of Court, 1900, Order 32, rule 3,) the defendant is not entitled to make an application that the action be dismissed for want of prosecution.

A summons to dismiss an action for want of prosecution, involving as it does the termination of the action, is not a "proceeding" within the meaning of rule 5 (2) of Order 32 of the Rules of Court, 1900.

A pending action means an action in which some proceeding may still be taken.

When an action, by virtue of rule 5 (2) of Order 32 of the Rules of Court, 1900, is deemed altogether abandoned and incapable of being revived, no proceeding may be taken therein, and the action is no longer a pending action.

No action can be dismissed for want of prosecution unless that action is pending at the date of the application to dismiss.

An application may not be made to dismiss for want of prosecution an action which, by virtue of rule 5 (2) of Order 32 of the Rules of Court 1900, is deemed altogether abandoned and incapable of being revived, as that action is no longer a pending action.

An application to dismiss an action for want of prosecution may be made:

- (1) under Order 25, rule 1, where the plaintiff does not deliver a statement of claim within the time allowed for that purpose; or
- (2) under Order 27, rule 21, where the plaintiff fails to comply with an order to answer interrogatories or for discovery or inspection of documents, after personal service upon him of a copy of the order.

SUMMONS by the defendant Richard Quintin (heard in New Amsterdam, Berbice,) for an order that the action instituted by Nedd Oxias Beaton be dismissed with costs for want of prosecution. The last proceeding had in the action was on the 23rd May, 1941, when the defence was filed. The summons by the defendant was tiled on the 16th March, 1943.

E. A. Luckhoo, O.B.E., solicitor, for the applicant (defendant).

Mungal Singh, for the respondent (plaintiff).

DUKE, J. (Acting): This is an application by the defendant, made by way of summons, for an order that this action be dismissed with costs for want of prosecution. The statement of claim was tiled on the 16th May, 1941, and the defence was filed on the 23rd May, 1941. The plaintiff could have filed a reply within 10 days from the date upon which the defence was tiled, that is to say, on or before the 2nd June, 1941: but he didn't. The pleadings were therefore deemed to be closed at the close of the day of the 2nd June, 1941 (Rules of Court 1900. Order 25, rule 6).

Order 32, rule 3 of the Rules of Court is as follows:

The Registrar shall keep a Hearing List, in which he shall enter every action which, by the close of the pleadings or otherwise, has become ripe for being heard by the Court. The entry shall be made on the request of the plaintiff, or other party having the lead, but if he does not, within ten days after the action has become ripe for hearing, request that it be entered, then the opposite party may so request, and the Registrar shall make the entry.

On the 3rd June, 1941, the action became, by the close of the pleadings, ripe for being heard by the Court. The plaintiff did not, within ten days after the action became ripe for hearing,

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request that the action be entered in the Hearing List. The defendant could therefore, on the expiration of ten days after the action became ripe for hearing, have requested that the action be entered upon the Hearing List: but he didn't.

Order 32, rule 5 (1) of the Rules of Court is as follows:

If any action which has become ripe for hearing shall not, on the request of either party, be entered in the Hearing List within six months after it shall so have become ripe, the same shall be deemed deserted, and shall not be capable of being further proceeded in to any effect until an order of revivor has been made by the Court, which order the Court may grant upon the application of any party.

The action was not, at the request of the plaintiff or of the defendant, entered in the Hearing List within six months after it became ripe for hearing. The action was therefore deemed deserted.

Order 32, rule 5 (2) of the Rules of Court is as follows:

If no order of revivor be applied for within a further period of six months, or if such order shall have been made, but the action has not, on the request of either party, been entered on the Hearing List within six months from the date of the order of revivor, or if in any action whatever there has been no proceeding for one year from the last proceeding had, the action shall be deemed altogether abandoned, and incapable of being revived.

Neither the plaintiff nor the defendant applied for an order of revivor within six months of the 3rd December, 1941; and no such order was made. The last proceeding had in the action was on the 23rd May, 1941, when the defence was tiled. Consequently, in accordance with Order 32 rule 5 (2). on the 24th May, 1942, (or at the very latest, on the 4th June, 1942,) the action was deemed altogether abandoned and incapable of being revived.

On the 1st March, 1943, at the request of the defendant, the Registrar placed on the file a certificate that "there has been no proceeding had in the above action or cause since the 23rd day of May, 1941, when the Defence was filed and that the said action is therefore deemed altogether abandoned and incapable of being revived by virtue of the Rules of Court 1900, Order 32, rule 5 (2)."

It is in these circumstances that the defendant took out a summons on the 16th March, 1943, for an order that this action be dismissed with costs for want of prosecution.

An application to dismiss an action for want of prosecution may be made:

- (1) under Order 25, rule 1, where the plaintiff does not deliver a statement of claim within the time allowed for that purpose; or
- (2) under Order 27, rule 21, where]the plaintiff fails to comply with an order to answer interrogatories or for discovery or inspection of documents, after personal service upon him of a copy of the order.

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In England such an application may also be made under Rules of the Supreme Court, 1883, Order 36, rule 12, where the plaintiff does not give notice of trial within the time limited by the rule. In such case, the defendant may either give notice of trial, or he may apply to dismiss the action for want of prosecution. In this colony, however, where the plaintiff does not request that the action be entered on the Hearing List, within the time limited by Order 32, rule 3, of the Rules of Court, 1900, although the defendant may request that the action be so entered, he is not authorised or empowered to apply to have the action dismissed for want of prosecution.

I therefore hold that where a plaintiff does not, within ten days after the action has become ripe for hearing, request the Registrar to enter the action on the Hearing List, (as provided by the Rules of Court, 1900, Order 32, rule 3,) the defendant is not entitled to make an application that the action be dismissed for want of prosecution.

I quite agree that a summons to dismiss an action for want of prosecution, involving, as it does, the termination of the action, is not a "proceeding" within the meaning of rule 5(2) of Order 32 of the Rules of Court, 1800; see notes in Annual Practice, 1942, p. 1393 and in Yearly Annual Practice, 1940, p. 1408, to the English Order 64, rule 13. However, no action can be dismissed for want of prosecution unless that action is pending at the date of the application to dismiss. A pending action means an action in which some proceeding may still be taken: *per* Jessel M.R., in *Re Clagett, Fordham v. Clagett* (1882) 20 Ch. D, 653. And when an action, by virtue of rule 5 (2) of Order 32 of the Rules of Court, 1900, is deemed altogether abandoned and incapable of being revived, no proceeding may be taken therein, and the action is no longer a pending action. Consequently, the Court cannot entertain an application to dismiss such an action.

The defendant's application made by way of summons must therefore be refused with costs.

Application refused.

O. FISHER v. H. D. FRASER.

OLIVE FISHER, Plaintiff,

v.

HUBERT DARCY FRASER, Defendant.

[1942. No. 172.—DEMERARA].

BEFORE SIR JOHN VERITY. C.J.

1943. MARCH 22, 23, 29.

Husband and wife—Ante-nuptial contract excluding community of property—Right of election of wife on dissolution of marriage—Whether to share in profits and losses of marriage, or to content herself with taking back property brought by her into marriage—Terms of contract—Election to be exercised within six months from dissolution of marriage—Contract not registered until after death of wife—Election not exercised by heiress of wife within time prescribed by contract, or within 6 months from registration of contract—Right of election lost.

By the terms of an ante-nuptial contract, community of property was excluded, but it was provided that during the marriage (in case of need) and at its dissolution, the wife should have the right of election whether to share in the profits and losses of the marriage, or to content herself with taking back the property brought by her into the marriage. She was given six months from the date of the dissolution within which to declare her choice.

The marriage was dissolved by the wife's death on the 26th August, 1941.

The plaintiff, the sole surviving child of the marriage, stated that, at the time of her mother's death, she was not aware of any ante-nuptial contract, and she believed that her parents had been married in community of property. She made certain enquiries from her father, and the existence of an ante-nuptial contract was then made known to her. The contract had not been registered and she had no knowledge of its terms.

On the 11th September, 1941, she commenced proceedings against her father to determine certain questions relating to the marriage. On that day the contract was registered.

On the 27th September, 1941, the plaintiff filed an affidavit in those proceedings in which she stated that "if the Court finds that the said contract governs the marriage . . . then I elect to share in the profits and losses arising during the said marriage."

An order was made in those proceedings on the 27th April, 1942, whereby the Court found that the ante-nuptial contract, upon registration, became effectual as from the date of the marriage.

Subsequently, the plaintiff issued a writ against her father claiming an order for a statement of affairs in the terms of a certain ante-nuptial contract, and further consequential relief.

Held (1) that the validity of the ante-nuptial contract was not dependent upon the subsequent decision of the Court; it did not acquire validity by reason of the order but was effectual in law from the date of its registration;

(2) that had the plaintiff rightly conceived the legal position, she was from that moment herself in a position to make a final or unconditional election;

(3) that her declaration became effective only on the 27th April, 1942;

(4) that having by the terms of her declaration deferred the effect of her election until, in the event, the prescribed time had expired, she has lost the right of election, and her action must fail on that ground alone.

S. L. van Batenburg-Stafford, K.C., for the plaintiff.

H. C. Humphrys, K.C., (*Lionel A. Luckhoo* with him), for the defendant.

Cur. adv. vult.

O. FISHER v. H D. FRASER.

VERITY, C. J.: In this case the plaintiff seeks an order against the defendant for a statement of affairs in the terms of a certain ante-nuptial contract and further consequential relief.

The defendant and the plaintiff's mother were married on 1st August, 1903, and the plaintiff is the sole surviving child of the marriage. The parties had entered into an ante-nuptial contract to certain terms of which it will be necessary to refer later. It will suffice for the present to say that in support of the marriage each brought in certain property. In 1905 the wife voluntarily left her husband's house and removed all the property brought in by her. She returned some months later and they resumed cohabitation but she did not return the property which she had removed and in 1914 she again voluntarily left him and did not resume marital relations up to the day of her death in 1941.

The plaintiff states that at the date of her mother's death, 26th August, 1941, she was not aware of any ante-nuptial contract and believed that her parents had been married in community of property. She made certain enquiries from the defendant and the existence of an ante-nuptial contract was then made known to her. The contract had not been registered and she had no knowledge of its terms. On 11th September, 1941, she commenced proceedings to determine certain questions relating to the marriage. On that day the contract was registered. By its terms community of property was excluded, but it was provided that during the marriage (in case of need) and at its dissolution the wife should have the right of election whether to share in the profits and losses of the marriage or to content herself with taking-back the property brought by her into the marriage. She was given six months from the date of the dissolution within which to declare her choice.

The marriage was dissolved by the wife's death on the 26th August, 1941, and on the 27th September, 1941, the plaintiff stated in an affidavit filed in the proceedings then pending "that if the Court finds that the said contract governs the marriage then I elect to share in the profits and losses arising during the said marriage."

An order was made in those proceedings on the 27th April, 1942, whereby the Court found that the ante-nuptial contract, upon registration, became effectual as from the date of the marriage.

The plaintiff's solicitor then wrote to the defendant "I again inform you that my client . . . elects to share in the profits and losses arising during the said marriage."

Counsel for the defendant submits that in these circumstances the conduct of the wife disentitles her or any person claiming through her from any benefit under the contract. He further submits that even if this be not so the plaintiff failed to make election within the prescribed period.

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It is clear that the letter of the plaintiff's solicitor on the 27th April, 1942, was out of time, and, in view of the rejection of an earlier letter as inadmissible (it having been written "without prejudice") the only declaration of choice within time, is to be found in that paragraph of the plaintiff's affidavit to which I have already referred.

Whether or not this declaration is a final election depends upon the meaning and effect of the words used. Counsel for the defendant submits that the words convey no more than the expression of a future intention to elect in certain circumstances then undetermined. On the other hand, it is contended on behalf of the plaintiff that the election herein expressed is final; that it is not conditional upon the happening of any event but merely upon the legal validity of the contract.

It is to be observed that the validity of the contract was not dependent upon the subsequent decision of the Court. It did not acquire validity by reason of the order but was effectual in law from the date of its registration. Had the plaintiff rightly conceived the legal position she was from that moment herself in a position to make a final or unconditional election. She refrained from so doing, however, and by the terms of her declaration postponed its effect until the Court should declare the contract to have been valid. In choosing to follow this course by means of which she hoped, presumably in her own interest, to secure a declaration against the document, she ran the risk of deferring her final election until the prescribed time had expired, which in fact occurred.

Her declaration while expressed in positive terms—"then I elect"—became effective only in the circumstances and at the time selected by her, that is to say, upon the Court finding against her in what was then her main contention. Until her election became effective the defendant was not at liberty to carry out those terms of the contract which were dependent upon her choice even had he been disposed to concede her right to share in the profits and losses arising from the marriage.

Having by the terms of her declaration deferred the effect of her election until, in the event, the prescribed time had expired she has, in my view, lost the right of election and her action must fail on that ground alone.

The question whether the plaintiff in the particular circumstances of this case would in any event have been entitled to claim benefit under the contract does not therefore arise, and as, in the present condition of the laws of this Colony, it lacks general importance I refrain from expressing any view which would be of but academic interest.

Judgment will be entered for the defendant with costs.

Judgment for defendant.

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

E. FRANK v. A. BUKSH.

ELIZABETH FRANK, *et al*, Plaintiffs,

v.

ALI BUKSH, *et al*, Defendants.

[1941. No. 233.—DEMERARA].

BEFORE VERITY, C.J.:

1942. OCTOBER 5; 1943. MARCH 29.

Prescription—Positive title by—How secured—Civil Law of British Guiana Ordinance, cap. 7, s. 4 (1).

Limitation of actions—Action to recover possession of land—Defence—Possession for 12 years—Civil Law of British Guiana Ordinance, cap. 7, s. 4 (2)—Negative in its operation—Confers no positive right or title which Court may properly declare—Subsection to be used not aggressively but defensively—As a shield and not as a sword—Declaration as to 12 years' possession—Cannot be granted—Injunction in aid of declaration—Cannot be granted.

Injunction—Common law remedy of damages—In aid of, rather than in substitution for.

The plaintiffs alleged that they were and had been for over 12 years in possession of a parcel of land, and that the defendants had trespassed thereon and had threatened to re-enter and dispossess the plaintiffs. The plaintiffs did not claim relief by way of damages for trespass. The only relief claimed by them was (1) a declaration that they are and have been in possession for over 12 years and that they are entitled to the protection of section 4 (2) of the Civil Law of British Guiana Ordinance, cap. 7; and (2) an injunction restraining the defendants, and any person claiming through them, from making any entry or distress and from bringing any action or suit for the recovery of the said land.

Section 4(2) of the Civil Law of British Guiana Ordinance, cap. 7, is as follows:

“No person shall make an entry or distress, or bring an action or suit to recover immovable property, but within twelve years next after the time at which the right to make, bring or recover the same has accrued to him or to some person through whom he claims.”

Held (1) that positive title by prescription is secured only in the circumstances which fall within section 4 (1) of the Civil Law of British Guiana Ordinance, cap. 7;

(2) that a declaration that the plaintiffs are and have been in possession over 12 years would not be a declaration of right, but it would be no more than a finding of fact;

(3) that if the Court were to find as a fact circumstances which bring the plaintiffs within the scope of section 4 (2) of the Civil Law of British Guiana Ordinance, cap. 7, the plaintiffs would be protected by the operation of the statute, and would need no declaration by the Court that they are entitled to the protection of section 4 (2);

(4) that section 4 (2) of the Civil Law of British Guiana Ordinance, cap. 7, is one of limitation only and as such is negative in its operation and confers no positive right or title which the Court may properly declare;

(5) that the Statute of Limitations should be used defensively and not aggressively, as a shield and not as a sword;

(6) that the relief claimed in the action by way of declaration is unknown to the law, and cannot be granted;

(7) that the relief claimed in the action by way of injunction is unknown to the law, and must be refused.

In the exercise of its discretion the Court tends to the use of the injunction in aid of, rather than in substitution for, the common law remedy of damages.

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ACTION by the plaintiff's Elizabeth Frank, Lavinia Stewart, Edmund Moore, Gertrude Moore, Lena Bovell and Aaron Nathaniel Moore against Ali Buksh and Hiralal for (a) a declaration that the plaintiffs jointly with Thomas Moore are and have been in the possession of "lot number 8 (eight) section H, portion of the northern half of Plantation D'Edward, West Coast, in the county of Berbice, the said lots being shown on a plan by S. S. M. Insanally, Sworn Land Surveyor, dated 24th August, 1928, and deposited in the Deeds Registry of British Guiana, on the 2nd September, 1929," for a continuous period of more than 12 years immediately preceding this suit (instituted by way of writ of summons on 8th August, 1941), and are entitled to the protection of section 4 (2) of the Civil Law of British Guiana Ordinance, Chapter 7, in relation to the said land; (b) a perpetual injunction restraining the defendants and each of them and all persons succeeding them or claiming through them from making any entry or distress upon the land aforesaid or bringing any action or suit for the recovery of the said land from the plaintiffs.

In their statement of claim the plaintiffs alleged that jointly with one Thomas Moore or alternatively in common with him they had been for a period of over 12 years immediately preceding the month of July, 1941, in the sole undisturbed and continuous possession *nec vi nec clam nec precario* of lot 8, section H, portion of the northern half of Plantation D'Edward, West Coast, Berbice; that during the said period the plaintiff's have cultivated the said land, and reaped the crops, mostly coconuts therefrom, and held the same to their own use and benefit; that in or about the month of July, 1941, the defendant Ali Buksh sold the said piece of land to the defendant Hiralal but the plaintiffs had no notice of the said sale and were at the time unaware of it; that subsequently to the said sale in or about the months of July and August, 1941, the defendants Ali Buksh and Hiralal informed the plaintiffs thereof and claimed to be entitled to the possession of the said lot and threatened to enter upon the said lot 8; that in pursuance of the said threat and claim the defendant Hiralal entered upon and cut wood and bush from part of the said lot during the month of November, 1941, and that the defendants continue to assert that the defendant Hiralal is now the owner of the said lot 8 and that they threaten to re-enter upon the said land and to dispossess the plaintiff's.

In their defence, the defendants alleged that the plaintiffs had never at any time been in possession of the said lot 8; alternatively, if the plaintiffs or any of them were in possession, such possession was by stealth and secrecy of which stealthy and secret possession the defendant Ali Buksh was not aware and the same could not avail. The defendants further alleged that by Order in Council dated the 22nd September, 1926, a partition officer was appointed to partition the north half of Plantation D'Edward, West

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Coast, Berbice; that by the awards published in the *Official Gazette* of the 12th January, 1929, lot 8 was awarded to Alexander Schultz and Jemima Hercules born Schultz; that during the month of May, 1930, the defendant Ali Buksh purchased lot 8 at execution sale, and thereafter received judicial sale transport No. 186 of 1933, (Berbice) for the said lot 8; that he was in uninterrupted possession of lot 8 since the year 1929 until the month of July, 1941; that in the month of July, 1941, he sold lot 8 to the defendant Hiralal, passed transport Mo. 445 of 1941 in favour of the defendant Hiralal and put him into possession; and that the defendant Hiralal was in possession of lot 8 without any knowledge of any adverse claim by any person previous to the commencement of this action. The defendants pleaded that the plaintiffs were not entitled to the protection of section 4 (2) of the Civil Law of British Guiana Ordinance, cap. 7; that the plaintiff's statement of claim disclosed no cause of action against them or either of them; and that the plaintiffs had mistaken their remedy.

S.L. van Batenburg-Stafford, K.C., for the plaintiffs.

There was no appearance by or on behalf of the defendants.

Cur. adv. vult.

VERITY, C. J.: In this case the plaintiffs allege that they are and have been for over 12 years in possession of a parcel of land; that the defendants have trespassed thereon and have threatened to re-enter and dispossess the plaintiffs who claim by way of relief a declaration that they are and have been in possession for over 12 years and that they are entitled to the protection of Section 4 (2) of the Civil Law Ord. Ch. 7. They further claim an injunction restraining the defendants from making entry or distress and from bringing any action or suit for the recovery of the said land.

In regard to the declaration sought this would appear to be an entirely novel form of action, for counsel cited no precedent or authority and such research as I have been able to make discloses none. Such a declaration appears, moreover, to be unnecessary. The first part of the declaration, if made, would not be a declaration of right but no more than a finding of fact and in that it differs from the only authority cited by counsel which approaches the question, the decision of this Court in *Foo v. Nerahoo* (25. 9. 1940) by which the Court declared that the plaintiff was "entitled to possession." It is to be observed that in that case the learned Chief Justice did not purport by his judgment to consider any question which might have arisen as to the legal propriety of any such declaration as is now sought. As to the second part of the declaration, if the Court were to find as a fact circumstances which bring the plaintiffs within the scope of the section, then the plaintiffs would be protected by the operation of the statute and would need no declaration by the Court. It is further to be

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observed that the section referred to is one of limitation only and as such is negative in its operation and confers no positive right or title which the Court may properly declare. Positive title by prescription is secured only in the circumstances which fall within the immediately preceding subsection. I can find no authority for the use of a statutory limitation of this nature as the basis for such a declaration as is sought. The difficulties and hardships which might well ensue upon this use of a statute of limitation as "a sword" rather than as "a shield" are patent. In the absence of any authority to the contrary, therefore, I am of opinion that the relief first sought is unknown to the law and that in this respect, at least, the form of action is misconceived.

In regard to the second relief claimed, by way of injunction, it may well be that a perpetual injunction might issue restraining the defendants from further entry or trespass, although in the exercise of its discretion the Court tends to the use of the injunction in aid of rather than in substitution for the common law remedy of damages. Here again, however, the plaintiffs attempt the novel use of a statute of limitation aggressively rather than defensively by seeking not only that the defendants shall be restrained from further trespass but also that they and any person claiming through them may be restrained from making any distress or bringing any action or suit for the recovery of the land. Here also counsel has cited no authority in point nor have I been able to discover any. In the absence of any such authority I am of the opinion that the relief in the terms secondly claimed is unknown to the law. No other relief having been claimed the whole action is in my view misconceived and must therefore be dismissed.

I must confess that I am at a loss to understand why the plaintiffs did not proceed by way of an ordinary common law action for damages in trespass wherein, if the circumstances warranted, they might have obtained an injunction restraining the defendants from further wrong.

The defendants not having appeared at the hearing there is no order as to costs.

Action dismissed.

Solicitors: *R. G. Sharples; J. Eleazar.*

SOMAIRSINGH v. HARPAULSINGH.
 SOMAIRSINGH, Appellant (Defendant),
 v.
 HARPAULSINGH. Respondent (Complainant).

[1942. No. 421.—DEMERARA].

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

1943. FEBRUARY 26; APRIL 2.

Nuisance—Branches of overhanging trees—Abatement of nuisance—By Cutting branches—Abatement—A lawful and not an unlawful act—Right to abate—Not confined to adjoining owner—May be exercised by tenant.

Criminal law and procedure—Unlawfully and maliciously damaging a tree—Act of person resulting in damage—Lawful act—Motive for act immaterial—No offence committed—Even though subsequent thereto, entry made by person on adjoining land and fruit picked by him—Summary Jurisdiction (Offences) Ordinance, cap. 13, s. 53.

The mere fact that branches of a tree overhang the adjoining land gives the owner of that land a right to cut them in order to abate the nuisance.

The right to abate a nuisance is not limited to the legal owner of premises affected by the nuisance.

The rights of the tenant or occupier to abate a nuisance do not differ either in kind or in degree from those of the owner.

A tenant or occupier of land, who cuts the branches of a tree which overhang on that land, does a lawful, and not an unlawful, act,

No person can be convicted of unlawfully and maliciously damaging a tree, contrary to section 53 of the Summary Jurisdiction (Offences) Ordinance, cap. 13, if the act of the person which resulted in damage to the tree was a lawful act. Where the act is lawful, the motive of the person in doing it is immaterial.

The lawful act of an owner, tenant or occupier of land in cutting the branches of a tree which overhang on that land is not converted into an unlawful act by his subsequent conduct in entering upon the adjoining land and picking and removing fruit from the tree.

APPEAL by the defendant from a decision of the Magistrate of the Georgetown Judicial District convicting him of unlawfully and maliciously cutting part of a tree, to wit, branches of a breadfruit tree growing on lot 4, Water Street, Kingston, Georgetown, the property of SUBHADRA, contrary to section 53 of the Summary Jurisdiction (Offences) Ordinance, cap. 1B.

D. P. Debidin, solicitor, for appellant.

C. Shankland, 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 malicious damage under section 53 of the Summary Jurisdiction (Offences) Ordinance. Cap. 13.

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The facts as found by the learned Magistrate would appear to be that the appellant is the tenant of a room on certain premises over the yard of which hung the branches of a breadfruit tree growing on the adjoining premises occupied by the respondent. On the date charged the appellant, while in the yard of the premises of part of which he is a tenant, cut one or more of the overhanging branches of the tree and it is in respect of this act that he has been convicted of malicious damage. It appears that he was charged at the same time with larceny of certain fruit growing on the tree and the charges were heard together. The Magistrate found that, having cut down the overhanging branch, or branches, the appellant and a boy acting on his orders picked and removed the fruit from the tree. The learned Magistrate dismissed the charge of larceny but states in his reasons for decision that although the facts warranted a conviction of larceny or conversion the ease was marked "dismissed" upon the defendant agreeing to pay the value of the fruit and the costs of the summons.

Against the conviction for malicious damage this appeal is now brought on the main ground that the offence is committed only if the act is both unlawful and malicious and that in the present case it is neither.

In regard to the question whether the appellant's act was unlawful, counsel for the respondent admitted that the owner of premises is lawfully entitled to cut branches from a tree growing on adjoining premises if they overhang his premises and if they are in fact a nuisance. He argues that in the present case the appellant is not the owner but only a tenant of one room situated on the premises and that the right so to abate a nuisance does not vest in him. He further submitted that while there was evidence that leaves or fruit falling from the tree might constitute a nuisance there is no evidence that any nuisance was in fact subsisting at the time when the appellant cut the tree. It was his contention that the true remedy of the appellant was to make complaint to the local authority which would then have taken steps to abate the nuisance under powers conferred by section 276 of the Local Government Ordinance cap. 84.

We do not think that these submissions are well-founded. There does not appear to be anything in the authorities cited by either party which limits the right to abate a nuisance to the legal owner of the premises. It is clear from the evidence that the tenants in this case are responsible for keeping the yard clean and, as occupiers, they would no doubt be open to penalty under the Health Laws if they refused or failed to do so. Tenants cannot effectively discharge this liability if they are precluded from exercising the rights which the owner or occupier of premises possesses to secure the abatement of a nuisance which may give rise to proceedings against themselves. We are aware of no

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authority, however, which would limit the right of an occupier, whether sole or jointly with others, to abate one kind of nuisance and not another, and we are of the opinion therefore that the rights of the tenant or occupier do not differ in this matter either in kind or in degree from those of the owner.

The question then arises as to whether or not the overhanging branches constituted a nuisance in fact, at the time when the appellant cut them, even though there is no evidence that at that time they were actually dropping leaves or fruit in the premises occupied by the appellant. It appears from the opinion of the Lord Chancellor in *Lemmon v. Webb* (1894) 59 J. P. 564, that the mere fact that branches overhang the adjoining land gives the owner of that land a right to cut them, though His Lordship expressed the view that "it may be and probably is generally a very unneighbourly act to cut down the branches of overhanging trees unless they are really doing some substantial harm." An unneighbourly act is not necessarily a criminal offence, however, and there can be no doubt in our view that the appellant would have committed no offence had he cut the overhanging branch and done no more than that. His act would then not have been unlawful and the question of malice would not in such case arise. If the branch was a nuisance by the mere fact of its overhanging, which is so, and if the appellant had the right to cut it in order to abate that nuisance, which he had, then his motive in doing so is immaterial.

The only question which remains is whether the nature of his act in cutting the branch is affected by his subsequent conduct in cutting up and removing the same or by his subsequent entry on the complainant's premises to pick the fruit. We do not think that his lawful act is converted into an unlawful act by his subsequent conduct. A lawful entry, for instance, into premises even if accompanied by a lawful breaking would not be converted into an unlawful breaking and entering because the individual who had so entered subsequently stole goods from within the premises. In the present case the complainant, no doubt, had her remedy in regard to the unlawful removal by the appellant of the branches he had lawfully cut. He had already been dealt with by the Magistrate in regard to the fruit which it is alleged he stole. Neither of these factors, however, justifies his conviction for malicious damage in respect of an act which was in itself lawful.

Whatever may be our view of the merits of the appellant's conduct—and we cannot indeed do other than deplore it—the learned Magistrate erred in convicting him of the offence charged. The appeal is therefore allowed with costs and the conviction is set aside.

Appeal allowed.

J. MORGAN v. G. MORGAN
 JAMES MORGAN, Appellant
 v.
 GEORGE MORGAN, Respondent.

[1942. No. 170.—DEMERARA.]

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

1943. FEBRUARY 26; APRIL 2.

Appeal—Finding of fact—Contrary to weight of evidence—Inadmissible evidence admitted by magistrate after objection—Probable reason—Why less weighty evidence accepted by magistrate—No other reason apparent—None furnished by magistrate—Decision of magistrate—Set aside.

While the Appeal Court is always reluctant to differ from a Magistrate where his findings of fact are based upon his view of conflicting testimony, yet where those findings are contrary to the weight of the evidence, and the Magistrate refrains from furnishing the grounds for his acceptance of the less weighty evidence, the Appeal Court is bound to give what effect it thinks should be attached to the evidence as it appears upon the record. More especially is this so when inadmissible evidence has been admitted after objection, and such evidence may in itself have furnished a reason for the Magistrate's findings, no other reasons being apparent.

APPEAL by the defendant from a judgment of the magistrate of the West Demerara Judicial District, whereby the plaintiff obtained an order for possession of a certain tenement.

C. A. Burton, 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 Chief Justice, as follows:

This is an appeal by the defendant from a judgment of the Magistrate of the West Demerara Judicial District, whereby the plaintiff obtained an order for the possession of a certain tenement.

The principal ground of appeal is that the decision of the learned Magistrate is against the weight of the evidence and is not therefore one at which he could have arrived upon reasonable consideration.

The appellant based his defence upon an alleged sale of the tenement to him by the respondent and called in support of his contention several witnesses who testified to the sale.

This sale the respondent denied but called no witness directly bearing upon the issue. It appeared, however, that the tenement in question is situate upon the land of a certain estate and a witness was called who as an agent of the estate owners gave evidence as to the name of the person who according to the books of the estate paid the ground rent for the tenement during the material period. From this evidence it appeared that the appellant had paid this rent and, so far, this witness appeared

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rather to support the appellant. Questioned as to how the appellant's name came to be entered in the estate books the witness proceeded to give evidence as to a conversation between himself and the estate manager. Objection was taken to this evidence which was nevertheless admitted and went to show that this transfer from one name to the other was not necessarily or even *prima facie* evidence of a sale of the building but rather arose from no more than an undertaking by the appellant to pay arrears of ground rent due by the respondent whose tenant the appellant admittedly had been at one time.

It is unfortunately not clear from the record which party called this witness or upon whose behalf the objection to this part of his evidence was taken, but the evidence being obviously no more than hearsay, it should have been upheld and the evidence excluded.

As a general rule this might justify this Court in ordering a new trial in order that the lower Court should hear and determine the issue upon legally admissible evidence, but in the present case we do not think that such a course would serve the ends of justice.

In arriving at his final decision the learned Magistrate, as appears from his reasons, relied upon a series of facts as found by him. From his findings of fact it appears that he accepted the respondent's denial of the sale, influenced no doubt by the inadmissible evidence which he should not have accepted, and rejected the evidence of the appellant and his witnesses. The learned Magistrate has not thought fit, however, to indicate in any way the reasons which led him to arrive at these findings. If his conclusion was based upon the hearsay evidence which he should have rejected then his conclusion cannot be upheld. If it was not based upon that evidence then it is difficult to see upon what grounds he disbelieved the evidence of the appellant and his witnesses who told a reasonable and consistent story apparently unshaken by cross-examination and, taken at its face value, more convincing than the mere denial of the respondent and more with the entries in the estate books in the absence of the inadmissible hearsay explanation of those entries.

While this Court is always reluctant to differ from a Magistrate where his findings of fact are based upon his view of conflicting testimony, yet where those findings are contrary to the weight of the evidence, as in the present case, and the Magistrate refrains from furnishing the grounds for his acceptance of the less weighty evidence, this Court is bound to give what effect it thinks should be attached to the evidence as it appears upon the record. More especially is this so when inadmissible evidence has been admitted after objection and such evidence may in itself have furnished a reason for the Magistrate's findings, no other reasons being apparent.

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Examination of the evidence discloses to us nothing which would lead us to the conclusion that the evidence of the appellant's witnesses is false. It is clear and consistent, free from material contradictions, unshaken in cross-examination and apparently that of disinterested persons untainted by bias. There is in their evidence no inherent improbability and nothing incompatible with the admitted facts. It is consistent with such documentary evidence as was adduced. On the other hand the respondent's evidence is almost entirely unsupported and requires explanation to reconcile it with the documentary evidence. The explanation put forward by the respondent is unsupported by any admissible independent testimony although the respondent could have obtained such evidence (if it exists) had he not elected to bring these proceedings while the estate manager was absent from the colony. The learned Magistrate does not ascribe his disbelief of the far more weighty evidence to any observation of his own as to the manner in which the evidence was given or the demeanour of the witnesses. When it is borne in mind that judgment was entered in August, 1941, and that the learned Magistrate did not write his reasons until months later, it may be recognised that it was difficult for him to do so.

In all these circumstances we are of the opinion that the decision of the learned Magistrate is against the weight of the admissible evidence and was not one which he could properly have made had he viewed the evidence reasonably. The appeal must therefore be allowed with costs. The judgment in the Court below is set aside and the complaint of the plaintiff therein dismissed with costs.

We would once more draw attention to the care with which Magistrates should express the reasons for their decisions if these reasons are desired by them to be of that assistance to this Court which is their legitimate purpose. Undue delay in the writing of reasons for a decision may well reduce their value to a minimum in certain respects and while we appreciate that some delay may in some cases be unavoidable, we would express the view that Magistrates should take every step possible to record their reasons while the incidents of the hearing are still fresh in their minds.

Appeal allowed.

R. PINDER v. J. C. FALCONER.

R. PINDER, Appellant (Defendant),

v.

JOHN CAMERON FALCONER, Respondent (Plaintiff).

[1942. No. 323.—DEMERARA].

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

1943. APRIL 2.

Appeal—Other than in a criminal cause or matter—Due prosecution of—Deposit of three dollars by way of security for—Summary Jurisdiction (Appeals) Ordinance, cap. 16, s. 5(1)—Required by—To be deposited simultaneously with giving of notice of appeal—If deposited prior thereto—Failure to comply strictly with statutory requirements—Upon compliance wherewith his right of appeal subsists—Appeal cannot be entertained by Appeal Court.

The sum of three dollars required by section 5 (1) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, to be deposited with the clerk by way of security for the due prosecution of an appeal other than in a criminal cause or matter, must be deposited simultaneously with the giving of the notice of appeal.

If the said sum is deposited prior to the giving of the notice of appeal, there has been a failure on the part of the appellant to comply strictly with the statutory requirements upon compliance wherewith his right of appeal subsists, and there is no appeal which can be properly entertained by the Full Court of Appeal.

APPEAL by the defendant, in a cause or matter which was not criminal, from a decision of the Magistrate of the Berbice Judicial District.

J. A. Luckhoo, K.C., for the respondent Falconer.

J. L. Wills, for the appellant Pinder.

Cur. adv. vult.

The judgment of the Court, on the preliminary objection taken by counsel for the respondent, was delivered by the Chief Justice as follows:

The respondent takes a preliminary objection to the hearing of this appeal on the ground that the appellant has failed to comply with the provisions of section 5 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, in that he did not when he gave notice of appeal lodge the sum of three dollars with the clerk by way of security for the due prosecution of the appeal.

The record discloses that on the 12th June, 1942, the date upon which the magistrate pronounced his decision the appellant purported to give verbal notice of appeal in the absence of the plaintiff. On the same day he deposited three dollars with the clerk. This notice of appeal was of no effect for it did not comply with section 4 (a) of the Ordinance.

On the 15th June, 1942, the appellant gave written notice of appeal under section 4 (b) but he made no fresh deposit.

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It has been argued on the part of the appellant that there is no requirement for the deposit to be simultaneous with the giving of notice, but that the same may be made at any time within 14 days. With this view we cannot agree.

It is further submitted on his behalf that the sum having been deposited prior to the date of the notice and not having been withdrawn remained in the hands of the clerk and was properly applied by him as security for the due prosecution of the appeal notice of which was subsequently given.

We are not of the opinion that this course is due compliance with the provisions of the Ordinance nor that the clerk could properly apply a prior deposit to the securing of due prosecution of a subsequent appeal.

The appellant having failed to comply strictly with the statutory requirements upon compliance with which his right of appeal subsists there is before this Court no appeal which we may properly entertain.

The appeal must therefore be dismissed with costs.

Appeal dismissed.

ANTHONY RICHARD GOMES AND WILLIAM CADOGAN,
Plaintiffs,

v.

JAMES EMANUEL TOBIAS, Defendant.

[1938. No. 338.—DEMERARA].

BEFORE SIR JOHN VERITY, KT., C.J.:

1943. APRIL 5, 9, 12, 14, 19.

Partnership—Agreement to carry on business at future time—Not partnership—Before business actually carried on.

Partnership—Creation and existence of—Evidence—Negotiations—Stage not reached at which any of parties felt legally bound—No partnership.

Agreements to carry on business at a future time do not render the parties to them partners before they actually do carry on business.

In an action for a declaration of partnership the trial judge found that the conduct of all parties disclosed clearly that their negotiations had at no time reached a stage at which any of the parties felt legally bound.

Held that there was no partnership.

ACTION for a declaration of partnership, and for consequential relief. The facts appear from the judgment.

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

S. L. van B. Stafford, K.C., (*G. M. Farnum* with him), for the defendant.

Cur. adv. vult.

A. R. GOMES AND ANR. v. J. E. TOBIAS.

VERITY, C. J.: In this case the plaintiffs seek a declaration that a partnership exists between themselves and the defendant in respect of certain gold mining claims; that the partnership be dissolved, a receiver appointed and accounts taken; and an order for payment of the amounts found due to them.

The plaintiffs base their case upon certain transactions between the parties in June, 1934, their allegations being that the plaintiff Cadogan had discovered certain lands in the Siparuni District of this colony which he believed to be rich in gold; that he communicated the details of his discovery to the plaintiff Gomes and eventually to the defendant also, whereupon the parties entered into a partnership agreement whereby Gomes and the defendant or either of them were to raise the necessary funds to finance an expedition to the locality. Cadogan was to accompany the expedition and the profits were to be divided equally between the three partners. They further allege that the necessary funds were raised by the defendant with the assistance of the plaintiff Gomes and that Cadogan was at all times ready and willing to accompany the expedition but that the defendant neglected or refused to allow Cadogan to do so, proceeded to the lands on the information previously supplied by Cadogan, located and licensed claims thereon in his own name and between the month of July, 1934, and the date of the commencement of this action operated the same at a profit which he appropriated to his own sole use.

The defendant, on the other hand, alleges that the formation of a partnership was discussed between the parties and that it was proposed that if he and Gomes or either of them could raise the necessary funds by borrowing and if Cadogan would accompany an expedition to the locality and the lands proved profitable, then a partnership was to be entered into and the profits to be shared. He further alleges that Gomes failed to raise funds but that he, the defendant, raised a loan on his personal responsibility and that of his wife. He alleges that he then informed Gomes that unless he found a share in the necessary capital he could not become a partner in the venture. Gomes failed to secure any funds and the defendant therefore proceeded to conduct an expedition to the Siparuni District and was prepared to admit Cadogan to partnership if he should accompany him and assist in the location of profitable claims. He alleges that Cadogan had not afforded such information as would have enabled him to locate the lands referred to and that he failed to present himself for departure with the expedition. He alleges that he proceeded with the expedition, located certain lands upon information received from a stranger to all the previous negotiations and has since operated the claims so located in his own name and for his own benefit. In these circumstances he alleges that no partnership ever came into existence, the plaintiffs having

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failed to discharge obligations which were conditions precedent to the creation thereof.

Before I can proceed to determine the rights of the parties it is necessary to disentangle from a mass of conflicting and frequently incredible evidence what I can find to be an account as near as may be to the truth of the dealings between these parties.

The task is by no means easy. Four and a half years were allowed to elapse between the date of the negotiations and the issue of the writ in this action; approximately another four and a half years have elapsed between the date of the writ and the trial of the action. There is little documentary evidence whereby the recollections of the parties may be refreshed or with which their oral testimony may be compared. And during the course of these years the proceeds of the mining operations are alleged to have reached what is no doubt to the parties the substantial and attractive sum of \$150,000. All these factors, the last by no means least, have contributed to a conflict in testimony wherein I have found a welter of deliberate falsehood and disingenuous statements from the midst of which I must attempt to retrieve such grains of truth as I may find. As indications of the manner in which the parties have involved both themselves and the Court in difficulty I must refer to the instances in which the plaintiff Gomes did not hesitate flatly to contradict himself if after but momentary reflection, as it appeared, he thought that the reverse of a statement previously made by him might prove beneficial, or at least not harmful, to his interests, or those in which both he and his co-plaintiff in their anxiety to show that the defendant had benefited by their good offices, sought to prove that Cadogan had broadcast to persons interested in gold-mining the fullest information as to the precise location of the rich vein of gold he believed he had discovered, a course of conduct which I cannot believe to be the common habit of prospectors and which is plainly in conflict with common sense and prudence; or those in which the defendant in his anxiety to disassociate himself from the plaintiffs seeks to establish the happy coincidence which led him on the information of a stranger to the locality to which he would have been led by even the most meagre information disclosed by Cadogan.

My observation of the witnesses leads me to no more satisfactory conclusion as to their comparative reliability. It may well be that all these parties in all other matters are honest and reliable. If this is the case, and I have no reason to doubt it for gold-mining may, like horse-dealing, have its own effect upon the moral sense, then I can only conclude that what may be the dazzling wealth promised by the acquisition or retention of the sum alleged to be at stake has blinded them to the more modest value of the truth.

In seeking that truth, in so far as I can hope to reach it in this case, I must therefore be guided largely by the history of the case, the slight documentary evidence which is available, my own view of the probabilities in given circumstances and the inescapable consequences of the conduct of the parties in instances in regard to which there can be little or no dispute.

The primary question is as to what were the negotiations entered into by the parties on a date which would appear to have been the 23rd May, 1934, and what was the conclusion, if any, arrived at therein.

Counsel for the plaintiffs has submitted that on that occasion the parties entered into full partnership. There are however, grave obstacles to the acceptance of this view. It is possible that an agreement to enter into partnership might have been made on that occasion but it is to be borne in mind that, as is said by the learned author of *Lindley on Partnership* (9th Ed. p.16) "agreements to carry on business at a future time do not render the parties to them "partners before they actually do carry on business." In view of the fact that one of the matters then discussed was the method of obtaining funds with which to carry on the business of the proposed partnership and that the business could not be commenced until funds were found, it is difficult to conclude that the parties then and there became partners. The plaintiff himself, however, makes no such assertion but places the date of the commencement of the partnership at a date in June when the parson through whom the defendant eventually obtained funds had agreed to secure them. I am satisfied that neither in the intention of the parties, nor in fact nor in law did any partnership commence on the date of the first meeting. At the most the dealings on that day amount to no more than an agreement to enter into partnership in a certain event, that is to say, in the event of either or both Gomes and Tobias securing that finance which was of necessity a condition precedent to the commencement of the venture they had in view. It is indeed possible that their dealings on this day amounted to no more than preliminary discussions of a situation from which some arrangement might emerge to their common profit.

The next stage in the proceedings may lead to some conclusion on this point. The defendant either failed to secure funds or made no attempt to do so, whereupon Gomes introduced a fourth person, Timothy Van Sluytman, who was prepared to furnish the necessary funds provided that an agent of his own was substituted for the defendant in the venture. This suggestion Gomes rejected and counsel would have me credit him with a loyal devotion to the defendant sadly at variance with certain aspects of his subsequent conduct and with the impression I have formed from my own observations in the course of these proceedings. It would appear not unlikely that there was a less

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altruistic reason for his refusal. In the absence of Tobias who would conduct the expedition? Gomes himself, a clerk in permanent employment and with no practical experience? Or Cadogan? an excellent prospector, no doubt, but hardly to be chosen as leader of the venture. Or Van Sluytman's unknown agent? Some such reason commends itself to my view rather than pure loyalty to the man who, from Gomes' account, came into the matter by accident. Van Sluytman's offer, however, was refused—for the time being. Thereafter representations were made to Pires at the instance, Gomes avers, of himself, though this is denied by Tobias. While it is admitted that Gomes accompanied Tobias on one occasion to Pires in the course of the proposals, it is not denied that the loan was eventually negotiated in the name of Tobias and his wife, and it would appear strange that if it was contemplated that this loan should be in the nature of a joint contribution to the finance of the expedition venture, and if Gomes was the mover in obtaining it, he should have assumed no liability in respect thereof. The fact that he assumed no such liability and that the loan was made on the responsibility of the defendant and his wife alone leads me to the conclusion that in all probability the account given by the defendant is the true one and that Gomes did not introduce this finance.

According to Gomes, it was upon Pires' consenting to arrange finance that the partnership agreement was arrived at and there does indeed seem more basis for such a conclusion than the earlier date put forward at the last minute by counsel. Such an agreement at that time is, however, denied by the defendant; and it is necessary to consider subsequent events in order to reach a conclusion on this point.

On the 8th June, the loan was finally negotiated and immediately, according to Gomes, the defendant "became a despot," and refused to speak to him. According to the defendant it was then that he decided not to enter into partnership unless Gomes raised half the capital. The latter seems to be more probable in the light of the defendant's letter to Harry written that night. He gives no indication of excluding Gomes altogether but refers to him as one "who shares the venture." More weight than the terms justify has been attached to this letter, as to that which followed it, by counsel for the plaintiffs who seeks to find in it an admission of a pre-existing contract of partnership. Whatever significance may reasonably be attached to the precise form of words used in these very informal documents they are highly inconsistent with the attitude ascribed to Tobias by Gomes. It is difficult to reconcile this unnecessary admission to a third party that Gomes was a fellow-venturer with a refusal even to speak to his alleged partner. It appears more probable that finding himself saddled with the liability for repayment of the capital sum, for Pires had not agreed to enter as a partner in the

venture as had been in the first instance contemplated. Tobias decided that he would not enter into partnership with Gomes unless the latter relieved him of half the extent of that liability. It may be indeed, that Tobias here first conceived of the possibility of shaking off at least one of the proposed partners for whom he began to feel he would have no further use but who would take a large share of the profits. If there had indeed been an effective partnership then subsisting or if there had been a completed agreement for a future partnership the terms of which were inconsistent with Tobias' demand that Gomes should himself contribute capital, Tobias by this demand made it quite clear to Gomes that he was not prepared to carry out those terms, and nothing he wrote to Harry, of which Gomes had then no knowledge, could alter that fact.

Harry was then introduced and according to Gomes a "new agreement" was entered into whereby Harry was to be admitted as a partner and the division of profits determined at one-fourth each. It may well be that had there been a partnership its terms might have been varied by mutual consent and a fresh partner admitted without any such abrogation of the original partnership as the plaintiff implies, but there is nothing except Gomes' word, upon which I cannot rely to lead me to believe that anything of the sort happened or that the defendant ever receded from the position adopted by him immediately he had raised the money through Pires: that Gomes might still become a partner if he wished but only if he raised a sum equal to half that for which the defendant was liable. Whether or not Harry became a partner with Tobias as he subsequently claimed, is not for me to determine but his relation to the affair will be of interest in discussing the plaintiff's subsequent conduct.

The expedition was to leave on the 16th June. On the 15th Gomes had not contributed nor assumed liability for any share of the capital. He had been made aware that Tobias did not propose to admit him or treat him as a partner unless he did. In these circumstances what action did he take?

The incidents of this Friday and Saturday furnish, I am afraid, a sad example of cupidity. Gomes takes no steps to secure his rights, if in fact he believed that he had any, but with Cadogan he proceeds to negotiate with Van Sluytman, enters into another so-called partnership with him and Cadogan is furnished with a prospecting licence by means of which the latter might locate claims for the new partners when conveyed to the Siparuni District as a member of the defendant's expedition.

By Saturday morning Tobias knows that Gomes has failed to raise any money and feels that he has successfully shaken him off. While it is highly unlikely that Cadogan had given precise details of the selected spot I cannot believe that Tobias had not gathered from the fact that Cadogan was prospecting in his spare

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time that it was somewhere in close proximity to his former employers' claim. I cannot believe, moreover, that he made any serious attempt to secure Cadogan's accompanying him or that he was in any way dismayed to find that Cadogan was left behind. He no doubt proceeded with no little satisfaction in the thought that Cadogan as well as Gomes had now been disposed of. Nor, it is to be remarked, did Cadogan display any particular anxiety to join the expedition, for it has been disclosed that he could have crossed by a later ferry, taken a cheap car trip to Parika and presented himself to the defendant there. On the contrary, he and Gomes repaired to Van Sluytman, who finding that it will be necessary to finance a further expedition instead of trading upon the defendant's, destroys the first prospecting licence and secures one in his own name. Without his knowledge, however, Gomes and Cadogan furnish themselves with another in the names of three women related or known to them and so the second expedition proceeds on the heels of the first. So honourable and so innocent of greed are all these parties that Tobias will attempt to locate not the lands discovered by Cadogan but some place to which he may be directed by Saigo; while Cadogan will not attempt to locate the lands he had discovered but some other lands allocating, he would no doubt have me believe, the most likely to his acknowledged partner Van Sluytman, and whatever is left to the owners of his secret prospecting licence, Gomes' wife, his own reputed wife and the mysterious stranger. So honest are they all that but for a happy chance the rich lands discovered by Cadogan seemed in danger of being located by no one at all—unless by Cadogan's former employers from whom he had concealed his discovery, very wisely no doubt for he appears to have got nothing out of the previous discovery prematurely revealed to them by his fellow labourer. I do not believe a word of all this. I am satisfied that the conduct of all parties disclosed clearly that their negotiations had at no time reached a stage at which any of the parties felt legally bound, whatever might be their moral obligations one to another. They then realised that it was a case of "each man for himself and the devil take the hindmost,"—in this case no doubt Timothy Van Sluytman.

In these circumstances when one reads that partnership is a matter of the utmost good faith one is indeed amazed at the temerity of the plaintiffs in endeavouring to associate themselves with so honourable a relationship.

There is no doubt in my mind that from the moment that a dispute arose between Gomes and Tobias as to the financing of the venture, from the moment Tobias realised that Gomes contemplated his shouldering liability for the finance of the whole venture, from the moment that Gomes realised that Tobias was seeking to exclude him from the affair, each determined that it should be the

other who would be deprived of the fruits of Cadogan's discovery, while Cadogan sought to attach himself to whomsoever at the moment appeared the most likely to get him to the scene of discovery when, armed with a licence unknown to the organiser of either expedition, he might make such locations as he thought fit in the interests of Gomes and himself.

Nevertheless the plaintiffs have asked this Court to declare that they are partners with the defendant and it is necessary to consider their further conduct in order to determine their claim.

They knew on the 15th June, 1934, that the defendant had, as they allege, deliberately left Cadogan behind and that he had refused to recognise Gomes as a partner. He located certain claims and it must be assumed that his application for claim licences was advertised as required by law. Neither of the plaintiffs took any steps to secure that those licences should not be issued in the defendant's name alone but that their alleged rights as partners should be acknowledged by inclusion of their names therein. Cadogan visited the defendant's camp, crossed the claims which he now says was their joint property but did not so much as ask Tobias the result of the expedition. Perhaps the knowledge that he had in his pocket a licence in the name of Van Sluytman and yet another licence unknown to them both, kept him silent. Tobias returned to town. Gomes alleges that he attempted to speak to him and was rebuffed—but he took no action. Tobias' right to the claims which the plaintiffs alleged belonged in part to them was disputed by an outsider but they made no attempt to intervene in defence of what was, they aver, their property.

Years passed during which the defendant won considerable quantities of gold from the claims he located in 1934 and disposed of the proceeds for his own use. Never at any time did he indicate awareness of the existence of his alleged partners nor they of his. In 1938 Harry, the alleged fourth partner, took action against Tobias in which he sought a declaration that he was sole partner with the defendant in the claims in which the plaintiff's now allege they had equal shares. They did not seek to be joined in that action in order that their alleged rights might also be determined. On the contrary, they supported Harry by giving evidence on his behalf in an action in which had he succeeded in all he then claimed, the interests of the present plaintiffs would have been ignored and the distribution of the partnership assets have been proceeded with as though they did not exist.

The action did not proceed, it would appear, to such a conclusion. It appears to have been settled upon terms which it must be assumed were sufficiently satisfactory to Harry, whatever those terms might have been.

Then only in December, 1938, four and a half years after the defendant's virtual repudiation of their alleged agreement, the

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plaintiffs come to the Court praying declaration of a partnership in which they had themselves taken no part throughout all that time.

I am fully satisfied, upon consideration of the whole of the evidence and of the circumstances from which it emerges, that these parties at no time entered into a partnership and that at no time did they believe that they had entered into a partnership. At no time did there exist between them a relationship which either at common law or by the Partnership Ordinance, Cap 83 or by the Mining Ordinance, Cap. 175 constituted a partnership in law or of which a Court of equity will take cognisance.

There can be but little doubt that in the course of their negotiations to that end they were outwitted by the defendant. There can be no doubt whatever that they failed in their attempt to outwit him in turn. It may be that then the plaintiff Gomes sought legal advice and as a result, if that advice were wise, accepted defeat and brought no action. I can only conclude that the action brought by Harry four years later, coupled with the comparative wealth of the claims involved therein induced them to seek a share in what only too plainly they consider the defendant's ill-gotten gains. In that attempt they cannot succeed upon the evidence before me and judgment must therefore be entered for the defendant. His conduct in relation to the subject of the suit has been such, however, and the evidence given by both himself and one of his witnesses has been so marred by what I consider to be deliberate falsehood in at least one instance that I decline to exercise in his favour my discretion as to costs and each party will be left to bear his own.

Judgment for defendant.

Solicitors: *M. S. Fitzpatrick; R. G. Sharples.*

MANGAL v. M. HANIFF, EXOR. JAMIRAN, DECD.

MANGAL, Plaintiff,

v.

MAHAMAD HANIFF, IN HIS CAPACITY AS EXECUTOR UNDER
THE LAST WILL OF JAMIRAN, DECEASED, Defendant.

[1938. No. 229.—DEMERARA].

BEFORE DUKE, J. (Acting):

1943. FEBRUARY 3, 5, 10, 11, 12, 16.

Execution—Application by judgment creditor to Registrar—To take immovable property in execution—As being property of judgment debtor—Rules of Court, 1900, Order 36, rule 40, as enacted by the Rules of the Supreme Court (May), 1920—Uniform course of procedure—No notice given to judgment debtor—Application always made ex parte—Immovable property of judgment debtor to be levied upon—Determined by judgment creditor and not by judgment debtor—Affidavit filed by execution creditor—Examination by Registrar of the Supreme Court—As to whether execution creditor should be permitted to levy upon the immovable property (or any part thereof) as indicated by execution creditor in his affidavit—Registrar acts judicially, not ministerially—Title of judgment debtor to immovable property defective—Registrar will not allow it to be taken into execution.

Execution—Immovable property—Not levied upon as property of judgment debtor—Not included in execution creditor's affidavit of title under Order 36, rule 40 as to the immovable property of the debtor upon which he proposed to levy—Cannot be sold by Registrar at execution sale—Registrar cannot agree to sell at execution.

Rectification—Suit for—What plaintiff must prove—Actually concluded agreement antecedent to instrument sought to be rectified—Agreement inaccurately represented in instrument—When this proved—Statute of Frauds—No defence to party insisting on instrument—Other party may claim in spite of Statute of Frauds—That instrument does not represent real agreement.

Rectification—Unilateral error which can hardly be distinguished from carelessness—No ground for rectification.

Contract—Mistake—Subject matter of contract—Terms of contract—Nothing therein to identify subject matter—Evidence admissible—To show that mind of each party directed to a different object—Contract void—Terms of contract—Contained therein such a description of subject matter as would practically identify it—Contract cannot be avoided.

Execution—Sale at—Of immovable property—Description of property exposed for sale—Clear, distinct and unambiguous—Mistaken belief—By purchaser at execution sale—As to what property sold at execution—Error on part of purchaser not induced by Registrar—Error the result of his own negligence or deliberate omission to do what a prudent man wishing to bid at a sale at execution does and ought to do—No mistake in law—Contract not voidable by purchaser.

Immovable property—Owner by transport—Entitled to—Unless better title can be shown—Person claiming in opposition to transport—Onus of proof upon.

Evidence—Transport—Evidence of title in favour of transportee—Person asserting claim in opposition to transport—Onus of proof upon.

Immovable property—Person builds on land of another—Knowing land to be land of that other person—Nothing in conduct, active or passive, of real owner—Making it inequitable in him to assert his legal right to land—Land with benefit of all expenditure made upon it save and except any buildings and erections which may be removable according to the law of this Colony—May be claimed by real owner—Principles of equity.

Immovable property—Person builds on land of another—Believing it to be his own land—Real owner knows land is his—Encourages person to build—Either directly or by abstaining from asserting his legal right—Protection of person who builds—Equity will intervene for—Foundation upon which reposes

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the right of equity to intervene—Either contract, or the evidence of some fact which the legal owner is estopped from denying—Estoppel.

Immovable property—Rights of owner of—Not to be deprived thereof—Unless the owner has acted in such a way as to make it fraudulent for him to set up those rights—Elements or requisites necessary to constitute fraud of that description—Acquiescence—Equitable doctrine of—Equitable estoppel.

Equity—Acquiescence—Doctrine of—Upon what founded—Conduct with knowledge of legal rights.

Opposition to transport—By person in possession for 3 years—No right to oppose.

Practice—Land—Possession of—Two persons entitled to—Only one party to action—Whether order for possession can be made,—Right to possession as against person in possession—Declaration made—As to right thereto, along with other person.

The uniform course of procedure has always been that when an execution creditor makes application to the Registrar under Order 36, rule 40 of the Rules of Court, 1900 (as enacted by the Rules of the Supreme Court (May), 1920) to take immovable property in execution as being the property of the judgment debtor, no notice is ever given to the judgment debtor. The application is always made by the execution creditor *ex parte*.

It is the execution creditor and not the judgment debtor, who determines what property of the judgment debtor should be levied upon; and it is the Registrar of the Supreme Court who then decides, on the affidavit filed by the execution creditor, whether or not the execution creditor should be permitted to levy upon the immovable property (or any part thereof) of the judgment debtor as indicated by the execution creditor in his affidavit. In arriving at his decision, the Registrar acts judicially, he does not perform a ministerial act. If the title of a judgment debtor to immovable property is defective, the Registrar will not allow it to be taken in execution.

In a suit for rectification, the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which it is sought to be rectified; and secondly, that such agreement has been inaccurately represented in the instrument. When this is proved either party may claim, in spite of the Statute of Frauds, that the instrument, on which the other insists, does not represent the real agreement.

UNITED STATES OF AMERICA v. MOTOR TRUCKS, LTD. (1924) A.C. 196, 200, 201 applied.

If there is nothing in the terms of a contract to identify what is its subject matter, evidence may be given to show that the mind of each party was directed to a different object, and that therefore the contract is void on the ground of mistake: but the contract cannot be avoided if its terms contained such a description of the subject matter as would practically identify it.

The owner by transport is entitled to the property transported unless any other party can show a better title, and the onus of proof is on the party claiming in opposition to the transport.

WILLS v. GONSALVES. General Civil Jurisdiction, 12th December, 1904, applied.

JAMIRAN and ALIMAN had offered to MANGAL for sale, by private treaty, certain immovable property, including 2/5 of lot B/1. MANGAL, however, broke off negotiations for the sale at some time prior to the 1st May, 1935, and he never thereafter reopened them.

On the 1st May, 1935, MOHADEO obtained judgment against JAMIRAN and ALIMAN for the sum of \$452 and costs.

On the 21st May, 1935, MOHADEO swore to an affidavit in which he deposed to facts showing that *prima facie* JAMIRAN and ALIMAN were the owners of certain immovable property. In that affidavit, MOHADEO did not mention 2/5 of lot B/1. At that time the title of JAMIRAN and ALIMAN to 2/5 of lot B/1 was defective. The proper officer in the Registry examined the affidavit and made the usual searches; and on the 27th May, 1935, on behalf of the Registrar, he certified that the affidavit was passed for execution in respect of all (except one) of the parcels of land specified in the affidavit, as being the property of JAMIRAN and ALIMAN. The Registrar did not certify that JAMIRAN and ALIMAN had a *prima facie* title for 2/5 of lot B/1.

On the 28th May, 1935, a marshal of the Supreme Court, on the instructions

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of MOHADEO, levied execution on the immovable property of JAMIRAN and ALIMAN as passed by the Registrar on the 27th May, 1935, for execution. The marshal did not levy execution upon 2/5 of lot B/1 as being the property of JAMIRAN and ALIMAN.

On the 8th, 15th and 22nd days of June, 1935, there was advertised in the *Official Gazette* a notice that on the 25th day of June, 1935, the Registrar of the Supreme Court proposed to expose for sale at execution, at the instance of MOHADEO, certain immovable property as the property of JAMIRAN and ALIMAN. This immovable property did not include 2/5 of lot B/1, and it was the same property which was taken in execution on the 28th May, 1935.

MANGAL did not read any of the advertisements which appeared in the *Gazette*. The immovable property which was advertised for sale at execution was described with reference to a plan which was deposited in the Deeds Registry. On payment of a search fee of 24 cents to the Registrar, MANGAL would have been accorded access to the plan, and he could have ascertained where the different parcels of land (advertised for sale on the 25th June 1935 at execution) were situate, and that no one of those parcels of land abutted on the middle walk of Pln. Uitvlugt. MANGAL did not examine the plan quoted in the advertisements.

The property advertised, and exposed for sale at execution, by the Registrar was described as hereunder;

Two undivided filth parts or shares of and in the following:—

Lot B/2 the west half of lot B/4 and one undivided third part or share of and in lots B/5 and B/6 part of lots La B...each of the said lots B/2, B/4, B/5 and B/6 being laid down and defined on a plan of lot B...by John Peter Prass, Sworn Land Surveyor, dated 3rd March, 1883, and deposited in the Registrar's Office of British Guiana on the 17th day of April, 1883, with two buildings on the said lot B...the property of the said Jamiran and Aliman. MANGAL attended the execution sale on the 25th June, 1935, and he purchased the property which was put up for sale. He alleged in his evidence that when he heard the description of the property read out at the execution sale, he understood therefrom, and believed, that there was exposed for sale 2/5 of lot B/1 (which was incorrectly described in transport dated 29th June, 1889 No. 164 as lot B), in addition to 2/5 of lot B/2, 2/5 of W½ of lot B/4, 2/5 of ⅓ of lot B/5, and 2/5 of ⅓ of lot B/6, Pln. Uitvlugt.

JAMIRAN and ALIMAN were in occupation of 2/5 of lot B/1. Lot B/1 is described as a front lot, and it abuts on the middle walk of Pln. Uitvlugt.

MANGAL signed the conditions of sale between the Registrar of the Supreme Court and himself, and paid the Registrar the sum of \$570 the purchase price of the property exposed by the Registrar for sale at execution.

After the execution sale, MANGAL did not pay or tender to JAMIRAN and ALIMAN the sum of \$30, being the difference between the sum of \$600, the price which he says he had been willing to pay to them for their immovable property (including 2/5 of lot B/1) by private treaty, and the sum of \$570 which he paid at execution sale for, as he claimed, all the immovable property (including 2/5 of lot B/1) of JAMIRAN and ALIMAN.

On the 29th July, 1935, on the application and at the expense of MANGAL, the Registrar of the Supreme Court conveyed to MANGAL full and absolute title for the immovable property which was sold to him at execution. This did not include 2/5 of lot B/1.

By order of Court dated the 22nd March, 1937, the defect in the title of JAMIRAN and ALIMAN to 2/5 of lot B/1 was removed, and thereupon they acquired full and absolute title to 2/5 of lot B/1.

MANGAL asked for rectification of the sale at execution of the 25th June, 1935, and of the consequential judicial sale transport of the 29th July, 1935, to include therein 2/5 of lot B/1: and, in the alternative, he asked that the sale, and the transport be declared null and void by reason of the mistake of MANGAL as to the subject-matter sold.

Held (1) that 2/5 of lot B/1 could not have formed part of the subject-matter of the contract of sale at execution as it was not referred to in the affidavit of Mohadeo leading to the levy;

(2) that even if Mangal thought that the Registrar had exposed 2/5 of lot B/1 for sale at execution, the Registrar was under no such impression;

(3) that there was no mutual mistake, and that unilateral error which in such a case as the present would hardly be distinguished from carelessness does not afford to the plaintiff any ground upon which he can claim to have

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the contract of sale of the 25th June 1935, or the judicial sale transport of the 29th July 1935, rectified;

UNITED STATES OF AMERICA v. MOTOR TRUCKS, LTD. (1924) A.C. 200, applied.

(4) that if MANGAL did in fact believe that 2/5 of lot B/1 were advertised for sale at execution, it was because of his own negligence, or his deliberate omission to do what a prudent man, wishing to bid at a sale at execution, does and ought to do, and that the decision in FREEMAN v. COOKE (1848) 2 Exch. 654, 663 was therefore inapplicable to the facts and circumstances of this case;

(5) that the description of the property exposed for sale at execution was clear, distinct and unambiguous; that any mistaken belief which MANGAL may have had at the time of the sale at execution as to the inclusion of lot 2/5 of B/1 in the property exposed for sale was not induced by the Registrar of the Supreme Court who was in no way responsible therefor; that the decision in FARADAY v. TAMWORTH UNION (1916) 86 L.J. Ch. 436, 438, does not apply to the facts and circumstances of this case; and that the contract of sale at execution cannot be avoided on the ground of mistake;

In re TRANSPORT OF LOTS AT BUSH LOT, General Civil Jurisdiction, 9th January 1905, and WILLS v. GONSALVES, General Civil Jurisdiction, 12th December 1904, applied.

(6) that the plaintiff did not consider the execution sale of the 25th June 1935, to have been a sale to give effect to the offer which he had, some months previously, made to purchase from JAMIRAN and ALIMAN for the sum of \$600 all the immovable property of JAMIRAN and ALIMAN (including 2/5 of lot B/1), inasmuch he did not, immediately after the execution sale tender to JAMIRAN and ALIMAN the sum of \$30, being the difference between the sum of \$600 the price which MANGAL said he had been willing to pay for the said immovable property by private treaty, and the sum of \$570 the price which he paid at execution sale for, as he claimed all of the said property.

Where A. builds on land which he thinks is his but is really B's, and B, knowing of A's mistake, encourages A. to build either directly or by abstaining from asserting his legal right, equity will intervene for the protection of A.

Two things are required to raise the equity:

1. The person expending the money supposes himself to be building on his own land; and
2. The real owner at the time of the expenditure knows that the land belongs to him, and not to the person expending the money in the belief that he is the owner.

The foundation upon which reposes the right of equity to intervene is either contract, or the evidence of some fact which the legal owner is estopped from denying. Thus, in the case put, B's conduct is such that from it may be inferred a contract by B. not to disturb A. in the possession of the land, or it may amount to a statement by B. that the land is A's, upon the faith of which A. has acted and built.

RAMSDEN v. DYSON (1865) L.R., H.L. 129, 140, per Lord Cranworth, L.C.; MICHAUD v. CITY OF MONTREAL (1923) 92 L.J.P.C. 161, 163, per Viscount Cave, L.C.; and CANADIAN PACIFIC RAILWAY v. THE KING (1931) A.C. 414, 429 per Lord Russell of Killowen, applied.

If a person builds on the land of another knowing it to be the land of that other person, there is no principle of equity which would prevent the real owner from claiming the land with the benefit of all the expenditure made on it (save and except any buildings and erections which may be removable according to the law of this Colony). There would be nothing in the conduct, active or passive, of the real owner, making it inequitable in him to assert his legal right to the land.

Ramsden v. Dyson (1865) L.R. 1 H.L. 129, 140 per Lord Cranworth, L.C. applied.

The rule laid down by Lord Kingsdown in RAMSDEN v. DYSON (1865) L.R. 1 H.L. 170, 171 was founded on GREGORY v. MIGHELL (1811) 18 Vesey 328. It was cited with approval by the Judicial Committee of the Privy Council in PLIMMER v. MAYOR, etc., of the CITY OF WELLINGTON (1884) L.R. 9 A.C. 699, 710, 711, and it was explained by the Judicial Committee of the Privy Council in ARIFF v. RAI JADUNATH MAJUMDAR BAHADUR (1931) 47 T.L.R. 238.

The equitable doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights.

Willmott v. Barber (1880) 15 Ch. D. 96, 105, per Fry, J., and *Russell v. Watts* (1883) 25 Ch. D. 559, 585, 566, applied.

A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. The elements or requisites necessary to constitute fraud of that description are:

1. The plaintiff must have made a mistake as to his legal rights;
2. The plaintiff must have expended some money, or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief;
3. The defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights;
4. The defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights;
5. The defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

Willmott v. Barber (1880) 15 Ch. D. 96, per Fry, J.: and *Russell v. Watts* (1883) 25 Ch. D. 559, 585, 586, C.A., per Fry, L.J. applied.

Where an owner by transport of immovable property advertises his intention to transport that property, a person who has been in possession for only 3 years has no right to oppose the passing of that transport.

Paddenburg v. Pereira (1897) L.R.B.G. 21, explained.

On the 25th June, 1935 property of J. and A. was sold at execution. The judgment debtors were in possession of 2/5 of lot B/1. They erroneously believed that this parcel of land had been levied upon and sold, and that it had been purchased by M; and on the 26th June they vacated possession and went to live at Diamond, East Bank Demerara.

On the latter day M. entered into possession. He believed that he had in fact purchased the said parcel of land at execution sale, but this belief was erroneous as it had neither been taken in execution nor sold. However, on or before the 9th August, 1935 M. ascertained that he was not the owner, but, despite this knowledge, he began to expend, and he expended money, upon the land.

The title of J. and A. to 2/5 of lot B/1, was defective. J. died in 1936, and probate of her will was granted to H. on the 22nd October, 1936. About 2 months after the 26th June, 1935 H. had learnt that M. was not the owner of the parcel of land. On the 1st February, 1937 A. and H. as executor of J., applied for a rectification of title, and an order was made accordingly on the 22nd April, 1937. As a consequence of the order, A. and H. as executor of J., acquired full and absolute title to 2/5 of lot B/1. At some time between the 22nd March, 1937 and 2nd April, 1938 H. entered into possession of the land, and his possession was disturbed by M. who continued in possession. On the 2nd April, 1938 H. as executor of J. caused his solicitor to write M. a letter claiming \$500 damages for trespass, and requiring him to desist from further acts of trespass. On the 30th July, 1938 and the 6th and 13th August, 1938 H. as executor of J. caused the Registrar of Deeds to advertise in the *Gazette* notice of his intention to pass transport of J.'s interest in the said parcel of land in favour of the beneficiaries named in the will of J. Opposition to the passing of the transport was entered by M. who instituted an action against H. as executor of J. to enforce his opposition.

A. died after the institution of this action, and H. who was appointed executor, obtained probate of her will.

On behalf of M. it was submitted that the facts and circumstances raise an equity in his favour against H. as executor of J., and that the equity was sufficiently strong to bar the defendant from asserting his legal right to the land, even though the Statute of Limitations in this Colony does not bar an action to recover possession of land until after 12 years. In the alternative, it was submitted that if the equity raised against the defendant was not sufficiently strong to debar the defendant from asserting his legal right to the land (including his right to possession thereof) then the equity was strong enough to require the defendant to pay compensation to the plaintiff for improvements effected to the land.

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Held (1) that the plaintiff could not pray in aid the equitable doctrine of acquiescence, or the legal doctrine of estoppel by conduct, because the true inference of fact to be drawn was that M. was acting as his peril throughout and knew throughout that he was so acting, and that although he reckoned on security and although for some time the defendant did not interfere with plaintiff's possession, there was nothing on the part of the defendant to lull him into security.

Proctor v. Bennis (1887) 36 Ch. D. 762, per Bowen, L.J. applied.

(2) that there was nothing in the conduct of J. and A. to make it inequitable in them to assert their legal rights to the land, inasmuch as when M. began to expend money on the land, he did not suppose that he was expending the money on his own land, he knew he was not, and further, at that time J. and A. did not yet know that the land belonged to them.

Ramsden v. Dyson (1865) L.R. 1 H.L. 129, 140, per Lord Cranworth, L.C. and *Proctor v. Bennis* (1887) 36 Ch. D. 760 per Cotton, L.J. applied.

(3) that J. and A. (or their executors) were not estopped from asserting or exercising, as against M., their legal right to 2/5 of Lot B/1, and they were not precluded, by the equitable doctrine of acquiescence from asserting as against M., their legal right to 2/5 of lot B/1, because:

(a) M. did not make any mistake as to his legal rights: he well knew, before he began to incur any expenditure, that he had no legal rights, and that the legal rights, in the land of which he was in occupation, were in J. and A;

(b) M. did not expend any money on the faith of any mistaken belief. He spent the money in order that he might make it appear that he was the owner of the land;

(c) J. and A., the owners of the legal right in the land, did not know that they were the owners thereof. If M. believed that he was the owner, then J. and A. were in the same position as M., because the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights;

(d) J. and A. never at anytime encouraged M. in his expenditure of money, either directly or by abstaining from asserting their legal right. J. and A, did not know that M. was expending money on the land, they were at Pln. Diamond, East Bank, Demerara. They could not be said to have abstained from asserting their legal right, when they did not know of their legal right; and

(e) even assuming that J. and A. knew the facts about their title to 2/5 of lot B/1 at the same time as M, and that they had seen him proceeding with the incurring of expenditure, no equity would have been raised against them in favour of M. There was no evidence that, after knowledge by J. and A. of their title, they acted in such a way as to induce M. to believe that they would raise no objection to what he was doing: M. began to incur expenditure within two months after the execution sale, and within a month after judicial sale transport was passed in his favour on the 29th July 1935, and before J. and A. were aware of their legal rights. J. and A. knew no facts which were unknown to M.: on the other hand, M. knew facts which were unknown to J. and A, and he did not inform them about these facts. There could be no suggestion that J. and A. lay by, and let M. run into a trap.

Willmott v. Barber (1880) 15 Ch. D. 96, per Fry, J.; and *Russell v. Watts* (1883; 25 Ch. D. 559, 585, 586, per Fry, L.J., and at page 576, per Cotton, L.J. applied.

M. entered opposition to the passing of a transport of 1/5 of lot B/1 by J., and he instituted an action against J. to enforce the opposition. M. claimed that he had purchased 2/5 of lot B/1 (the property of J. and A) at execution sale and that he had obtained judicial sale transport therefor; that if the transport did not include 2/5 of lot B/1 it should be rectified accordingly; and that J. was barred from asserting her claim to the land by virtue of the equitable doctrine of acquiescence and of the legal doctrine of estoppel by conduct. The Court found that 2/5 of lot B/1 were not sold at execution, that the judicial sale transport passed in favour of M. could not be rectified, and that the equitable doctrine of acquiescence and the legal doctrine of estoppel by conduct had no application to the facts of the case.

At the time of the institution of the opposition action J. and A. had full and absolute title for 2/5 of lot B/1; and M. had been in possession thereof, and J. and A. had been out of possession, for a period of only three years.

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J. filed a counterclaim claiming possession against M.

Held (1) that as A. was not a party to the proceedings, and as the question as to whether an order for possession could properly be made in those circumstances, was not fully argued, an order for possession would not be made;

(2) that a declaration would, however, be made that J. (along with A.) was entitled, as against M., to possession of 2/5 of lot B/1 occupied by M.

Action by the plaintiff Mangal *inter alia* for an injunction restraining the defendant Mahamad Haniff in his capacity as executor of Jamiran, deceased from passing transport of 1/5 of lot B/1, Uitvlugt, West Coast, Demerara, and for a declaration that the opposition entered by the plaintiff on the 13th August, 1938; was just, legal and well-founded. The facts and arguments appear from the judgment.

J. A. Luckhoo, K.C., and D. P. Debidin. solicitor, for the plaintiff.

S. L. van B. Stafford, K.C. and A. J. Parkes, for the defendant.

Cur. adv. vult.

DUKE, J. (Acting): This is an action by the plaintiff Mangal against the defendant Mahamad Haniff in his capacity as executor under the last will and testament of Jamiran, deceased, who was a devisee under the last will and testament of Jahuran, deceased, in which he claims:

(1) an injunction restraining the defendant from passing transport in favour of the defendant in his own right and of Sahidan Bibi as devisees under the last will and testament of Jamiran of—

one undivided fifth part or share of and in lot B/1 part of lot La B part of that part of the front lands of Plantation De Groete-en-Klyne, Uitvlugt, situate on the west sea coast of the county of Demerara laid out and defined on a diagram of allotments of the front lands of Plantation de Groete-en-Klyne, Uitvlugt, by the Sworn Land Surveyor, William Downer, dated the 9th day of October, 1849, and deposited in the Registrar's Office of the counties of Demerara and Essequibo on the 29th day of November, 1849, save and except that part or portion of said lot La B forming and being a continuation of the line of road reserved between the adjoining lots, laid down on said diagram and now running from the public road to said lot La B, said lot B/1 being laid down and defined on a plan of lot B (4 acres 144 roods) forming part of allotments on the front of plantation Uitvlugt by John Peter Prass, Sworn Land Surveyor, dated 3rd March, 1883, and deposited in the Registrar's Office of British Guiana on the 17th April, 1883, without the buildings thereon;

(2) an order that the opposition entered by the plaintiff on the 13th August, 1938, against the passing of the said transport (which was advertised in the *Official Gazette* of the 30th July, 1938, and the 6th and 13th days of August, 1938,) is just, legal and well-founded;

(3) an order of the Court declaring the plaintiff the owner by purchase at execution sale on the 25th day of June, 1935, of the property sought to be transported and above described;

(4) an order directing the Registrar to pass a valid transport

or, alternatively, to rectify Transport No. 714 of 1935, to and in favour of the plaintiff herein, to include the property sought to be transported and above described;

(5) *alternatively*, an order declaring the sale at execution on the 25th day of June, 1935, advertised for the third time in the *Official Gazette* of this Colony on the 22nd day of June, 1935, and numbered 580 therein, and also Transport No. 714 of 1935, passed in pursuance thereof null and void by reason of the mistake of the plaintiff as to the subject-matter sold;

(6) *alternatively*, the sum of \$300 as compensation for improvements effected and expenses incurred by the plaintiff with respect to the above described property with the knowledge and approval and to the benefit of the defendant and the defendant's testatrix, Jamiran, female East Indian, No 12 Casual, 1885, deceased;

(7) such further or other order as to the Court shall deem fit; and

(8) the costs of these proceedings.

Lot B Uitvlugt is laid down and defined on a plan by William Downer, Sworn Land Surveyor, dated 9th October, 1849, and deposited in the Registrar's Office on the 29th November, 1849, as Plan No. 324/4. Lot B was subdivided into 8 sub-lots (B/1, B/2, B/3, B/4, B/5, B/6, B/7, B/8,) by John Peter Prass, Sworn Land Surveyor: and his plan, recording those subdivisions, was dated 3rd March, 1883, and deposited in the Registrar's Office on the 17th April, 1883, as Plan No. 794/3.

Jahuran, at the time of her death on the 4th September, 1905, owned the following parcels of land at Uitvlugt:

(1) A piece of land described as "Lot B part of lot La B" by transport in her favour dated 29th June, 1889, No. 164;

(2) Lot B/2 by transport in her favour dated 12th September, 1895, No. 552;

(3) $W\frac{1}{2}$ Lot B/4 by transport in favour of BABULIAH dated 10th September, 1892, No. 351, and as sole devisee and legatee of BABULIAH whose will was deposited in the Registrar's Office on the 13th August, 1900;

(4) $\frac{1}{3}$ of lot B/5 and $\frac{1}{3}$ of lot B/6 by transport in favour of BABULIAH dated 11th July, 1885 No. 270 and as sole devisee and legatee of BABULIAH.

The land intended to be transported by virtue of transport dated 29th June, 1889 No. 164 was lot B/1 part of lot B. The error in the description was not corrected until the 22nd March, 1937, on which date an order of Court was made for rectification in proceeding No. 28 of 1937. Lot La B means Lot Letter B or Lot B; La is the abbreviated form of "Litera" or Letter.

At the time of the death of Jahuran, she was in possession of lot B/1 but her title thereto was defective.

Jahuran, died testate, and her will was deposited in the Registrar's Office on the 8th September, 1905. Thereupon, and according to the terms of her will, all her property became vested, in equal shares, in her five children:

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Jamiran, R of D,	... No. 12 Casual 1885,
Rahman,	... No. 15 Casual 1885,
Aliman,	... No. 13 Casual 1885,
Riazali,	... No. 16 Casual 1885, and
Naseeran,	

Jamiran, Rahman, Aliman and Riazali were born in this Colony. They went to India and they returned to this Colony in 1885.

Jamiran and Aliman (referred to in the evidence as “the two old ladies”) had legal title for:

2/5 of lot B/2,
 2/5 of W $\frac{1}{2}$ of lot B/4.
 2/5 of $\frac{1}{3}$ of lot B/5, and
 2/5 of $\frac{1}{3}$ of lot B/6.

They also had a good possessory title for 2/5 of lot B/1. The legal title thereto was defective. Jamiran and Aliman were, however, in possession of 2/5 of lot B/1; and they owned, and resided in, two buildings which were situated on the N 2/5 of lot B/1.

In or about the year 1934 Jamiran and Aliman agreed to sell to Mohadeo, by private treaty, their interests in lots B/1, B/2, W $\frac{1}{2}$ of B/4, B/5 and B/6 for (according to the defendant) the sum of \$850. It would appear that some difficulties arose in respect of the carrying of the agreement into effect; and Mohadeo required Jamiran and Aliman to repay to him the sum of \$542 which he had advanced to them from time to time with reference to the said purchase.

According to the plaintiff, Jamiran, Aliman and the defendant Mahamad Haniff approached him in June, 1935, with the view of inducing him to purchase, by private treaty, the buildings owned by Jamiran and Aliman and their interests in lot B/1, in lot B/2, in W $\frac{1}{2}$ of lot B/4, in lot B/5 and in lot B/6; they showed him the portions of those lots which were occupied by Jamiran and Aliman; they told the plaintiff that they wanted \$600 for the two buildings and their interests in lots B/1, B/2, W $\frac{1}{2}$ of B/4, B/5 and B/6; he verbally agreed to purchase at that figure; it was arranged that the plaintiff, the defendant, Jamiran and Aliman should come to Georgetown; they met, as arranged, at the chambers of Mr. K. S. Stoby, who was then practising as a barrister; the plaintiff told Mr. Stoby that he had arranged to purchase for \$600 the 2 buildings, the portion of the front lot (B/1) where the 2 buildings were, and the back lots; he had \$250 with him which he had withdrawn from the Post Office Savings Bank; Mr. Stoby told him that he would get title later on, that he could move his house on the front lot (Mangal had and still has a house on leased land) and that nobody would trouble him; he asked Mr. Stoby what about the division of the land (meaning thereby the partition of the undivided interests so that each undivided owner should have his separate portion of land); Mr. Stoby told him that, later on, when he got title, he could make

an agreement to divide the land; Mr. Stoby did not tell him that there was something wrong with the title to the front lot (B/1); the plaintiff told Mr. Stoby that he would not agree to what he (Mr. Stoby) had told him, as he wanted his own portion of the lots which Jamiran and Aliman were offering for sale; the plaintiff then told Mr. Stoby that he was going to put back his \$250 in the bank and that he didn't want the "place", meaning thereby the 2 buildings of Jamiran and Aliman and their interests in lots B/1, B/2, W½ of B/4, B/5 and B/6; and he thereupon left Mr. Stoby's office, re-deposited his money in the Post Office Savings Bank, and returned to his home at Uitylugt.

Counsel for the defendant objected to the admission of this evidence, on the ground that it was not covered by the by the reasons of opposition. I reserved the point, and allowed the plaintiff to give such evidence, and the defendant to give evidence in answer, (subject always to the objection) on the point, as they might think fit.

It will be observed that the plaintiff states that the only difficulty that existed at the time of his interview with Mr. Stoby (who was representing, as the plaintiff says, Mohadeo), was in respect of his obtaining a specific share of the lands. Had the interview taken place in June 1935, that is to say, subsequent to the levy on the two undivided fifth parts or shares of Jamiran and Aliman of and in lots B/2, W½ of B/4, ⅓ of B/5 and ⅓ of B/6 hereinafter referred to, Mr. Stoby could, and would, not have failed to inform the plaintiff (and the plaintiff says that Mr. Stoby did not) that there was a defect in the title of Jamiran and Aliman to 2/5 of lot B/1 (referred to by the plaintiff as the front lot). Further, the plaintiff was invited by the Court to support his story as to the date of the interview by producing his Post Office Savings Bank Book, or an extract from his account with the Post Office Savings Bank, showing the withdrawal, and the re-deposit, by the plaintiff (as alleged by him) of the sum of \$250 on one and the same day in June 1935. Although the trial of this action lasted 5 days, no such evidence was adduced. I do not believe that it was in June 1935 that Jamiran and Aliman (or the defendant Mahamad Haniff) asked the plaintiff to purchase, by private treaty, 2/5 of lots B/1, B/2, W½ of B/4, ⅓ of B/5 and ⅓ of B/6, from Jamiran and Aliman; that request was made some months before. I accept the evidence of the defendant that the interview with Mr. Stoby took place prior to the 1st May, 1935.

The defendant says that, at the interview, the plaintiff had intimated that he would pay the sum of \$900 as purchase price, and not the sum of \$600 as stated by the plaintiff in his evidence. I am unable to say whether the plaintiff or the defendant is accurate on this point: and, for the purposes of this case, the purchase price which the plaintiff had said that he was willing to pay, will be deemed to be \$600.

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In any event, it is clear that when the plaintiff left the chambers of Mr. K. S. Stoby on some date prior to the 1st May, 1935, there was no agreement in existence for the purchase by him, by private treaty, from Jamiran and Aliman (whether for \$900, for \$600, or for any other consideration) of:

- 2/5 of lot B/1,
- 2 buildings on lot B/1.
- 2/5 of lot B/2,
- 2/5 of W½ of lot B/4.
- 2/5 of ⅓ of lot B/5, and
- 2/5 of ⅓ of lot B/6

The plaintiff did not, at any subsequent time, reopen negotiations with Jamiran and Aliman for the sale, by private treaty, by them to him of the said property. The letter written by the defendant to the plaintiff on the 17th June, 1935, (the admission of which was objected to by counsel for the defendant on the same ground as that already referred to) did not cause the plaintiff to reopen any such negotiations.

On the 1st May, 1935, Mohadeo obtained judgment in action No. 73 of 1935 against Jamiran and Aliman for the sum of \$452 and costs.

Order 36, rule 40 of Rules of Court, 1900 as enacted by the Rules of the Supreme Court (May), 1920 is as follows:

40 (1). Before any immovable property, or interest therein, is taken in execution to satisfy a judgment or order of a court or judge, the person claiming so to enforce the judgment or order shall file in the registry an affidavit of the facts and documents upon which his claim to take the immovable property or interest therein in execution is based, and shall lodge with the registrar the documents mentioned in the affidavit, or office copies of such of them as are of record in the registry.

(2). The registrar may require, and the claimant shall furnish, such evidence in support of the claim, in addition to the affidavit and documents aforesaid, as the registrar may deem necessary;

(3). The immovable property or interest therein in the affidavit mentioned shall not be taken in execution unless the registrar, upon examination of the facts stated in the affidavit and contained in the documents, and the further evidence (if any) in support of the claim, is satisfied that they show *prima facie* that the judgment debtor is the owner of the immovable property or interest therein sought to be taken in execution.

(4). The provisions of this rule shall not extend to proceedings by way of—

(a) parate execution, or

(b) execution against mortgaged property to enforce a judgment or order for payment of the mortgage debt thereby secured.

This rule does not provide that notice of an application made thereunder should be given to the judgment debtor: and the uniform course of procedure has always been that no such notice is ever given to the judgment-debtor. The application is always made by the execution-creditor *ex parte*.

On the 21st May, 1935, Mohadeo swore to an affidavit in which he deposed to facts showing that *prima facie* Jamiran and Aliman were the owners of:

- 2/5 of lot B/2,
- 2/5 of west half of lot B/4,
- 2/5 of ⅓ of lot B/5,
- 2/5 of ⅓ of lot B/6, and
- 2/5 of ⅓ of lot B/7.

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There was no allegation in the affidavit that Jamiran and Aliman were the owners of any interest in lot B/1, or in “lot B part of lot La B”. The proper officer in the Registry examined the affidavit and made the usual searches; and on the 27th May, 1935, on behalf of the Registrar, he certified that the affidavit was passed for execution in respect of:

2/5 of lot B/2,
2/5 of $W\frac{1}{2}$ of lot B/4,
2/5 of $\frac{1}{3}$ of lot B/5, and
2/5 of $\frac{1}{3}$ of lot B/6,—

being the interests of Jamiran and Aliman. He did not certify that they had a, *prima facie* title for 2/5 of $\frac{1}{3}$ of lot B/7.

On the 28th May, 1935, a marshal of the Supreme Court, on the instructions of Mohadeo, levied execution on the following as being the property of Jamiran and Aliman:

2/5 of lot B/2,
3/5 of $W\frac{1}{2}$ of lot B/4,
2/5 of $\frac{1}{3}$ of lot B/5,
2/5 of $\frac{1}{3}$ of lot B/6, and
2 buildings on lot B.

The buildings were the buildings on lot B/1 previously referred to. Lot B/1 is part of lot B. In paragraph 5 of his reasons of opposition the plaintiff points out that the affidavit of title sworn to by the execution creditor Mohadeo for the purpose of giving instructions to levy execution above referred to, contains in the sixth paragraph thereof the following statement:

The said Jamiran and Aliman the abovenamed defendants are the owners of two of the buildings situate on the aforesaid lots.

If there is any ambiguity as to the meaning of the words “aforesaid lots” which appeared in the affidavit of the execution creditor Mohadeo sworn to by him on the 21st May, 1935, it was removed by the execution creditor on the 25th May, 1935, for in his instructions to levy given to the Registrar on that day the words used are:

with two buildings situated on the said lot B the property of Jamiran and Aliman.

In his act of levy dated the 28th May, 1935, the words used by the marshal are:
with two buildings situated on lot B the property of the defendants.

Neither Jamiran, Aliman, the defendant Mahamad Haniff nor the plaintiff Mangal was aware, at any time prior to the 25th June, 1935, (the date of the sale at execution hereinafter referred to) of the terms of the affidavit of title sworn to by the execution creditor Mohadeo on the 21st May, 1935, of the terms of the instructions to levy given by the execution creditor Mohadeo on the 25th May, 1935, nor of the terms of the act of levy drawn up by the marshal on the 28th May, 1935.

Mohadeo gave no instructions to the marshal to levy upon lot B/1, nor upon any interest therein. The marshal did not levy upon lot B/1, nor upon any interest therein. In paragraph 7 of

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his Reasons of Opposition the plaintiff alleges that the execution creditor Mohadeo honestly believed that the 2/5 of lot B/1 (upon which the buildings of Jamiran and Aliman were situate) were levied upon by him (Mohadeo). This is not so. It is clear, from what I have previously said, that Mohadeo knew that the said 2/5 of lot B/1 were not levied upon by him. No evidence has been called by the plaintiff to contradict the plain inference to be drawn from the terms of the affidavit sworn to by Mohadeo on the 21st May, 1935, and from the instructions to levy given to the Registrar on the 25th May, 1935 by his lawyer, on his behalf.

On the 25th June, 1935, (General Sale No. 58 of 1935, the following property of Jamiran and Aliman, which was taken in execution on the 28th May, 1935, was sold at execution:

2/5 of lot B/2,
 2/5 of W $\frac{1}{2}$ of lot B/4.
 2/5 of $\frac{1}{3}$ of lot B/5,
 2/5 of $\frac{1}{3}$ of lot B/6, and
 2 buildings on lot B.

The plaintiff purchased the said property for \$570. Article 3 of the Conditions of Sale upon which the Registrar of the Supreme Court exposed the said property for sale to the highest bidder was as follows:

The property will be sold and transport passed to the purchaser at his expense subject to and in accordance with the provisions of the Deeds Registry Ordinance, cap. 177.

On the 29th July, 1935, on the application and at the expense of the plaintiff, the Registrar, by judicial sale transport No. 714 of 1935, transferred to the plaintiff full and absolute title for the said property.

The interests of Jamiran and Aliman in 2/5 of lot B/1 were not levied upon, they were not sold by the Registrar at execution sale and they were not purchased by the plaintiff. In paragraph 11 of his Reasons of Opposition, the plaintiff alleges that Jamiran, Aliman and the plaintiff knew that the interests of Jamiran and Aliman in 2/5 of lot B/1 had been levied upon. This statement is incorrect, as there was no such levy made. The plaintiff also alleges that Jamiran and Aliman knew that their interests in 2/5 of lot B/1 had been purchased by the plaintiff at the execution sale held on the 25th June, 1935. This statement is also incorrect, as the property sold at execution by the Registrar did not include any portion of, or interest in, lot B/1, and the plaintiff purchased what was sold.

The plaintiff alleged in his evidence that when he purchased at execution the property exposed for sale by the Registrar, he thought that he had purchased the 2/5 of lot B/1, (which had been occupied by Jamiran and Aliman) as well. He says that he listened to the Marshal when he was reading out the description of the property, and that he understood therefrom that 5 pieces of land (and not 4 pieces) were being put up for sale: at the

trial he was asked to read the description of the property as contained in the conditions of sale, and he maintained that 5 pieces of land were in fact sold to him.

The description of the property which was exposed for sale on the 25th June, 1935, by the Registrar of the Supreme Court to the highest bidder, was as follows:

580. Two undivided fifth parts or shares of and in the following:—

Lot B/2 the west half of lot B/4 and one undivided third part or share of and in lots B/5 and B/6 parts of lot La B, part of that part of the front land of Plantation De Groote en Klyne, Uitvlugt, situate on the west sea coast of the county of Demerara laid down and defined on a diagram of allotments on the front lands of Plantation De Groote en Klyne, Uitvlugt, by the Sworn Land Surveyor, William Downer, dated the 9th October, 1849, and deposited in the Registrar's Office of the counties of Demerara and Essequibo on the 29th November, 1849, save and except that part or portion of said lot B forming and being a continuation of the line of road reserved between the adjoining lots laid down and defined on said diagram and now running from the public road to the said lot La B each of the said lots B/2, B/4, B/5 and B/6 being laid down and defined on a plan of lot B (4 acres 144 roods) forming part of allotments on the front of Plantation Uitvlugt by John Peter Prass, Sworn Land Surveyor, dated 3rd March, 1883, and deposited in the Registrar's Office of British Guiana on the 17th April, 1883, with two buildings on the said lot B as per inventory of the property of the said Jamiran and Aliman.

The plaintiff Mangal need not have waited until the time of the execution sale of the 25th June, 1985, to ascertain what the Registrar proposed to expose for sale at execution. He could have perused the *Official Gazette* of the 8th June, 1935, or of the 15th June, 1935, or of the 22nd June, 1935 (or even the "Daily Argosy" newspaper of Saturday the 8th June, 1935). He could have done this perusal at his leisure, and if he were unable to understand its meaning, he could have consulted a lawyer. Further, he could, on payment of a search fee of 24 cents to the Registrar, have been accorded access to the plan of John Peter Prass, Sworn Land Surveyor, dated 3rd March, 1883, and deposited in the Registrar's Office of British Guiana on the 17th April, 1883; and he could have ascertained that neither lot B/2 nor W½ of lot B/4 nor lot B/5 nor lot B/6 abuts on the middle walk dam of Plantation Uitvlugt and that the Registrar was not exposing for sale any interest in any lot which abutted on the middle walk. Lot B/1 which is described by the plaintiff as the front lot abuts on the middle walk.

It is quite clear that only four parcels of land were levied upon, put up for sale, and sold at execution. The attempt by the plaintiff to make it appear that from hearing the above description read by the marshal (and from reading the description himself), he believed (and still believes) that there was sold to him at execution sale, the land (2/5 of lot B/1) upon which the two buildings of Jamiran and Aliman were situate, was ludicrous in the extreme. The plaintiff has a building on land leased by him, but he does not suggest that because he owns the building he is also the owner of the land: and he does not suggest that if his

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building is levied upon, the land is also levied upon. Nevertheless, the plaintiff would like this Court to believe him when he says that the words “with two buildings on the said lot B as per inventory the property of the said Jamiran and Aliman” made him believe that the 2/5 of lot B/1, part of lot B, on which the buildings were situate, were exposed for sale by the Registrar. I do not accept the testimony of the plaintiff that those words inspired any such belief in him.

Counsel for the plaintiff has submitted that the acts and conduct of Jamiran, Aliman and the defendant Mahamad Haniff prior to the execution sale of the 25th June, 1935 showed that they induced the plaintiff Mangal to believe that the interests of Jamiran and Aliman in the 2/5 of lot B/1 then occupied by them had been levied upon, and were being advertised by the Registrar for sale at execution on the 25th June 1935: and that consequently the contract of sale entered into between the Registrar and the plaintiff, and the consequential judicial sale transport passed on the 29th July, 1935 should be set aside, or, in the alternative, rectified as the plaintiff would never have been a bidder at the execution sale had he known, or thought, that the interests of Jamiran and Aliman in the 2/5 of lot B/1 then occupied by them, were not being sold at execution sale. In support of his submission, counsel cited *Freeman v. Cooke (1848)* 2 Exch. 654, 663; and *Faraday v. Tamworth Union (1916)* 86 L.J. Ch. 436, 438.

In *Freeman v. Cooke*, Parke, B., said:

Where one, by his words or conduct, *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time A party who *negligently* or *culpably* stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving By the term “*wilfully*,” however, in that rule we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man’s real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect.

In *Faraday v. Tamworth Union*, the facts as stated in the head note were as follows:

In 1941 a correspondence took place between the plaintiff who was a surveyor, and the clerk of the guardians to the defendant union, with a view to the plaintiff acting as valuer for the guardians at an arbitration between them and the Birmingham Union, arising out of the dissolution of the Aston Union, the transfer of its property and liabilities to the Birmingham Union, and the inclusion in the defendant union of Sutton Coldfield, a parish hitherto in the Aston Union. In the opinion of the Court the plaintiff throughout the correspondence believed and intended that he should be remunerated on Ryde’s scale on the basis of the value of the whole of the properties of the Aston Union, while the guardians believed and intended

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that the scale was to be applied only to the interest of their union in those properties. The contract for employment of the plaintiff as valuer was originally drawn in the sense understood and intended by him; but the draft was altered to the sense understood and intended by the guardians, and in that form it was executed by the plaintiff and sealed with the seal of the guardians.

In delivering judgment, Younger, J., said:

The plaintiff executed the agreement under a mistake as to its true effect and I think that that mistake was innocently induced by the defendants. As I have said, the plaintiff's view of the original negotiation was that taken by the original draftsman of the agreement; and the one alteration in his draft made by Mr. Dewes and sent as altered to the plaintiff, though effective to alter the bargain, was not, I think, enough to displace the impression that it remained the same produced on the plaintiff's mind by the unaltered indorsement, recitals and last operative provision. In these circumstances I am of opinion, on the principle of *Wilding v. Sanderson* (1897) 2 Ch. 534, that the plaintiff is entitled to be relieved of his contract, and is entitled to be remunerated on the footing of a *quantum meruit*.

Jamiran and Aliman did in fact point out to the plaintiff the 2/5 of lot B/1 occupied by them, as being one of the parcels of land which they were prepared to sell to the plaintiff by private treaty. The negotiations for a sale by Jamiran and Aliman to the plaintiff fell through, and they were broken off by the plaintiff himself. Mohadeo, a creditor of Jamiran and Aliman, then obtained judgement and proceeded to levy execution. It is the execution creditor, and not the judgment debtor, who determines what property of the judgment debtor should be levied upon; and it is the Registrar of the Supreme Court who then decides on the affidavit filed by the execution creditor whether or not the execution creditor should be permitted to levy upon the immovable property (or any part thereof) of the judgment debtor as indicated by the execution creditor in his affidavit. In arriving at his decision, the Registrar acts judicially, he does not perform a ministerial act as contended by the solicitor for the plaintiff. An execution creditor is not compelled to levy execution on, all the immovable property of the judgment debtor. Further, if the title of a judgment debtor to the immovable property is defective (and the title of Jamiran and Aliman to 2/5 of lot B/1 was in fact defective), the Registrar will not allow it to be taken in execution. The plaintiff was not entitled to assume that the immovable property exposed for sale by the Registrar of the Supreme Court as the property of Jamiran and Aliman was one and the same as the immovable property which Jamiran and Aliman were willing to sell to him by private treaty more than 2 months previously—at a time when the writ of summons in the action in which the levy took place was not even filed. He should have borne in mind that the sale at execution was a sale by the Registrar, and not a sale by Jamiran and Aliman, and that the Registrar does not expose for sale at execution immovable property as being the property of a judgment debtor merely because the judgment debtor thinks he is the owner thereof. Suppose the judgment creditor had levied execution upon a parcel of land which had

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not been pointed out to the plaintiff by Jamiran and Aliman when they were seeking to effect a sale to him by private treaty, and suppose that parcel of land had been included in the parcels of land sold at execution and purchased by the plaintiff, could Jamiran and Aliman have claimed to recover that parcel of land from the plaintiff, on the ground that he had entered into negotiations with them to purchase by private treaty and that they had pointed out to him some of their immovable property but not that particular parcel? The answer would certainly be in the negative.

Had the plaintiff entered into an enforceable contract of sale with Jamiran and Aliman to purchase from them:

2/5 of lot B/1,
 2/5 of lot B/2,
 2/5 of W $\frac{1}{2}$ of lot B/4,
 2/5 of $\frac{1}{3}$ of lot B/5, and
 2/5 of $\frac{1}{3}$ of lot B/6.—

Jamiran and Aliman would have been under a contractual duty to assure to him what he had purchased. There was no agreement in writing and the verbal agreement which the plaintiff purported to make was broken off by the plaintiff himself. After the interview at the chambers of Mr. K. S. Stoby, there was no contractual duty by Jamiran and Aliman to the plaintiff.' The evidence in this case points to the inference that Jamiran and Aliman were unaware that their interests in the 2 5 of lot B/1 occupied by them were not levied upon: and that they believed that those interests were in fact levied upon. But even if they knew that those interests were not levied upon, they were under no obligation to seek out the plaintiff and tell him so. If the plaintiff had acted as a prudent purchaser, he could have ascertained from the Deeds Registry, at the cost of 24 cents, and within a few minutes, that the properties which the Registrar proposed to sell on the 25th June, 1935, as the property of Jamiran and Aliman did not include any parcel of land abutting on the Uitvlugt middle walk. The plaintiff says that he arrived in Georgetown at 9 a.m. on the 25th June, 1935, and the sale took place at 12 noon; he therefore, had ample time and opportunity, even on the day of the sale, to ascertain the true position. Jamiran and Aliman (the two old ladies) did not wilfully, negligently or culpably deceive the plaintiff into believing that the 2/5 of lot B/1 which were occupied by them were advertised for sale at execution. If the plaintiff did in fact believe that that 2/5 of lot B/1 were advertised for sale at execution, it was because of his own negligence, or his deliberate omission to do what a prudent man, wishing to bid at a sale at execution, does and ought to do. The decision in *Freeman v. Cooke* is therefore inapplicable to the facts and circumstances of this case.

It has been strenuously argued on behalf of the plaintiff that, from the wording of the description of the property sold by the Registrar at execution he innocently led the plaintiff to believe that the 2/5 of lot B/1 were being sold at execution. I have already found that I cannot accept the testimony of the plaintiff that the wording of the description of the property sold by the Registrar at execution on the 25th June, 1935, inspired any belief in the plaintiff that the 2/5 of lot B/1, upon which the two buildings of Jamiran and Aliman were situated, were being exposed for sale by the Registrar. The decision in *Faraday v. Tamworth Union* therefore does not apply.

Jamiran and Aliman never at any time induced the plaintiff to believe that among the parcels of land which were exposed for sale on the 25th June, 1935, at execution by the Registrar of the Supreme Court was 2/5 of lot B/1.

In *Anson's Law of Contract*, 17th edition, 1929, Chapter 6, Section 1, sub-title "Mistake as to the identity of the subject-matter," it is stated that if there is nothing in the terms of the contract to identify what is its subject-matter, evidence may be given to show that the mind of each party was directed to a different object, and that therefore the contract is void on the ground of mistake but the contract cannot be avoided if its terms contained such a description of the subject-matter as would practically identify it.

In *Re Transport of Lots at Bush Lot*, General Civil Jurisdiction, 9th January, 1905, the Court said:

Where the title is clear, distinct and unambiguous, evidence cannot be adduced to show that the title really means something more than is stated therein.

The judgment of the Court in *Wills v. Gonsalves*, General Civil Jurisdiction (Appeal Court), 12th December, 1904, is to the same effect. The contract of sale of the 25th June, 1935, between the Registrar of the Supreme Court and the plaintiff is clear, distinct and unambiguous, and it is that the lands exposed for sale, and sold on that day, and purchased by the plaintiff were:

2/5 of B/2,
2/5 of W $\frac{1}{2}$ of lot B/4,
2/5 of $\frac{1}{3}$ of lot B/5, and
2/5 of $\frac{1}{3}$ of lot B/6.—

and no other. Therefore the contract of sale cannot be avoided on the ground of mistake. I have already found that any mistaken belief which the plaintiff may have had at the time of the execution sale, was not induced by the Registrar of the Supreme Court who is in no way responsible therefor.

In *United States of America v. Motor Trucks, Ltd.*, (1924), A.C. 196, 200, 201, the Earl of Birkenhead, delivering the judgment of the Judicial Committee of the Privy Council in a suit for rectification said:

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The plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which it is sought to be rectified; and secondly, that such agreement has been inaccurately represented in the instrument. When this is proved either party may claim, in spite of the Statute of Frauds, that the instrument, on which the other insists, does not represent the real agreement.

The judicial sale transport which was passed by the Registrar in favour of the plaintiff on the 29th July, 1935, No. 714 carried out, and conveyed the same property as that described in, the contract of sale which was made between the Registrar and the plaintiff on the 25th June, 1935, (General Sale No. 58 of 1935). That property was the same property that was taken in execution on the 28th May, 1935, the same property that was passed for execution on the 27th May, 1935, by the Registrar, and the same property that the judgment-creditor Mohadeo, by writing dated the 25th May, 1935, instructed the Registrar to levy upon.

In his affidavit of the 21st May, 1935, Mohadeo did not seek to levy upon 2/5 of lot B/1, or on 2/5 of "Lot B part of lot La B"; the Registrar did not authorise a levy upon that property: and the Registrar did not expose that property on the 25th June, 1935, for sale at execution. Even if the plaintiff thought that the Registrar had in fact exposed for sale at execution 2/5 of lot B/1, or 2/5 of lot B part of lot La B, the Registrar was under no such impression. There was no mutual mistake, and neither the contract of sale of the 25th June, 1935, (made between the Registrar and the plaintiff) nor the judicial sale transport of the 29th July, 1935 (from the Registrar to the plaintiff) can be rectified by including therein 2/5 of lot B/1 as having been sold and transported, as that piece of land was never in fact sold. Indeed, it could not have formed part of the subject-matter of the contract of sale as it was not referred to in the affidavit of Mohadeo leading to the levy: see *Faraday v. Tamworth Union*.

To use the language of the Earl of Birkenhead in *United States of America v. Motor Trucks, Ltd.*, (1924), A.C. 200.

Unilateral error which in such a case as the present would hardly be distinguished from carelessness does not afford—

to the plaintiff any ground upon which he can claim to have the contract of sale of the 25th June, 1935, (General Sale No. 58 of 1935), or the judicial sale transport of the 29th July, 1935, No. 714 rectified.

The claim of the plaintiff for:

- (a) an order of the Court declaring the plaintiff the owner by purchase at execution sale on the 25th day of June, 1935, of the property sought to be transported by the defendant and above described (1/5 of lot B/1, Uitvlugt);
- (d) an order directing the Registrar to pass a valid transport of, alternatively to rectify Transport No. 714 of 1935, to and in favour of the plaintiff herein, to include the property sought to be transported and above described (1/5 of lot B/1, Uitvlugt);
- (e) *Alternatively*, an order declaring the sale at execution on the 25th day of June, 1935 advertised for the third time in the *Official Gazette* of this Colony on the 22nd day of June, 1935, and numbered 580 therein, and

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also Transport No. 714 of 1935 passed in pursuance thereof null and void by reason of the mistake of the plaintiff as to the subject-matter sold,—

must therefore be refused.

In *Wills v. Gonsalves*, General Civil Jurisdiction, (Appeal Court), 12th December, 1904, the Appeal Court said:

The owner by transport would be entitled to the property transported unless any other party could show a better title and the onus of proof would be on the party claiming in opposition to transport.

The defendant Mahamad Haniff in his capacity as executor of Jamiran deceased has a good legal title to the 1/5 of lot B/1, the subject matter of this action, by virtue of:

Transport dated 29th June, 1889, No. 164 in favour of Jahuran for lot B, part of lot La B;

Order of Court dated 22nd March, 1937, in proceeding No. 28 of 1937 directing that the description of land in the said transport should be lot B/1. part of lot La B;

Will of Jahuran deposited in Registrar's Office on the 8th September, 1905, bequeathing and devising to Jamiran one-fifth of her property; and

Will of Jamiran, appointing as the executor the defendant Mahamad Haniff in whose favour probate was granted on the 22nd October, 1936.

Jamiran was in possession of the said 1/5 of lot B/1 from the 4th September, 1905, (the day of the death of Jahuran) up to the 25th June, 1935. At some time between the 22nd March, 1937, and the 2nd April, 1938, the defendant entered into possession; and his possession was interfered with by the plaintiff who has been in possession since the 26th June, 1935.

The plaintiff claims that he has a better right to the said 1/5 of lot B/1 than the defendant on the ground that the defendant is estopped from setting up the title of his testatrix Jamiran, or, alternatively, on the ground that there has been such acquiescence on the part of Jamiran and of the defendant her executor as in a Court of Equity would bar the defendant from asserting his legal right to the said 1/5 of lot B/1. In substance, the plaintiff submits that the facts and circumstances of this case raise an equity in his favour against the defendant, and that the equity is sufficiently strong to bar the defendant from asserting his legal right to the land, even though there is a Statute of Limitations in this Colony which bars actions to recover immovable property after 12 years. In the alternative, the plaintiff submits that if the equity raised against the defendant is not sufficiently strong to debar the defendant from asserting his legal right to the land (including his right to possession thereof) then the equity is strong enough to require the defendant to pay compensation to the plaintiff for improvements effected to the land.

The plaintiff entered into possession of the interests of Jamiran and Aliman in 2/5 of lot B/1. He did so on the 26th June, 1935, immediately after Jamiran and Aliman had vacated possession of the buildings on lot B/1 which the plaintiff had purchased at execution on the preceding day.

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The plaintiff did not consider the execution sale to have been a sale to give effect to the offer which he had, some months previously, made to purchase for the sum of \$600 from Jamiran and Aliman—

2/5 of lot B/1,
 2 buildings on lot B/1,
 2/5 of lot B/2,
 2/5 of W½ of lot B/4.
 2/5 of ½ of lot B/5, and
 2/5 of ½ of lot B/6.

Had the plaintiff considered the execution sale in this light, he would have tendered to Jamiran and Aliman, immediately after the execution sale on the 25th June 1935, the sum of \$30, being the difference between the sum of \$600 the price which he had been willing to pay for the said properties by private treaty and the sum of \$570 the price which he paid at execution sale for, as he claims, all the said properties.

On the 26th June, 1935, Jamiran and Aliman left Uitvlugt, and they came to Georgetown where they spent the night with the defendant in Albouystown. The defendant had been living in Georgetown for about a year prior to the sale at execution. On the 27th June, 1935, Jamiran and Aliman went to live at Plantation Diamond. Jamiran never returned to Uitvlugt, and she died in Diamond hospital in 1936. The defendant returned to Uitvlugt in 1935; Aliman returned to Uitvlugt in 1938, and she died after the commencement of this action.

On the evidence adduced at the trial, I find that Jamiran, Aliman and the defendant Mahamad Haniff believed that the plaintiff had purchased at execution sale on the 25th June, 1935, the 2/5 of lot B/1 which were occupied by Jamiran and Aliman. Neither Jamiran, Aliman nor the defendant Mahamad Haniff knew, until sometime after the execution sale, that the 2/5 of lot B/1 which had been in possession of Jamiran and Aliman still continued to be owned by them, after the sale.

The plaintiff has deposed in evidence that Mahamad Haniff was his general adviser, after the sale at execution, in respect of the properties which, prior to the execution sale, were owned by, and were in possession of, Jamiran and Aliman. But even if this evidence were true, the advice was given before Mahamad Haniff was aware that the plaintiff did not purchase at execution sale the 2/5 of B/1 which were occupied by Jamiran and Aliman. The defendant was not living at Uitvlugt at the time: he was living in Georgetown; and the plaintiff has not adduced, or suggested, any reason why Mahamad Haniff should, after the sale, be interested in the personal affairs of the plaintiff. The defendant Mahamad Haniff did not advise the plaintiff to refuse to grant a lease to one Sahadeo who owned a building on the N 2/5 of lot B/1, neither did he advise him to purchase the building from C. Weekes to whom Sahadeo had subsequently sold it. The

defendant did not advise the plaintiff that he should get Mr. W.E. Ying, sworn land surveyor, to survey lots B/1, B/2, W $\frac{1}{2}$ of B/4, B/5 and B/6; neither did he assist in the survey made by Mr. Ying on the 20th August, 1935. He did not advise the plaintiff to fill up the land on which the 2 buildings purchased by the plaintiff were situate. The plaintiff did not require advice from the defendant, or from anybody else, on any of those matters: he is able to think for himself.

On the 9th August, 1935, by agreement in writing (drawn by Mr. J. A. Luckhoo, K.C.) the plaintiff (as owner by transport dated the 29th July, 1935, No. 714) and 4 other persons (all claiming under Rahman, male, Riazali, male and Naseeran female, all deceased who were 3 of the 5 devisees under the will of Jahuran, deceased, the 2 other devisees being Jamiran and Aliman) agreed among themselves to subdivide and allot among themselves the specific portions set forth in a schedule to the agreement:

Lot B/1.
Lot B/2,
W $\frac{1}{2}$ of lot B/4,
Lot B/5, and
Lot B/6.

Mr. W. E. Ying, sworn land surveyor, was employed to mark out on the ground the subdivisions already agreed to. He commenced his survey on the 19th August, 1935, and he completed it the next day. On the 20th August, 1935, he made a plan of the lots specified in the agreement and subdivided them as required by the agreement. On the 26th August, 1935, he made a plan of lot B/1, and subdivided it into N $\frac{2}{5}$, Centre $\frac{1}{5}$ and S $\frac{2}{5}$ in accordance with the agreement. Each of the lots B/2, B/4, B/5 and B/6 has an area of 0.54 acre. B/1 has an area of 0.55 acre. The following parcels of land were allotted to the plaintiff Mangal under the agreement of the 9th August, 1935, and are depicted on the plans of Mr. W. E. Ying, sworn land surveyor, of the 20th and 26th August, 1935, as having been demarcated on the ground:

N $\frac{2}{5}$ of lot B/1.
E $\frac{1}{3}$ of lot B/2,
W $\frac{1}{2}$ of lot B/4, and
E $\frac{1}{3}$ of lot B/5

Jahuran did not have title for the entire interest in lots B/5 and B/6. However, lots B/5 and B/6 were subdivided among the parties to the agreement of the 9th August, 1935, as if the 5 legatees of Jahuran (of whom Jamiran and Aliman were two) owned the entire interest in those lots, and not merely one-third therein.

From the agreement of the 9th August, 1935 (which was carried into effect by the survey of Mr. W. E. Ying and his plans of the 20th and 26th days of August, 1935) the inference is clear

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that on or before the 9th August, 1935, (assuming he did not know prior thereto) the plaintiff Mangal well knew that his transport of the 29th July, 1935, did not confer title in his favour for 2/5 of lot B/1. He also knew on the 9th August, 1935, that by the agreement he would be allotted the N 2/5 of lot B/1.

In paragraphs 13, 14 and 16 of his Reasons of Oppositions the plaintiff alleged that, acting on the belief that he had purchased 2/5 of lot B/1.

- (a) on the 9th August, 1935 he entered into the agreement previously referred to, to make a partition of lots B/1, B/2, W½ of B/4, B/5 and B/6 in manner specified in the agreement in order to avoid disputes as to their respective holdings and occupations;
- (b) he joined with Haliman and Safiran, the other parties to the agreement, in having a survey and sub-division made by W. E. Ying, Sworn Land Surveyor, for the purposes of the agreement;
- (c) he commenced extensive repairs and alterations to the two buildings purchased at execution sale; and
- (d) subsequent to the 26th August, 1935, and in accordance with the agreement and survey, he paled the N 2/5 of lot B/1, allotted to him under the agreement with Haliman and Safiran, he raised the level of N 2/5 of lot B/1 by filling it with earth and he cultivated it.

It was alleged by the plaintiff in paragraph 17 of his Reasons of Opposition that Jamiran, Aliman and the defendant Mahamad Haniff—

- (a) well knew or shared in the belief that the plaintiff had in fact purchased 2/5 of lot B/1 at execution sale on the 25th June, 1935; or
- (b) alternatively, if they did not, then by their subsequent conduct they acquiesced in a mistake of the plaintiff and are estopped by delay from claiming the said lands.

Particulars of the “subsequent conduct” of Jamiran, Aliman and the defendant Mahamad Haniff are contained in paragraphs 15 and 16 of the Reasons of Opposition wherein it was alleged that Jamiran, Aliman and the defendant Mahamad Haniff, well knew:

- (a) that W. E. Ying, Sworn Land Surveyor, made a survey on the 20th August 1935 of lots B/1, B/2, W½ of B/4, B/5 and B/6;
- (b) that on the 26th August, 1935 he (W. E. Ying) allotted to the plaintiff *inter alia* N2/5 of lot B/1, in accordance with an agreement made on the 19th August, 1935, (this is the agreement of the 9th August, 1935, previously mentioned) with Haliman and Safiran in whom 3/5 of lots B/1, B/2, W½ of B/4, ½ of B/5 and ½ of B/6 were vested by purchase and/or devolution;
- (c) that subsequent to the 26th August, 1935, and in accordance with the allotment, the plaintiff proceeded to pale the N 2/5 of lot B/1 and to raise the lot by filling it with earth and to cultivate the same.

The plaintiff paid W. E. Ying the sum of \$32.40 in respect of the survey of the lands allotted to him under the agreement of the 9th August, 1935: the survey fees in respect of N 2/5 of lot B/1 would be \$8. The plaintiff enclosed the N 2/5 of lot B/1 with palings at a cost, as alleged by him, of \$60. He states that at a cost of \$80 he filled up the N 2/5 of lot B/1 (which had been in the possession of Jamiran and Aliman) with 130 to 140 cartloads of earth obtained from Uitvlugt estate. He also stated that he effected general repairs to the buildings purchased by him, and

that he put up a gallery to one building. I am not satisfied that the cost of filling up the land was as high as \$80: the cartage and other expenditure even if 140 cartloads of earth were deposited on the land could not have exceeded \$25. The repairs effected by the plaintiff to the buildings purchased by him at execution were not "extensive": they merely consisted of patching and general maintenance work. The palings and the buildings may be removed by the plaintiff at any time, without the consent of the defendant.

When the survey was made, when the plaintiff commenced to fill up the N 2/5 of lot B/1, when he commenced to effect repairs to the buildings which he had purchased at execution sale on the 25th June, 1935, when he commenced to erect palings around the N 2/5 of lot B/1, and when he commenced to cultivate that land, he already had knowledge that he had not purchased any interest in lot B/1 at the execution sale, and that the 2/5 of lot B/1 which had been occupied by Jamiran and Aliman up to the 25th June, 1935, still belonged to them. In *Proctor v. Bennis* (1887) 36 Ch. D. 760, 762, a case in which the defendants relied upon the equitable doctrine of acquiescence and also upon the legal doctrine of estoppel by conduct, Bowen, L.J. said:

It seems to me that the true inference of fact to be drawn here is, that the defendants were acting at their own peril throughout, and knew throughout that they were so acting.

Although they reckoned on security, and although for a long time the plaintiff did not interfere, there was nothing on the part of the plaintiff to lull them into security.

In this case, the plaintiff is relying upon the equitable doctrine of acquiescence and also upon the legal doctrine of estoppel by conduct. The plaintiff was acting at his own peril throughout and knew throughout that he was so acting. Although he reckoned on security and although for some time Jamiran and Aliman did not interfere, there was nothing on their part to lull him into security.

About 2 months after the sale at execution, Mohadeo had a conversation with Mahamad Haniff who, subsequently, made inquiries and ascertained that the 2/5 of lot B/1 owned by Jamiran and Aliman had not been sold at execution sale on the 25th June, 1935. The title of Jamiran and Aliman to 2/5 of lot B/1 was defective, and legal proceedings were necessary, in order that Jamiran and Aliman might have a good title thereto. Jamiran left a will in which she appointed the defendant as her executor and in which she named the defendant and Sahidan Bibi as her legatees. Probate of the said will was granted in favour of the defendant on the 22nd October 1936.

The defendant accumulated money for legal fees and expenses, and on the 1st February, 1937, he joined with Aliman in making application to the Court for rectification of Transport dated 29th June, 1889, No. 164, in favour of Jahuran. The amendment asked

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for was that the words “lot B/1 part of lot La B” be substituted for “lot B part of La B” in the Transport, The plaintiff says that he opposed the making of the order, and that he had counsel appearing on his behalf. The Court made an order on the 22nd March, 1937, in terms of the application.

On the making of the said order, the defendant in his capacity as executor under the last will and testament of Jamiran, deceased, and Aliman acquired full and absolute title for 2/5 of lot B/1, Uitvlugt. The plaintiff’s attempt to avoid this result did not succeed. He, however, continued in possession.

After the order for rectification was made the defendant on a day between 22nd March, 1937, and 2nd April, 1938, entered on N 2/5 of lot B/1 and picked coconuts. The plaintiff seized the coconuts; put them in a bag, called a rural constable: and the coconuts and the defendant were removed to Stewartville police station. The plaintiff told the police that he had purchased the land on which the coconuts were picked; and the defendant showed the police the order of rectification which was made by the Supreme Court. The police instituted no charge against the defendant, and the plaintiff did not sign any charge against the defendant. The plaintiff continued in possession despite the entry of the defendant.

On the 2nd April, 1938, Mr. A. T. Peters, barrister-at-law, on behalf of the defendant in his capacity as executor of the estate of Jamiran, deceased, wrote the plaintiff demanding the sum of \$500 as damages for trespass on lot B/1. and requiring him to desist immediately from committing any further acts of trespass on lot B/1, Uitvlugt.

In *Ramsden v. Dyson* (1865) L.R. 1 H.L. 129, 140, 141, Lord Cranworth, L.C., said:

If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own.

This passage was cited with approval, and applied, by the Judicial Committee of the Privy Council in *Michaud v. City of Montreal* (1923) 92 L.J., P.C., 161, 163, a case which no one will suggest as being one to which the rule above laid down was not properly applicable. It was also cited with approval by Cotton, L.J., in *Proctor v. Bennis* (1887) 36 Ch. D. 760, but not applied, as the facts did not warrant its application: see also *Weller v. Stone* (1885) 54 L.J., Ch. 407, per Fry, L.J.

In *Ramsden v. Dyson*, Lord Cranworth (at page 141) continued:

It (a Court of equity) considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

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In *Proctor v. Bennis*, after citing the above passage with approval, Cotton, L. J., said:

That lays down the principle which was applied to the particular case there under discussion, where it was contended (but unsuccessfully) that a landowner had lost his right to recover the land and turn out those who were tenants from year to year or tenants at will, because he had not objected to their building. It is necessary that the person who alleges this lying by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title.

I may here mention that, in this Colony, if a person builds on the land of another, the owner of the land does not acquire ownership of the buildings. The rule of law is however different in England.

In *Ramsden v. Dyson* Lord Cranworth (at page 141) continued:

But it will be observed that to raise such an equity two things are required: *first*, that the person expending the money supposes himself to be building on his own land; *and secondly*, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal right.

In this case when the plaintiff began to expend money on filling up the N/5 of lot B/1, on the erection of palings and on cultivating the land, he did not suppose that he was expending the money on his own land: he knew he was not. Further, at that time Jamiran and Aliman did not yet know that the land belonged to them. In this Colony the plaintiff would be entitled to remove the palings. And there would be nothing in the conduct of Jamiran and Aliman to make it inequitable in them to assert their legal rights.

In *Michaud v. City of Montreal* the facts were as follows:—

An owner of a strip of land had offered to present it to a city council for the purpose of widening a street in the city and he himself presided as Mayor at a meeting of the council at which a resolution was passed accepting the gift. The city, while he was still mayor, took possession of the land, and spent money in paving it and fitting it for public use, without any objection on his part. It was held by the Judicial Committee of the Privy Council that he was estopped from alleging that the gift was made subject to a condition which had not been fulfilled, or that it was ineffective because it was not carried out by a notarial act. In delivering the judgment of the Judicial Committee of the Privy Council, Viscount Cave, L.C. said:

The appellant, the Mayor of the City, offered to give this land; his gift was accepted; the city took possession, spent money on the land, believing it to be theirs; and the appellant, although he must have perceived their mistake, abstained from setting them right, and left them to persevere in their belief and to spend their money on the property. In those circumstances a Court of Equity, either in this country or in the Dominion of Canada, will not permit a man afterwards to assert his title to the land in question; in short, he is estopped from doing so. It is true that the City,

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after taking possession, attempted to obtain a formal conveyance of the land; but it is plain that that was done only for the purpose of having an authentic record of the transaction and the attempt cannot affect the right which they had already acquired in consequence of the conduct pursued by the appellants.

In the present case there are none of the features that existed in *Michaud v. City of Montreal*, or in *Dillwyn v. Llewellyn* (1862) 4 De Gex, Fisher & Jones 517, which case was similar to *Gregory v. Mighell* (1811) 18 Vesey 328, which was the foundation of Lord Kingsdown's rule in *Ramsden v. Dyson* (at pages 170 and 171 of the report).

In *Canadian Pacific Railway Company v. The King* (1931)

A.C. 414, 429, Lord Russell of Killowen, in delivering the judgment of the Judicial Committee of the Privy Council said:

In the course of the judgments in *Ramsden v. Dyson* instances are given in which equity will intervene in favour of a litigant as against the legal owner of land. One such is the case where A. builds on land which he thinks is his, but is really B.'s, and B., knowing of A.'s mistake, encourages A. to build either directly or by abstaining from asserting his legal right. In such a case equity will intervene for the protection of A.

The foundation upon which reposes the right of equity to intervene is either contract or the evidence of some fact which the legal owner is estopped from denying. Thus, in the case put, B.'s conduct is such that from it may be inferred a contract by B. not to disturb A. in the possession of the land, or it may amount to a statement by B. that the land is A.'s, upon the faith of which A. has acted and built.

Reference may properly be made to a case before this Board, *Lala Beni Ram v. Kundun Lall*, L.R. 26 Indian Appeals 58, in which the necessity for contract as a basis for this intervention of equity is made clear. In that case tenants of land had successfully resisted ejection after the determination of their lease, upon the ground that the landowners by standing by and allowing buildings to be erected on the land by the tenants, were estopped from ejecting the tenants. On appeal from the High Court of Allahabad this Board was of opinion that the judgments appealed from should be reversed and ejection decreed. In the view of the Board in order to raise the estoppel which the Courts below had enforced against the owner of the land, "it was incumbent upon the respondents to show that the conduct of the owners, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation."

In this case there is no foundation whatever for the application of the equitable doctrine of estoppel, as expounded by Lord Russell of Killowen. There can be no suggestion in this case that Jamiran and Aliman ever encouraged the plaintiff to spend money on N 2/5 of lot B/1 on the survey, on the filling up of the land, on the repairs to the buildings purchased by the plaintiff at execution sale on the 25th June, 1935, and removable from N 2/5 of lot B/1 at the will of the plaintiff; on the erection of palings, or in the cultivation of the land. There is nothing to justify the implication that Jamiran and Aliman had agreed with the plaintiff that his occupation (which had begun only on the 26th June, 1935,) should be changed into a perpetual right of occupation.

In this judgment I do not propose to deal with the rule laid down by Lord Kingsdown in *Ramsden v. Dyson* (at pages 170,

171) which rule was cited with approval by the Judicial Committee of the Privy Council in *Plimmer v. Mayor, etc., of City of Wellington* (1884) L.P. 9 A.C. 699, 710, 711, and was explained by the Judicial Committee of the Privy Council in *Ariff v. Rai Jadunath Majumdar Bahadur* (1931) 47 T. L.R 238, as Lord Kingsdown's rule is not applicable to the facts and circumstances of this case.

In *Willmott v. Barber* (1880) 15 Ch. D. 96, 105, Fry, J. said:

A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up these rights. What, then, are the elements or requisites necessary to constitute fraud of that description. *In the first place*, the plaintiff must have made a mistake as to his legal rights. *Secondly*, the plaintiff must have expended some money, or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. *Thirdly*, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. *Fourthly*, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. *Lastly*, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

In *Russell v. Watts* (1883) 25 Ch. D. 559, 585, 586, C. A., Fry, L. J. adhered to the above expression of opinion on the subject of acquiescence as a bar to the assertion of a legal right.

In this case Jamiran and Aliman were not (and their executors are not) barred from asserting and exercising their legal rights to 2/5 of lot B/1, because:

- (1) the plaintiff did not make any mistake as to his legal rights: he well knew before he began to incur any expenditure that he had no legal rights, and that the legal rights, in the land of which he was in occupation, were in Jamiran and Aliman;
- (2) the plaintiff did not expend any money on the faith of any mistaken belief. He spent the money in order that he might make it appear that he was the owner to the land;
- (3) Jamiran and Aliman, the owners of the legal right did not know that they were the owners thereof. If the plaintiff did believe that he was the owner, then Jamiran and Aliman were in the same position as the plaintiff, as the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights; and
- (4) Jamiran and Aliman never at any time encouraged the plaintiff in his expenditure of money, either directly or by abstaining from asserting his legal right. Jamiran and Aliman did not know that the plaintiff was expending money on the land: they were at Pln. Diamond, East Bank, Demerara. They could not be said to have

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abstained from asserting their legal right, when they did not know of their legal right.

In *Russell v. Watts* (at page 576), Cotton, L.J. said:

He (the Vice-Chancellor) appeared to consider that there was some equity arising against the defendants from their allowing the owner of the other block . . . to erect the buildings on those different blocks. In my opinion, the facts of the case do not justify the conclusion that there is any equity against them. They did nothing; it is true they saw him going on, but he knew the title and facts as well as they did. The doctrine as to a person lying by so as to create an equity against him arises, if either he does something from which it can be reasonably inferred that he induced the other persons to think he would raise no objection to what they were doing; or if he knows facts which are unknown to the other persons acting in violation of the right which those facts give, and does not inform them about it, but lies by and let them run into a trap.

In this case, even assuming that Jamiran and Aliman knew the facts about their title to 2/5 of lot B/1 at the same time as the plaintiff, and that they had seen him proceeding with the incurring of expenditure no equity would have been raised against them in favour of the plaintiff. There is no evidence that, after knowledge by Jamiran and Aliman of their title, they acted in such a way as to induce the plaintiff to believe that they would raise no objection to what he was doing: the plaintiff began to incur expenditure within 2 months after the execution sale and within a month after the judicial sale transport, and before Jamiran and Aliman were aware of their legal rights. Jamiran and Aliman knew no facts which were unknown to the plaintiff: on the other hand, the plaintiff knew facts which were unknown to Jamiran and Aliman and he did not inform them about these facts. There can be no suggestion that Jamiran and Aliman (the two old ladies) lay by, and let the plaintiff run into a trap.

It therefore follows that Jamiran and Aliman (for their executors) are not estopped from asserting or exercising, as against the plaintiff, their legal right to 2/5 of lot B/1, and they are not precluded, by the equitable doctrine of acquiescence, from asserting, as against the plaintiff, their legal right to 2/5 of lot B/1.

The plaintiff, at the time of the institution of this action, was in possession for only 3 years. The solicitor for the plaintiff urged that a bare right of possession confers a right to oppose. He cited *Paddenburg v. Pereira* (1897), L.R.B.G. 21 which, however, is only an authority on who has the right (or the burden) to begin. The plaintiff is in possession, but he has no right to be, or to continue, in possession. He had no right to oppose the transport.

The claim of the plaintiff for:

- (a) an injunction restraining the defendant from passing transport in favour of the defendant in his own right and of Sahidan Bibi as devisees under the last will and testament of Jamiran of—
 one undivided fifth part or share of and in lot B/1 part of lot La B, part of that part of the front lands of Plantation de Groete-en-Klyne

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Uitvlugt, situate on the west sea coast of the county of Demerara, laid out and defined on a diagram of allotments of the front lands of Plantation de Groeten-Klyne Uitvlugt, by the Sworn Land Surveyor. William Downer, dated the 9th day of October, 1849, and deposited in the Registrar's Office of the counties of Demerara and Essequibo on the 29th day of November, 1849, save and except that portion of said lot La B forming and being a continuation of the line of Toad reserved between the adjoining lots, laid down on the said diagram and now running from the public road to lot La B, said lot B/1 being laid down and defined on a plan of lot B (4 acres, 144 roods) forming part of allotments on the front of Plantation Uitvlugt, by John Peter Prass, Sworn Land Surveyor, dated 3rd March, 1883, and deposited in the Registrar's Office of British Guiana on the 17th April, 1883, without the buildings thereon;

- (b) an order that the opposition entered by the plaintiff on the 13th August, 1938, against the passing of the said transport (which was advertised in the *Official Gazette* of the 30th July, 1938, and the 6th and 13th days of August, 1938) is just, legal and well-founded;
- (f) *alternatively*, the sum of \$300 as compensation for improvements effected and expenses incurred by the plaintiff with respect to the above described property with the knowledge and approval and to the benefit of the defendant and the defendant's testatrix Jamiran, female East Indian, No. 12 *Casual*, 1885, deceased;
- (g) such further or other order as to the Court shall seem meet; and
- (h) the costs of these proceedings,—

must therefore be refused.

The writ in this action was filed on the 22nd August, 1938, and the statement of claim was filed on the 28th October, 1938. On the 11th February, 1939, the defendant filed a defence and counter-claim. The counter-claim reads as follows:

By paragraphs 13 and 14 of the Reasons of Opposition as appear in the Statement of Claim herein, the plaintiff's building's are situated on land part of lot B/1 which was allotted under the agreement alleged in the said paragraphs as the shares of the defendant's testator (Jamiran) and her sister Aliman. The defendant and Aliman accept the said agreement and ratify the conduct of the plaintiff in the execution thereof. The defendant claims:

- (a) Possession of that portion of lot B/1 on which the plaintiff's two buildings are situated.
- (b) \$100 mesne profits.
- (c) Costs.

After the solicitor for the plaintiff had replied on behalf of the plaintiff at the trial of this action counsel for the defendant asked for an order joining as a party to the action Mahamad Haniff in his capacity as executor under the last will and testament of Aliman, female East Indian, No. 13 *Casual*, 1885, deceased, probate whereof was duly granted by the Supreme Court of British Guiana. This application was opposed by the plaintiff's solicitor. It was not argued, with reference to the special rules relating to oppositions, and consequently I express no opinion as to as to whether it is an application which may properly be granted by the Court.

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The plaintiff has submitted that I cannot make an order for possession as Aliman is not a party to this action. This point was not fully argued, and I think that it would be better to make an order for possession in an action in which not only the estate of Jamiran, but also the estate of Aliman, is represented. I therefore make no order for possession. But there will be a declaration that the defendant Mahamad Haniff in his capacity as the executor under the last will and testament of Jamiran, female East Indian No. 12 *Casual* 1885, deceased, probate whereof was duly granted by the Supreme Court of British Guiana on the 22nd day of October, 1936 (along with Mahamad Haniff, the executor under the last will and testament of Aliman, female East Indian No. 13 *Casual* 1885, deceased) is entitled, as against the plaintiff Mangal, male B.R. No. 431 of 1889, to possession of the—

Northern two fifths of lot B/1, Uitvlugt, the said lot B/1 being laid down and defined on a plan of lot B, Uitvlugt, made by John Peter Prass, Sworn Land Surveyor, dated 3rd March, 1883, and deposited in the Registrar's Office of British Guiana on the 17th April, 1883, without the buildings and erections thereon.

There will be judgment for the defendant with costs on the claim, and the judgment will include a declaration that the opposition entered by the plaintiff on the 13th August, 1938 to the passing of the transport of the land described in paragraph 1 (one) of the Statement of Claim (which was advertised in the *Official Gazette* of the 30th July, 1938 and the 6th and 13th days of August, 1938) was not just, legal or well-founded. On the counterclaim, there will be an order that the defendant is at liberty to bring a fresh action for possession and for mesne profits based on the same grounds as those contained in the counterclaim, and there will be judgment for the defendant against the plaintiff for the declaration which I have already set out with costs. And I certify for counsel.

Judgment for defendant.

Solicitor for defendant: *W. D. Dinally.*

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 MABEL CLEMENTINA BRAITHWAITE, Plaintiff,
 v.
 WALTER ARNOT BRAITHWAITE, Defendant.
 [1943, No. 5.—DEMERARA].
 BEFORE DUKE, J. (Acting): IN CHAMBERS,
 1943. APRIL 12, 13, 14, 15, 28.

Practice—Defendant—Sued in a representative capacity—Rules of Court, 1900, Order 4, rules 4, 5—Counterclaim by defendant in personal capacity against plaintiff—May be filed.

Will—Solemn form of law—May be proved in—Not only by executor—Also by any person interested therein.

Practice—Joinder of parties—Application of defendant to join a person as co-defendant—Relief which proposed defendant desired to claim, could be claimed by defendant—Presence of proposed defendant before Court not necessary in order to enable Court effectually and completely to adjudicate upon and settle all the questions involved in the action—Defendant’s application refused—Rules of Court, 1900, Order 14, rule 13.

Practice—Probate actions—Intervention—By whom application therefor to be made—Only by proposed intervener, not by person already a party to action—If application made by party to action—Refused.

Practice—Probate actions—Power of Court—To grant leave to person not named in writ—To intervene and enter appearance—Relief which proposed intervener proposed to claim—Could be claimed by defendant by way of counterclaim—No conflict of interest between defendant and proposed intervener—Leave granted to intervene—Costs of intervener to be paid in any event by ntervener.

Where a defendant is sued in a “representative capacity” within the meaning of rules 4 and 5 of Order 4 of the Rules of Court, 1900, he can, in his personal capacity, file a counter claim against the plaintiff.

In re Richardson, Richardson v. Nicholson (1933) W.N. 90, C.A., applied.

A will may be proved in solemn form not only by the executor but also by any person interested therein.

A. obtained a grant of probate in common form of the will of B. dated the 2nd May, 1942. C, the widow of B., filed a writ against A. claiming (1) that the probate be revoked as the will of the 2nd May, 1942, was revoked by a will executed on the 4th August, 1942, and (2) that the will of the 4th August, 1942, was revoked by B., by destruction, that B. died intestate, and a grant of Letters of Administration should issue in her favour.

A., his son, his two nephews and C. were legatees, and the bequests to them were the same, under both wills. A. was not an executor under the will of the 4th August, 1942.

A., took out a summons for an order that his sister D., one of the three executors under the will of the 4th August, 1942, be added as a defendant. In support of that summons he filed an affidavit in which he stated that on the 27th September, 1942, B. gave him instructions to tear up the will of the 4th August, 1942, “with the expressed intention of reviving his previous will of the 2nd May, 1942.”

There was no conflict of interests between A., A.’s son and A.’s two nephews on the one hand, and D. on the other hand.

D. was not named as a legatee in the will of the 4th August, 1942.

Held, (1) that A. could not only counterclaim that the will of the 2nd May, 1942, be proved in solemn form of law; he could also counterclaim that the will of the 4th August, 1942, be proved in solemn form of law;

(2) that D., who was named as an executor in the will of the 4th August, 1942, would not be added as a defendant, as her presence before the Court was not necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action.

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In probate actions the Court may grant leave to any person not named in the writ, to intervene and enter appearance.

Moses v. Storey (1928) L.R. B.G. 22, applied.

The nature of intervention connotes that an application therefor cannot be made by a person who is already a party to the action. Such an application can only be made by the proposed intervener.

Where the relief which the proposed intervener desired to claim was relief which the defendant could claim by way of counterclaim, and where there was no conflict of interest between the defendant and the person applying for leave to intervene, the Court granted leave to the applicant to intervene as a defendant upon the terms that the applicant's costs of and incidental to her intervention will in any event be borne by the intervener out of her own property.

SUMMONS by the defendant that Ruth Ann Verschuer be at liberty to intervene in this action as a defendant: alternatively, that she be added as a defendant.

A. J. Parkes, for the applicant (defendant).

H. C. Humphrys, K.C., for the respondent (plaintiff).

Cur. adv. vult.

DUKE, J. (Acting): This is a summons taken out by the defendant—

(1) (a) for an order that Ruth Ann Verschuer, the wife of John Verschuer, be at liberty to intervene in this action as a defendant,

(b) alternatively, that the said Ruth Ann Verschuer be added as a defendant and that the writ of summons and subsequent proceedings be amended accordingly and that the service on and appearance entered herein by the defendant, Walter Arnot Braithwaite, do stand; and

(2) that the costs of and occasioned by this application be costs in the cause.

Nathaniel Augustus Braithwaite died in this colony on the 28th November, 1942. On the 18th December, 1942, a document dated the 2nd May, 1942, purporting to be his last will and testament was deposited with proof of due execution in the Registry of the Supreme Court. That document contained the following clause:—

5. I appoint my son, Walter Arnot Braithwaite, to be the executor and trustee of this my will, and on his death, refusal to act or continue to act, or on his incapacity to act from any cause, I appoint my daughter, Ruth Ann Verschuer...to be my executrix and trustee, and all full powers to act herein known to law and equity.

Walter Arnot Braithwaite applied for probate in common form of the will of the 2nd May, 1942, and under the authority of sections 24 and 26 of the Deceased Persons Estates Administration Ordinance, cap. 149 and in pursuance of an order of the Court, probate of the said will of Nathaniel Augustus Braithwaite was issued to Walter Arnot Braithwaite, on the 31st day of December, 1942.

M. C. BRAITHWAITE v. W. A. BRAITHWAITE.

The plaintiff, Mabel Clementina Braithwaite, is the widow of Nathaniel Augustus Braithwaite to whom she was married on the 23rd November, 1918.

On the 7th January, 1943, the plaintiff issued the writ in this action claiming—

- (1) that the probate of the will of the 2nd May, 1942 which was issued in favour of the defendant Walter Arnot Braithwaite should be revoked, inasmuch as that will was revoked by a will executed by Nathaniel Augustus Braithwaite on the 4th August, 1942; and
- (2) that the deceased died intestate and a grant of Letters of Administration should issue in her favour, inasmuch as the will of the 4th August, 1942 was revoked by the said Nathaniel Augustus Braithwaite by destruction.

The writ was served on the defendant Walter Arnot Braithwaite on the 8th January, 1943, and he entered appearance on the 15th January, 1943. The plaintiff filed her statement of claim on the 4th March, 1943.

In the statement of claim she alleged that “in the month of October, 1942, the said Nathaniel Augustus Braithwaite, with the express intention of revoking the said will (of the 4th August, 1942), obtained it from the Reverend Charles Gordon Smith (one of the executors named therein to whom it had been handed by the said Nathaniel Augustus Braithwaite for sale keeping) and with the said intention of revoking it directed and caused it to be destroyed in his presence by being torn into several pieces. The said Nathaniel Augustus Braithwaite made no further will.”

In the main, the provisions of the will of the 2nd May, 1942, are the same as those of the will of the 4th August, 1942. However, the defendant is not an executor under the will of the 4th August, 1942: the executors thereunder are Ruth Ann Verschuer (daughter of the deceased), the wife of John Verschuer, Rev. Charles Gordon Smith, and Colin Coleridge King, nephew of the deceased.

The following legatees and bequests are the same under both wills:—

- (a) Walter Arnot Braithwaite, son of the deceased: Lot 271, Forshaw Street, Queenstown, Georgetown, subject to the bequest in favour of the plaintiff Mabel Clementina Braithwaite;
- (b) Courtney Lloyd Fleming Braithwaite, son of the said Walter Arnot Braithwaite: Lot 273, Forshaw Street, Queenstown, Georgetown, subject to the bequest in favour of the plaintiff Mabel Clementina Braithwaite;
- (c) Wallace Allan Mitchell and Clifford Frederick Mitchell, sons of Margaret Angela Mitchell born Braithwaite, a daughter of the deceased: West half of lot 33, David Street, Kitty, subject to the bequest in favour of the plaintiff Mabel Clementina Braithwaite: and
- (d) Mabel Clementina Braithwaite, widow of the deceased: During her life and so long as she remains the widow of the deceased, the sum of \$40 per month out of the net revenues of lots 271 and 273, Forshaw Street, Queenstown, Georgetown, and of the west half of lot 33, David Street, Kitty.

The defendant has not filed a defence in this action, but on the 7th April, 1943, he issued the summons herein. This summons is supported by his affidavit, and by an affidavit of his sister, Ruth Ann Verschuer. In his affidavit the defendant states that by the

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will of the 4th August, 1942, his sister Ruth Ann Verschuer was appointed one of the executors, and that on the 27th day of September, 1942, the deceased Nathaniel Augustus Braithwaite gave him instructions to tear up the will of the 4th August, 1942, "with the expressed intention of reviving his previous will of the 2nd May, 1942." In her affidavit Ruth Ann Verschuer states that she is one of the executors appointed by the will of the 4th August, 1942, which will is referred to in the statement of claim as having been revoked by the deceased: that she believes her brother the defendant, and the deceased also informed her, that on the 27th day of September, 1942, the deceased Nathaniel Augustus Braithwaite gave instructions to tear up the will of the 4th August, 1942, "with the expressed intention of reviving his previous will of the 2nd May, 1942."

The defendant and Ruth Ann Verschuer are agreed upon the facts which are to be presented to the Court at the trial of the action. It seems that, on those facts, the defendant proposes to ask that probate of the will of the 2nd May, 1942, (already granted to him in common form on the 31st December, 1942,) be granted to him in solemn form of law. He has not filed his defence, so that the Court does not know definitely whether this is so, or whether he will ask, in the alternative, that it be decreed that the will of the 4th August, 1942, is the last will of the deceased and was valid and subsisting at the time of the death of Nathaniel Augustus Braithwaite on the 28th day of November, 1942. It appears, however, that Ruth Ann Verschuer proposes, on the same facts, to claim the alternative relief, because in paragraph 4 of her affidavit she states: "I desire to intervene in this action, alternatively, to be added as a defendant therein in order to apply to the Court for probate in solemn form of the will of the of the deceased of the 4th August, 1942".

The defendant is a specific legatee under the will of the 4th August, 1942. Ruth Ann Verschuer, although named as an executor therein, is not named as a legatee thereunder. The defendant to this action is Walter Arnot Braithwaite. On the 31st December, 1942, he had obtained probate in common form of the will of the 2nd May, 1942, and he is a beneficiary under the will, and so the writ was issued against him because he is executor and a beneficiary under the will of the 2nd May, 1942, which will the plaintiff claims was revoked on the 4th August, 1942. Had the defendant set up, or joined in setting up, the will of the 4th August, 1942, it would have been stated that he was so sued. The will of the 4th August, 1942, has not been deposited in the Registry of Court, either by the defendant, or Ruth Ann Verschuer or any other person.

In the case of *In re Richardson, Richardson v. Nicholson* (1933) W.N. 90, the Court of Appeal held that where a plaintiff sued in her personal capacity, the defendant could counterclaim

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against the plaintiff in her capacity as administratrix. On the authority of this judgment I hold that assuming (but not deciding) that the defendant Walter Arnot Braithwaite was sued in a "representative capacity" within the meaning of rules 4 and 5 of Order 4 of the Rules of Court 1900, the defendant in his personal capacity could file a counterclaim against the plaintiff.

A will may be proved in solemn form not only by the executor but also by any person interested therein: *Tristram & Coote's* Probate Practice, 17th edition, p. 437. The defendant can therefore ask for the same relief which Ruth Ann Verschuer proposes to claim. Counsel for the defendant has stated that there is no conflict between the defendant and Ruth Ann Verschuer, and that the conflict is between the plaintiff on the one hand, and the defendant, Ruth Ann Verschuer and the grandchildren of the deceased who are legatees under the wills of the 2nd May, 1942, and on the 4th August, 1942 on the other hand.

In these circumstances, the presence of Ruth Ann Verschuer before the Court is not necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action. Consequently, she will not be added as a defendant under Order 14, rule 13 of the Rules of Court, 1900.

Counsel for the defendant has, however, asked that Ruth Ann Verschuer be at liberty to intervene in this action as a defendant. It is submitted on behalf of the plaintiff that, assuming that the Court has jurisdiction to make such an order, the application therefor should be made by the proposed intervener herself. The nature of intervention connotes that an application therefor cannot be made by a person who is already a party to the action. I therefore agree with this submission. The defendant's summons is consequently dismissed with costs to be recoverable from the defendant in his personal capacity, and I certify for Counsel.

However, in her affidavit filed in support of the defendant's summons, Ruth Ann Verschuer has herself made an application that she be allowed to intervene in the action in order to apply to the Court for probate in solemn form of the will of the 4th August, 1942; and she has stated the grounds of her application. The defendant is privy to the application and a consenting party thereto: and notice of the application has been served upon the plaintiff. The Court will therefore proceed to deal with the application of Ruth Ann Verschuer that she be at liberty to intervene in this action as a defendant.

In *Crickitt v. Crickitt* (1902) P. 187, Cozens-Hardy, L.J. stated that "the system or practice of intervention is really part of the canon law administered by the Ecclesiastical Courts". That canon law has not been declared to be part of the common law of

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this Colony. However, according to Douglas, J. in *Moses v. Storey* (1928) L.R.B.G. 22, "it has been the practice of this Court, in the absence of any local probate rule to follow as nearly as may be consistent with local conditions the practice obtaining in England", that is to say, the practice existing in England before any alterations thereto were made by the English Rules of the Supreme Court: see *Rampersaud Singh v. Ramlogan et al* (1924) L.R.B.G. 179, and *Budwah v. Gafoor* (1928) L.R.B.G. 63.

In probate actions the Court may therefore grant leave to any person not named in the writ, to intervene and enter appearance: see *Tristram & Coote's* Probate Practice, 17th edition, pp. 459, 460.

I have already indicated that, unless the defendant declines to ask that the will of the 4th August, 1942, be proved in solemn form, the interests of the defendant and the grandchildren of the deceased under the will of the 4th August, 1942, can be protected without the intervention of Ruth Ann Verschuer. Liberty is however granted to Ruth Ann Verschuer, the wife of John Verschuer, to intervene in this action as a defendant, but such liberty will be upon the terms that her costs of and incidental to her intervention will in any event be borne by her out of her own property: see *Tristram & Coote's* Probate Practice, 17th edition, p. 620. At the trial, the Court may order her to pay the costs of such other persons as the Court may think fit.

Defendants application dismissed.

Application to intervene granted.

Solicitors: *W. D. Dinally* for applicant;

M. S. Fitzpatrick for respondent.

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1943

AND IN

THE WEST INDIAN COURT OF APPEAL.

[1943].

EDITED BY

E. MORTIMER DUKE, LL.B., (Lond.),

Barrister-at-law, Middle Temple; Legal Draftsman, British Guiana.

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JUDGES
OF THE
SUPREME COURT OF BRITISH GUIANA

DURING 1943.

SIR JOHN VERITY, KT.	...Chief Justice.
WILMOT THEODORE STUART FRETZ	...First Puisne Judge.
WILLIAM HEMMING STUART	...Second Puisne Judge. (From January 1 to October 31).
EDGAR MORTIMER DUKE	...Acting Second Puisne Judge. (From January 1 to December 31).

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.

Those Reports will be cited as (1943) L.R.B.G.

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