JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1944.

SIR JOHN VERITY, KT.	— Chief Justice.
WILMOT THEODORE STUART FRETZ	— First Puisne Judge.
FREDERICK MALCOLM BOLAND	— Second Puisne Judge. (From April 30).
EDGAR MORTIMER DUKE	— Acting Second Puisne Judge. (From January 1 to April 30).

WEST INDIAN COURT OF APPEAL.

As, at present, no reports of decisions in the West Indian Court of Appeal are published separately, the decisions in that Court are included in the British Guiana Law Reports.

METHOD OF CITATION.

These Reports will be cited as (1944) **L.R.B.G.**

LIST OF CASES REPORTED

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BISSESSAR *et al,* Appellants (Defendants),

v.

DOUGLAS HAYNES, L.S.M.. No. 3128,
Respondent (Complainant).

[1943. No. 399.—DEMERARA.]

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

1944, JANUARY 7.

Criminal law and procedure—Sentence—Measure of—All the circumstances of the case to be taken into consideration—Sentence—May be of a deterrent nature.

In regard to sentence, all the circumstances should be taken into consideration as well as the particular act of each individual person convicted.

Persons who resort to violence for the expression or redress of grievances from which they believe themselves to be suffering must expect, and will receive, the penalty which such conduct attracts, and, in a proper case, they must not complain if that penalty is designed also to deter others from offending in the like case.

APPEALS from convictions of the Magistrate of the Courantyne Judicial District in cases of assault causing actual bodily harm.

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

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

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

These are appeals both against conviction and sentence in cases of assault occasioning actual bodily harm. The learned Magistrate convicted five of the appellants of the offence charged and three of common assault. In the former cases he sentenced the appellants to six months imprisonment with hard labour and in the latter he imposed a fine of $25 and $5 costs upon each appellant.

Upon the record there is evidence to support the findings of the learned Magistrate that the appellants were engaged with others on a common purpose in the course of which they assaulted divers persons who suffered thereby actual bodily harm and in

each case we are satisfied that the appellant was properly convicted.

In regard to sentence, all the circumstances should be taken into consideration as well as the particular act of each individual person convicted. Both of these factors the learned Magistrate would appear to have borne in mind and he appears also to have been careful to distinguish between the conduct of the three last named appellants and that of the others and to have measured their punishment accordingly.

Persons who resort to violence for the expression or redress of grievances from which they believe themselves to be suffering, must expect and will receive the penalty which such conduct attracts and in such cases as the present they must not complain if that penalty is designed also to deter others from offending in like case.

The appeals are dismissed with costs.

Appeal dismissed.

MANOEL C. D'ORNELLAS, *et al,* Appellants (Defendants),

v.

M. MONKOW, Respondent (Plaintiff).

[1943. No. 380.—Demerara].

BEFORE FULL COURT: SIR JOHN VERITY, C.J.,

AND DUKE, J. (Acting).

1944. January 26.

Landlord and tenant—Rent—Lawful deductions from—Constructive payments on account of rent—New lock fitted by tenant—Cost of lock deducted by tenant—When tendering rent due—Sum tendered refused by landlord—Distress for rent due—Cost of lock not a lawful deduction from rent—Distress legal.

Where a landlord, who by the terms of the tenancy is not liable to execute repairs, undertakes to provide a lock for the premises let and fails to do so, the tenant is not entitled, when tendering rent to the landlord, to deduct therefrom the cost of a lock purchased by the tenant and fitted by him to the premises.

Jones v. *Morris* (1849) 3 Exch. 742 and *Waters* v. *Weigall,* 2 Anstruther's Reports, 575, distinguished.

APPEAL by the defendants from a decision of a Magistrate of the Georgetown Judicial District in an action for damages for illegal distraint.

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

E. D. Clarke, solicitor, for respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

This is an appeal from a judgment for the plaintiff (respondent) in an action for damages for illegal distraint.

It appears that the defendants (appellants) as landlords of the respondent removed a lock from the door of the premises occupied for the purpose of repairs. It became necessary to provide a new lock and by reason of the absence of the respondent from the premises the appellants' agent did not fit the new lock forthwith and the respondent therefore purchased a lock himself, caused it to be fitted and when tendering the rent due he deducted therefrom the cost of the lock. The appellants refused to accept

the balance in full payment and distrained. The learned Magistrate held that there had been tender and that the distraint was illegal.

As is put by the learned author of *Woodfall's* Landlord and Tenant (23rd Ed. p. 544) "the tenant must, at his peril, tender the "full amount of the rent in arrears without any deductions except "in respect of actual or constructive payments on account thereof "(not items of set off)."

Deductions for amounts which may be deemed constructive payments on account of rent are strictly limited and cannot now be extended save by statute. It was sought by the respondent to bring this matter within the principle under which whenever a tenant may be ousted from his occupation on default made of a payment by his landlord he may himself make the payment and deduct such payment from the rent. It has been sought to show that in this case the protection of the premises from entry by a trespasser through the unlocked door is protective of the tenant's right of occupation and the learned Magistrate's reference to the case of *Jones* v. *Morris* (1849) 3 Exch. p. 742, appears to indicate that he adopted this view. We are of the opinion that such an application of the principle is erroneous. It might have been argued that the case falls within *Waters* v. *Weigall* as reported in 2 Anstruther's Reports, p. 575 on the ground that this is a case in which a tenant was bound to execute certain repairs to prevent further mischief but we do not think that such an argument would have succeeded inasmuch as no further mischief to the premises as distinct from the respondent's chattels was to be anticipated and, moreover, there is in this case no liability upon the landlords in law to execute such repairs. At the most the appellants' default amounted to no more than a breach of an undertaking to perform a certain specific act. This formed no part of the terms of the tenancy and threw no burden of liability upon the landlords as such. The precise nature and extent of the liability arising from this default might raise nice questions which it is unnecessary for us to answer, but it is clearly not a case which falls within the established principle as to what are lawful deductions in respect of constructive payments on account of rent.

In the circumstances the learned Magistrate erred in holding that there had been tender of the full amount of rent in arrear and that consequently the distraint was illegal.

The appeal is therefore allowed with costs, the judgment of the lower court is set aside and judgment must be entered therein for the defendants with costs also.

Appeal allowed.

ABDOOL AZIZ, Plaintiff,

v.

SANKAR SINGH, Defendant.

[1943. No. 133. DEMERARA.]

BEFORE SIR JOHN VERITY, C.J.

1944. May 4.

Animals—Steers attacked and injured by steers belonging to same owner—Animals acting in concert—Propensity of one steer to attack other steers without provocation—Knowledge of owner—Owner liable for whole damage.

Trespass to land—Action for—Foundation of—Possession—Mere permission to tie animals on land—No right to possession in holder of permission.

Trespass to land—By animals—Injury caused to goods of person other than owner of animals—Liability of owner of animals.

The action of trespass to land is founded on possession and upon infringement of the plaintiff's right thereto, and the mere acquisition of permission to tie animals upon the land of another confers upon the holder no interest in or right to possession of the land.

Cox v. Burbidge 13 C.B.N.S. 430 and *Fawcett* v. *York and North Midland Railway Co.,* 16 Q.B. 610, explained.

Where several steers, belonging to one person and acting in concert, killed steers belonging to another person, and where one of the attacking steers had to the knowledge of its owner a vicious propensity, the owner of the attacking steers is liable for the whole damage.

Arneil v. *Paterson* (1931) A.C. 560, applied.

Action for damages in respect of the loss of two steers alleged to have been killed by steers the property of the defendant.

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

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

Cur. adv. vult.

VERITY, C.J.: In this case the plaintiff seeks to recover damages in respect of the loss of two steers alleged to have been killed by steers the property of the defendant.

By his statement of claim he alleges that the defendant's steers wrongly entered upon certain land on which the plaintiff's steers were tethered by permission of the owner and there inflicted injuries which resulted in the death of his animals. In the alternative he alleges that the defendant so negligently controlled animals he knew to be vicious that they attacked and so injured the plaintiff's steers, as to cause their death.

The defendant alleges that there is no proof that his animals

caused the death of the plaintiff's steers, but submits that in any event the plaintiff's claim in trespass is misconceived and that in so far as the plaintiff relies in the alternative on knowledge by the defendant of the vicious propensity of his animals this has not been established by the evidence adduced.

In the first place it is convenient to record my findings of fact. There is a conflict of evidence upon almost every allegation in the pleadings but having observed the witnesses and given careful consideration to their evidence I have no hesitation in accepting the testimony of the plaintiff and his witnesses rather than that of the defendant and the witnesses called by him, for the latter almost without exception struck me as entirely unreliable, an impression confirmed by its contradictory nature on many matters material to the issue.

I find therefore that the plaintiff had four steers tied upon certain land with the owner's permission and that the defendant's four steers, having been left at large by him in the vicinity, strayed thereon and there attacked the plaintiff's steers. There is certain direct evidence of this attack but apart from this evidence all the circumstances are such as lead to no other conclusion but that the injuries which caused the death of the plaintiff's animals were the direct result of an attack upon them by those of the defendant. I find also that the animal which appears to have been the most aggressive in the attack upon the plaintiff's steers was one which had not long before, to the plaintiff's knowledge, attacked an animal the property of the witness Lilla and that the defendant was therefore aware of its propensity to attack other steers without provocation. There is on the other hand no evidence that the other three steers had ever to the defendant's knowledge or otherwise evinced any such propensity.

The question to be determined is whether in these circumstances the defendant is liable for the loss sustained by the plaintiff.

It is submitted in the first place that where the defendant's animals have trespassed upon the land of a third party then the plaintiff, apart from any question of scienter or negligence, is entitled to recover damages for any injuries to his property being on the land even though he has neither possession of the land nor interest therein, save only as a licensee. No direct authority was cited by counsel in support of this proposition but I am inclined to agree with counsel for the defendant that if this submission means that the plaintiff in such case has an action in trespass to the land the contention is not well-founded. The action of trespass to land is founded on possession and upon infringement of the plaintiff's right thereto and the mere acquisition of permission to tie animals upon the land of another confers upon the holder no interest in or right to possession of the land. On the other hand if, as appears from the argument of junior counsel for the plaintiff, the claim founded on trespass amounts to no more than a contention that the mere fact that the owner of the land could sustain an action for trespass makes the defendant liable as a wrong doer for any injury his animals may inflict upon the goods of another as a result of the trespass

then it would appear to be equally misconceived. The decisions in *Cox* v. *Burbridge* (13 C.B. (N.S.) 430) and *Fawcett* v. *The York and North Midland Railway Co.* (16 Q.B. 610) would appear to dispose of both these submissions. In the former case Erle, C.J. said "As between the owner of "the horse and an owner of the soil…….we may assume that the horse "was trespassing and if the horse had done any damage to the soil the "owner of the soil might have had a right of action against the "owner……..But in considering the claim against the defendant for injury "sustained from the kick the question of whether the horse was a "trespasser against the owner of the soil ……..has nothing to do with the "case of the plaintiff. Similarly in the latter of the two cases to which I "have referred Coleridge, J. said An issue is joined on the question whether "the horses were lawfully on the road. In one sense, perhaps, the horses "were not lawfully there; for it is possible that the surveyors of the "highway might have seized them as being wrongfully there, but "supposing the surveyor could do so, the issue is to be construed as "meaning 'lawfully' as between these two parties, the owner of the cattle "and the railway company. The railway company cannot insist on an "unlawfulness as regards a third person who does not interfere."

While it is true that both these cases refer to the presence of animals upon a highway yet it is clear that in *Cox* v. *Burbridge* a case the authority of which does not appear ever to have been questioned, the learned Chief Justice was careful so to word his observations as to cover cases of trespass other than upon a highway only and the principle involved appears to be equally applicable in the case of trespass to private lands. In considering the reasons for the rule it is perhaps significant to observe the care with which each judge in the cases cited refrain from determining finally whether or not the animals were in fact trespassing, for if the plaintiff's claim is to be based upon trespass to lands of another *per se* this would involve determining an issue of trespass as between the defendant and a third person who was not a party of the action, and one who might desire to waive or in fact waive any rights of action against the defendant by granting to him license *ex post facto* for the entry of his animals upon the land, thus destroying the supposed foundation of the defendant's liability toward the plaintiff. I am satisfied therefore that the claim of the plaintiff so far as it is based upon the alleged wrongful entry upon the land of a third party cannot be sustained.

In regard to the alternative claim counsel for the defendant does not contest the general proposition that the defendant would be liable for such damage done by an animal of known vicious propensities but submits that while, if Lillia's evidence be accepted, *scienter* may have been proved in regard to one of the defendant's animals there is no such proof in regard to the others, and that in the absence of any allegation or proof that all four animals were acting jointly or in concert the defendant would only be liable for the damage done by that one animal, and further that there is no evidence which would enable the Court to determine the measure of such damage. The question of whether or not animals acted jointly or separately in doing damage more usually arises in cases where damage is done by a number of

animals having different owners, where questions of joint tortfeasorship or contribution may be raised. In the case of damage to herbage or crops it can hardly be said that the animals act together or in concert and the question of whether or not the owners are joint tortfeasors can usually only be determined by reference to their own conduct. In the case of a number of animals attacking other animals, however, the considerations are rather different. It is still impossible to decide the question by the conception of any joint venture being set on foot by conspiracy between the animals themselves, but nevertheless where several animals at one and the same time make what is in fact a concerted attack upon some other animal or animals one must look at the circumstances of their act rather than speculate upon their intention. If in fact two dogs set upon a flock of sheep at one and the same time when they may be said in my view to be acting together or in concert, and in such case each is responsible for the whole damage. This appears to have been the basis of the decision in the case cited by counsel for the defendant (*Arneil* v. *Paterson,* 1931, A.C. p. 560). I see no reason to come to any other conclusion in the present case than that these steers acted in concert in their attack upon those of the plaintiff. They were straying together from the spot where their owner had left them at large and together in fact they attacked the plaintiff's animals. It was as the direct result of this attack that the plaintiff's steers received the injuries which caused their death. It is therefore immaterial in my view which of the animals or whether more than one actually inflicted those injuries for in such case the owners of each, were there separate owners, would be liable for the damage done by all and the mere omission from the pleadings of some such word as "together" or "jointly" makes no difference to that liability. In this case there is but one owner and he remains liable for the total sum of the damage if he is liable for any. As in my view of the evidence there is adequate proof of *scienter* in regard to one of the animals, the defendant is without question liable for the damage done by that animal and therefore for the whole damage. It would appear in the present case that there is no less than justice in this conclusion for there can be but little doubt upon the evidence that it was this animal which was in fact the leader of the attack and that if indeed it was not solely responsible for the injuries received by the plaintiff's steers it was in all probability its conduct which excited the others.

Upon my findings of fact and my view of the law judgment must be entered for the plaintiff with costs. There appears to be no conflict as to the value of the animals killed and assess the damages at the amount claimed.

Judgment for plaintiff.

F. DE FRANCE *v.* R. RAI

FRANCIS de FRANCE, Executor of MARIA SERRAO, Deceased, Appellant (Defendant),

v.

R. RAI, District Commissioner, Respondent (Complainant).

[1944. No. 118. DEMERARA.]

BEFORE FULL COURT: SIR JOHN VERITY, C.J. AND BOLAND, J.

1944. May 26.

Construction—Statutes—Headings in—To be read as part of statute—Similar weight as a preamble—Where any doubt as to construction of a section within scope of a heading—Heading may be looked at to determine effect of section.

Criminal law and procedure—Summary conviction offence—Variance — Between complaint and evidence adduced—Effect.

Intoxicating liquor licensing—Licensed premises—Power of entry by district commissioner—No authority in commissioner to search in order to ascertain whether there has been any breach of any part of Intoxicating Liquor Licensing Ordinance—Search by district commissioner impeded— No offence—Cap. 107, *ss.* 45, 83 (a), 75, 79.

Intoxicating liquor licensing—Unlicensed premises—Intoxicating Liquor Licensing Ordinance, cap. 107, s. 83*—Limited to.*

Headings in a statute are to be read as part of the statute, and much the same weight is to be attached thereto as to the preamble to an Act of Parliament. Where, therefore, there exists any doubt as to the construction to be placed upon any section falling within the scope of the heading, the words of the heading may be looked at in order to determine the effect of the section.

The powers of entry and search conferred upon a District Commissioner by sections 75 and 79 of the Intoxicating Liquor Licensing Ordinance, cap. 107, as amended by the District Administration (Transfer of Duties) Ordinance, 1937 (No. 31) are confined to authority to enter and search unlicensed premises.

The powers of entry into licensed premises implied in section 45 of Chapter 107 are confined to the purposes therein set out and do not extend to authority to search in order to ascertain whether there has been any breach of any part of the Ordinance.

Section 83 of the Intoxicating Liquor Licensing Ordinance, cap. 107 is limited to unlicensed premises.

The appellant was convicted for impeding a District Commissioner from entering and searching a room in a spirit shop contrary to section 83 (a) of the Intoxicating Liquor Licensing Ordinance, cap. 107. The respondent contended that the room formed part of licensed premises, and that there was a mere variance between the complaint and the evidence adduced.

Held (1) that if the room formed part of licensed premises and if the respondent was acting within the authority conferred by implication in section 45, the charge should have been laid under that section;

(2) that if the room in question formed no part of the licensed premises and so falls within the operation of section 83, then the offence was misdescribed in both complaint and conviction: and

(3) that there was no mere misdescription of the premises, but there was a confusion of offences so that the complaint does not enable either the defendant or the Court to determine the nature or source of the authority under which the complainant purported to act, the purpose of the entry the defendant is accused of impeding nor the real nature of the offence charged.

F. DE FRANCE *v.* R. RAI

Appeal from a conviction for impeding a District Commissioner from entering and searching a room in a spirit shop contrary to section 83 (a) of the Intoxicating Liquor Licensing Ordinance, cap. 107.

S. I. Cyrus, for the appellant.

A. C. Brazao, Acting Assistant Attorney-General, for the respondent.

The judgment of the Court was as follows: —

This is an appeal from a conviction for impeding a District Commissioner from entering and searching a room in a spirit shop contrary to section 83 (a) of the Intoxicating Liquor Licensing Ordinance, Cap. 107.

A number of grounds of appeal were raised and argued, the most substantial of which concerns the questions of the authority under which the respondent, a person authorised under sections 2 and 3 of Ordinance No. 31 of 1937, sought to enter a room in the licensed premises. While it appears to be clear that the respondent is a "District Commissioner" within the meaning of that term as defined by section 2 of the Ordinance of 1937 and is vested therefore with the powers of entry and search conferred upon a "commissary of taxation" by Cap. 107 it is still open to consideration whether he is empowered by this Ordinance to enter and search licensed premises for the purpose of ascertaining whether there has been a breach of any part of the latter Ordinance, for only in such event are the provisions of section 83 (a) applicable to the facts of this case.

This section refers to the obstruction of "any officer authorised by this “Ordinance …….to enter any premises and there to search or otherwise “ascertain whether there has been any "breach of any part of this “Ordinance."

It is to be observed that the authority referred to in this section is authority to enter "any premises" and that it is the meaning of these two words which determine the effect of the sub-section.

The authority to enter conferred upon a commissary of taxation is to be found, it is submitted, by implication in section 45 and expressly in sections 75 and 79. That conferred by section 45 is confined to licensed premises, while that conferred by sections 75 and 79 relates to "any store, shop or business premises" without word of qualification other than those to be found in the definition of "business premises" in section 2. It might be open to doubt as to what kind of "store, shop or business premises" was intended by the legislature were it not for the heading which immediately precedes section 74: "Powers of Police and Commissaries with respect to unlicensed premises." It is, we think, by now a well established rule of construction that such headings are to be read as part of the statute and that much the same weight is to be attached thereto as to the preamble to an Act of Parliament. Where, therefore, there exists any doubt as to the construction to be placed upon any section falling within the scope of the heading, the words of the heading may be looked at in order to determine the effect of the section.

Although not in terms divided into parts as is the case in certain statutes the sections of this Ordinance are in fact divided by a number of such headings as that to which we have referred. Immediately following this heading and between it and the next heading there fall sections 74 to 83 inclusive. Section 74 provides for the arrest of persons selling spirituous liquor or wine or malt liquor on unlicensed premises; section 74 authorises a commissary to enter certain premises and search for wine or malt liquor; sections 76, 77 and 78 deal with proceedings in relation to the occupier of certain premises wherein wine or malt liquor is found; section 79 authorises a commissary to enter certain premises to search for spirituous liquor; sections 80 and 81 deal with proceedings against the occupier of certain premises in which such liquor is found; and section 82 permits a dealer in spirituous liquor by wholesale to keep samples thereof in certain premises.

There are no words in these sections expressly stating whether the "stores, shops and business premises" referred to therein are licensed or unlicensed, but even if it were not fairly clear from the context that these sections are intended to refer to unlicensed premises, reference to the heading makes it abundantly plain that this is what is intended. We are quite definitely of the opinion therefore that the powers of entry and search conferred upon a commissary and, by virtue of the Ordinance of 1937, upon a "District Commissioner" by sections 75 and 79 are confined to authority to enter and search unlicensed premises. On the other hand the powers of entry into licensed premises implied in section 45 of the Ordinance are confined to the purposes therein set out and do not extend to authority to search in order to ascertain whether there has been any breach of any part of the Ordinance.

Further than this, however, it follows that if the provisions of sections 74 to 82 are limited to unlicensed premises then those of section 83 are also so limited and in that case the prosecution must fall between two stools, for if the room in question formed part of the licensed premises, as counsel for the respondent contends and if the respondent was acting within the authority conferred by implication in section 45, then the charge should have been laid under that section. If on the other hand the room in question forms no part of the licensed premises and so falls within the operation of section 83 then the offence has been misdescribed in both complaint and conviction.

It was submitted on behalf of the respondent that such a misdescription falls within the rule as to variance between the complaint and the evidence adduced, but in our view it goes a good deal deeper than that. It is no mere misdescription of the premises, but is a confusion of offences so that the complaint does not enable either the defendant or the Court to determine the nature or source of the authority under which the complainant purported to act, the purpose of the entry the defendant is accused of impeding nor the real nature of the offence charged.

In these circumstances the appellant could not properly have been convicted. The appeal is therefore allowed with costs and the conviction and sentence are set aside.

Appeal allowed.

A. GIDDINGS *v.* T. DREPAUL & ANR.

ALBERTIS GIDDINGS, (Lance Corporal of Police, No. 3908),
Appellant (Complainant),

v.

THOMAS DREPAUL and PETER DREPAUL,
Respondents (Defendants).

[1944. No. 115. DEMERARA.]

BEFORE FULL COURT: SIR JOHN VERITY, C.J. AND BOLAND, J.

1944. May 26.

Criminal law and procedure—Summary conviction offence—Complaints for recovery of fines penalties or forfeitures not especially assigned by statute to Supreme Court—Meaning of—Complaints in relation to which a fine penalty or forfeiture may be imposed—How tried—By a court of summary jurisdiction—Summary Jurisdiction (Magistrates) Ordinance, cap. 9, s. 39.

Land surveyors—Land Surveyors Ordinance, cap. 167, s. 20 (5) *—Breach of—Punishment of—Procedure.*

Land surveyors—Land Surveyors Ordinance, cap. 167, s. 20 (5) *—Breach of—Complaint for—Triable by a court of summary jurisdiction.*

Land Surveyors Ordinance, cap. 167, s. 20 (5)*—Complaint under-Right to institute—Not restricted to persons specified in section* 15 *of the Lands and Mines Department Ordinance, cap.* 166*—Where complaint relates to Crown lands—Complaint may be made by any person.*

The words "complaints for the recovery of fines, penalties or forfeitures not specially assigned by statute to the Supreme Court" in section 39 of the Summary Jurisdiction (Magistrates) Ordinance, cap. 9, mean complaints in relation to which any fine, penalty or forfeiture may be imposed.

Morris v. *Duncan* (1899) 1 Q.B. 4, applied.

A magistrate has jurisdiction to hear and determine any complaint in relation to which any fine, penalty or forfeiture may be imposed unless the jurisdiction is specially assigned by statute to the Supreme Court.

The offence under section 20 (5) of the Land Surveyors Ordinance, cap. 167, of wilfully removing a boundary mark lawfully placed on land is a summary jurisdiction offence.

Any person can institute a complaint under section 20 (5) of the Land Surveyors Ordinance, cap. 167, for wilfully removing a boundary mark lawfully placed on Crown lands. The right to institute such a complaint is not restricted to the persons specified in section 15 of the Lands and Mines Department Ordinance, cap. 166.

Appeal by the complainant from a decision of the Magistrate of the Courantyne Judicial District.

A. C. Brazao, Acting Assistant Attorney-General, for the appellant.

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

Cur. adv. vult.

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

This is an appeal by the complainant from the dismissal of a complaint laid by a member of the Police Force for an offence contrary to section 20 (5) of the Land Surveyors Ordinance

Cap. 167. The alleged offence related to the removal of a boundary mark stated to have been placed on certain Crown lands and the learned Magistrate held that inasmuch as the offence "related to Crown lands" within the meaning of section 15 of the Lands and Mines Department Ordinance, Cap. 168, the complaint could only be laid by the Commissioner or some officer of the department or other person authorised in writing by the Commissioner. As the complainant did not fall within these categories the Magistrate further held that the complaint was improperly laid and accordingly dismissed it.

We think that in so doing the learned Magistrate erred. Section 15 of Cap. 166 is permissive in its terms and does no more than provide that any of the persons referred to therein "may institute or conduct any prosecution for offences relating "to Crown lands." It does not require that he shall do so nor does it expressly provide that no other person shall do so. On the other hand section 6 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 14 provides that "anyone may make a complaint "against any person committing a summary conviction offence "unless it appears from the statute on which the complaint is "founded that a complaint for that offence shall be made only "by a particular person or class of persons." Neither section 15 of Cap. 166 which deals generally with offences relating to Crown lands nor section 20 of Cap. 167 which is the statute upon which this particular complaint is founded makes any such provision and anyone may therefore make the complaint, if indeed the offence charged is a summary conviction offence.

Counsel for the respondent, however, submitted that the offence charged is not a summary conviction offence and relied upon the doctrine that no complaint is triable summarily unless summary jurisdiction is conferred upon the magistrates by statute. He submitted that in this instance no jurisdiction is conferred upon the magistrate to hear and determine the complaint, that the dismissal was therefore right, though the reasons therefor were wrong and that the appeal should be dismissed.

This argument is sound in principle for it is well established that a court of summary jurisdiction may hear and determine complaints only where jurisdiction is conferred by statute. Almost universally such jurisdiction is conferred in each case by the statute which creates the offence and to this practice there would appear but few exceptions in the laws of this Colony. Of these, however, the Land Surveyors Ordinance is one, for neither *in* the provisions which constitute individual offences nor in any general provision is jurisdiction conferred for summary trial.

Our attention was directed, however, to section 39 of the Summary Jurisdiction (Magistrates) Ordinance, Cap. 9 which provides that the magistrate shall have jurisdiction to hear and determine all complaints for "summary conviction offences, including complaints for the recovery of fines, penalties or forfeitures not specially assigned by statute to the Supreme Court." If by the words "for the recovery of fines, penalties and “forfeitures" is meant "in relation to which any fine, penalty or forfeiture “may be imposed" then it is clear that in every such case summary jurisdiction is conferred upon the magistrate un-

less the jurisdiction is vested in the Supreme Court. In view of such decisions as *Morris* v. *Duncan* (1899) 1 Q.B. 4, it would appear that this is the meaning which should be placed upon the word "recovery" and that the Magistrate has jurisdiction in the present instance, for in that case the word "recovered" was held to include the institution of proceedings for the recovery of the penalty. We have but little doubt that this was the intention of the legislature in the enactment of section 39 of Cap. 9 and although we may be permitted to doubt the wisdom of any such general provision which contrary to common practice vests jurisdiction at large in the magistrates and requires special statutory vesting of jurisdiction in the Supreme Court, we cannot do otherwise than hold that where, as in the present case, the statute creating an offence subject to a pecuniary penalty makes no express provision as to jurisdiction the offender is liable to the penalty upon summary conviction.

The learned magistrate was vested with jurisdiction and the complaint having been properly before him he should have proceeded to hear and determine the matter on its merits.

The appeal is therefore allowed, with costs, and the case will be sent back to the lower court with instructions that it be heard and determined upon the evidence.

Appeal allowed.

OSCAR STANLEY WIGHT AND ROBERT MAR WIGHT,
Plaintiffs,

v.

BRODIE & RAINER, LIMITED, FRANCIS ISADORE LARROUY, JOHN deFREITAS, AND ANTHONY MARQUES. STANISLAUS BARCELLOS Defendants

[1943 No. 91—DEMERARA.]

BEFORE SIR JOHN VERITY, C.J.

1944. JUNE 16.

Company—Acts of—Alleged to be ultra vires—Shareholder a personal interest therein—Action against company—By shareholder—May be maintained.

Company—Personal interest of shareholder in acts of—Where right to transfer shares is restricted.

Company—Meetings—Extraordinary general meeting—Notice convening meeting—Provision in notice that if resolution passed, a special meeting would be held on a specified date to confirm it—Resolution passed— No provision in articles of association for conditional notice—Second meeting held—Resolution confirmed—Ultra vires.

Company—Meeting of—Held without due notice—Resolution passed thereat—Ultra vires—Companies (Consolidation) Ordinance, cap. 178, s. 67.

Company—Meeting held without due notice—Waiver of notice by shareholder—Where he attends meeting, takes part in proceedings and votes against resolution—Resolution passed—Objection as to lack of due notice—Cannot be taken by shareholder waiving the notice—Such shareholder not entitled to declaration that resolution ultra vires.

Ultra vires—Company—Meeting of—Held without due notice—Resolution passed thereat—Ultra vires—Companies (*Consolidation*) *Ordinance, cap.* 173, s. 67.

Waiver—By shareholder—Of notice of meeting of company—Where he does not object to lack of notice, attends meeting, takes part in proceedings and votes against resolution.

Two shareholders of a company sued the company, and the directors thereof, for a declaration that certain resolutions passed by the company were ultra vires, and they prayed for consequential relief by way of injunction. The resolutions authorised the directors, *inter alia,* to refuse registration of the transfer of shares which they would not have been able to do but for the resolutions.

Held that the effect of this must be a diminution of the rights of the plaintiffs, and if they say that the passing of the resolutions was *ultra vires,* then they are entitled as shareholders to bring the action in their personal capacity.

Towers and anor. v. *African Tug Co.* (1904) 1 Ch. 558, and *Moseley* v. *Koffyfontein Mines Ltd.* (1911) 1 Ch. 73, applied.

A notice of a meeting of a company signified the intention to hold a second meeting to confirm the resolutions if they were passed at the first meeting:

Held that the conditional notice, not being authorised by the articles of the company, was invalid.

Alexander v. *Simpson* 43 Ch. D. 139, and *Re North of England Steamship Company* (1905) 1 Ch. 609, applied.

Failure to comply with section 67 of the Companies (Consolidation) Ordinance, cap. 178, as to the giving of notice of a meeting of a company and with the articles as to the manner of giving notice renders the proceedings thereafter a nullity.

The holding of a meeting without due notice and the passing and confirming of resolutions thereat are *ultra vires.*

No mere approval of a majority of shareholders can convert that which was *ultra vires* into something *intra vires.*

The plaintiffs as shareholders of a company received due notice of the first meeting of the company. They attended the meeting, and spoke and voted against the resolutions. The notice contained a conditional notice of a meeting to confirm the resolutions, if passed at the first meeting. The resolutions were passed at the first meeting. The plaintiffs were aware of this, and they were also aware that in terms of the conditional notice the second meeting would be held. They attended the second meeting, and they again spoke and voted against the resolutions. The resolutions were confirmed at the second meeting. At no time did the plaintiffs take any exception to the form of notice either by word of mouth or by letter although during the period between the two meetings their solicitor was in correspondence with the company upon matters in connection with their shares and although their attempted dealings with those shares were specifically directed to prevent the resolutions from being passed, or if passed from being of any effect.

Held that the plaintiffs had waived due notice of the second meeting, and that they are therefore not entitled to a declaration that the resolutions confirmed thereat are invalid.

Action by the plaintiffs, who are shareholders in the defendant company, for a declaration that certain resolutions passed at an extraordinary general meeting of the company and confirmed at a subsequent meeting are void, and for consequential relief by way of injunction.

C. Vibart Wight, for plaintiffs.

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

W. J. Gilchrist, for the other defendants.

Cur, adv. vult.

VERITY, C. J.:

In this case the plaintiffs, who are shareholders in the defendant company, seek in their own behalf, a declaration that certain resolutions passed at an extraordinary general meeting and confirmed at a subsequent meeting are void and of no effect, and they pray also certain consequential relief by injunction.

The ground upon which they seek to base their claim is that the notice of the second meeting is a conditional notice only and as such does not comply with the requirements of section 67 of the Companies (Consolidation) Ordinance Ch. 178 and that the confirmatory resolutions passed at this second meeting are therefore invalid.

It is admitted by the defendants that the notice which purported to signify the intention to hold the second meeting only if the proposed resolutions were passed at the first meeting is not a sufficient notice but it is contended that this is no more than an irregularity and that the plaintiffs by attending each meeting and voting thereat without objection are precluded from now taking exception thereto. It is also submitted that the plaintiffs cannot bring this action in their personal capacity but could only do so as representative of all shareholders other than the defendants.

It will be convenient to consider this last submission in the first place in order to determine whether the action has been properly brought. From the authorities cited and from the decisions also in the cases of *Towers and anor.* v. *African Tug Co.* (1904) 1 Ch. 558 and *Moseley v. Koffyfontein Mines Ltd.* (1911) 1 Ch. 73, which were not cited by either party, it would appear that the plaintiffs are entitled to bring the action in their personal capacity provided that they have a personal interest in the matter of complaint and that the acts of which they complain are *ultra vires.* In the latter of the cases to which I have referred the plaintiff sued, it is true, on behalf of himself and all other shareholders, but in the course of his judgment Fletcher Moulton, L.J., said "The fact that he sues in a "representative character does not interfere with his suing in a personal "character and without dealing for the moment with his right to sue in a "representative character, I ask myself has he a right to sue in his personal "or individual character. As to that it seems to me there can be no possible "doubt. He is the holder of shares. He says that the directors are going to "create shares *ultra vires,* which, of course if they are issued, might give "rights in competition with his own. It must be the right of a shareholder "by reason of his being a shareholder to bring an action to stop such a "proceeding, so that he need not have added, in order to found this action "properly, that he was suing on behalf of all other shareholders." In the present case the resolutions which the plaintiffs as shareholders seek to invalidate would authorise the directors, amongst other things, to refuse registration of the transfer of shares which they would not have been able to do but for these resolutions. The effect of this must be a diminution of the rights of the plaintiffs and if they say that the passing of the resolutions was *ultra vires* then they are entitled as shareholders to bring this action.

The next point which falls, therefore, for consideration is whether or not the acts by means of which the defendants seek to achieve that which the plaintiffs would prevent are *ultra vires.* It is admitted that the notice to which exception is taken is invalid within the authority of *Alexander* v. *Simpson* (43 Ch. 139) but it is contended that this is no more than an irregularity which can be cured and has been cured by the action of the majority of shareholders and has been waived by the plaintiffs by reason of their attendance at the second meeting and taking part therein. It is argued on behalf of the defendants that by, reason of the decision in *Re North of England Steamship Company* (1905) 1 Ch. 609 that articles were not *ultra vires* which provided for such a form of notice as was given in the present case, a failure to comply with the statute where no such provision is made cannot be *ultra vires.* I am afraid that I am unable to follow or accept this line of argument. The statute requires that notice be given of each meeting and in *Alexander* v. *Simpson* it was held that a conditional notice is not such notice of the second meeting as the statute requires. The Ordinance provides further however that the articles of association may provide for the manner in which notice shall be given and the case of *the North of England Steamship Company* does no more than decide that the articles may make provision for such a form of conditional notice and that if so provided the form of notice complies with the statute. In the present case no such provision is made by the articles and the case does not apply. It is I think clear from the authorities that failure to comply with the statute as to the giving of notice and with the articles as to the manner of giving notice renders the proceedings thereafter a nullity and that this is so because the holding of a meeting without due notice and the passing and confirming of resolutions thereat are *ultra vires.* The learned author of Street on the Doctrine of Ultra Vires (at page 362) includes questions of notice amongst those requirements which are imperative and no mere approval of a majority of shareholders can, to quote the words of Vaughan Wiliiams, L.J., in *Towers* v. *African Tug Co.* "convert that which was *ultra "vires* into something *intra vires;* it always must be *ultra vires."* A certain amount of argument was addressed by counsel for the defendants upon the subject of the right of a class of individuals to waive the provisions of a statute made in their own protection but I do not think that this argument is sound. It is true that there are circumstances in which there may be such waiver but it does not follow that a majority of the class, whether bare or overwhelming, may deprive a minority of the statutory protection intended for them all, by a mere failure to comply with the requirements of the statute.

A more difficult question arises, however, when one comes to consider whether or not the plaintiffs are themselves, in the personal capacity in which they have sued, precluded by their own conduct from obtaining the relief they now seek.

The facts are that the plaintiffs received due notice of the first meeting, which they attended and at which they spoke and voted against the resolutions. They knew that the resolutions had been passed and were aware therefore that in terms of the

conditional notice the second meeting would be held. This second meeting they also attended and again spoke and voted against the resolutions. At no time did they take any exception to the form of notice either by word of mouth or by letter although during the period between the two meetings their solicitor was in correspondence with the defendant company upon matters in connection with their shares and although their attempted dealings with those shares were specifically directed to prevent the resolutions from passing or if passed from being of any effect. In those circumstances it is submitted on behalf of the defendants that the plaintiffs either have waived their rights or must be deemed to have waived them or that they are estopped from saying that a notice which they accepted and acted upon is bad or that the resolutions passed at a meeting at which they took part without objection are *ultra vires* and void.

In order to determine this issue it is necessary to consider the authorities which deal with waiver and with conduct which precludes a party to proceedings subsequently complaining of their invalidity, and in this connection I would wish to make clear the distinction between the cases *Re Oxted Motor Company. 126* L.T. 56 and either the present case or the general proposition put forward by counsel that shareholders are entitled to waive a statutory requirement as to notice. In the case to which I am now referring, as in *Re Express Engineering Works, Ltd.* (1920) 1 Ch. 466, all the shareholders, two and five in number respectively, attended the meeting of which due notice had not been given and it was held that in such case it did not lie within the power of any third party to challenge the validity of their action for every person concerned in receiving notice had waived his right thereto. That is very different from saying that a majority can waive on behalf not only of themselves but of a minority who have not received or themselves waived due notice of a meeting. The decision in this case goes no farther therefore than to establish the possibility of waiver by all shareholders, but it may nevertheless throw some light upon the possibility that the plaintiffs in the present case have waived their right to notice and thus have disentitled themselves to say that the meeting was *ultra vires* and the resolutions void. Turning therefore to the case *Re The British Sugar Refining Co. ex parte Faris 26* L.J. Ch. 369, it appears that at an adjourned general meeting a certain proposition was carried, but that notice of the adjournment was given by circular and not by advertisement as was required by the deed of settlement. It was held that a shareholder who was present and voted at the adjourned meeting was not entitled to take advantage of the irregularity of the notice. Wood, *V.C.*, said in regard to the shareholder concerned, "As regards Mr. Fraser, if he had been the “applicant, there is no 'question that his application would have been “refused because it would be enough to say 'You have come here after “having accepted notice of the meeting. You have no pretence for saying you knew nothing of it; you were present, you raised no question as to the regularity of the meeting . . .and now you come to ask the Court summarily to relieve you striking you off the register and “substituting this gentleman in your place'.”

The Vice Chancellor then proceeded to dispose of the claim of the persons to whom the shares had been assigned and in whose name the proceedings were brought. In 1904 there is the case of *Towers* v. *African Tug Co.* in which it was held that shareholders who had themselves received their portion of a certain dividend illegally paid by the directors were not entitled to maintain an action to compel the directors to repay to the company the amount of the dividend. Later in 1911 in *Moseley v. Koffyfontein Mines, Ltd.,* it was held that a shareholder who was a party to certain resolutions inasmuch as he was seeking to restrain future illegal proceedings by the company was entitled to maintain an action, but in the words of Cozens Hardy, M.R., in reference to the doctrine in *Towers* v. *African Tug Co.* "that doctrine has no application at all to a case where relief is not "sought in respect of the past, but where what is sought is an "injunction to restrain wrongdoing in the future." This last is not, perhaps, so helpful as one might at first suppose in relation to the present question inasmuch as the action which the plaintiff sought to restrain was held to be beyond the powers of the directors whether the amendment of the articles to which the plaintiff had been a party were valid or not, but at least it is clear that the Court held that it was an impropriety contemplated in the future to which he was no party and not the past wrong-doing to which he was a party which gave him his right to relief.

From a consideration of these authorities as well as others cited by counsel and to which I have made no specific reference I think it is proper to deduce the principle that in so far as all the shareholders could waive the statutory notice so could each shareholder in so far as he himself is individually concerned waive such notice, and that if he has in fact waived it by accepting a notice other than that required by statute and by attending the meeting, it is not open to him to say that the notice is invalid and that resolutions to the passing: of which he had been a party, even though opposing party, are therefore void. While, therefore, in my view, the notice was bad and *prima facie* the resolutions may be invalid, yet although it is not for that reason competent for the Court in the present case to declare they are good still the plaintiffs are not entitled to a declaration that they are invalid and their claim in this respect must be dismissed. By accepting notice and taking part in the proceedings they must be deemed to have accepted the decision of the majority of the shareholders and the wisdom and otherwise of that decision is a matter of internal concern with which this Court is not concerned and which the plaintiffs cannot call in question here.

I think that this substantially disposes of the real matter at issue between the parties, but as the question of the legality of the directors' closing of the share register and refusal to register certain transfers sought to be effected by the plaintiffs has been raised both by the pleadings and argument it is as well that I should express my view upon that point also. It is true that under the articles before amendment the directors are empowered to refuse registration of transfers in certain circumstances only, which do not exist in the present case and that by the articles

they should register such transfers within seven days. The particular transfers in question in the present case, however, were dated only on the day before in one instance and on the very day of, in the other instance an extraordinary general meeting notice for which had been duly given. At that meeting certain extraordinary resolutions were duly passed and it appears to me that in view of the nature of those resolutions the directors were justified in closing the register under the powers conferred upon them by the Articles of Association and section 31 of the Ordinance (Ch. 178). They were not obliged to register the shares before the date of such closing, seven days not having expired, and the right of the plaintiffs to relief in respect of the subsequent refusal of the directors to register in exercise of the discretion conferred upon them by the amended article now claimed by the plaintiffs to be *ultra vires* appears to be coincident with and as unenforceable as their claim to a declaration that the proceedings of the confirmatory meeting were invalid.

On the merits of the contentions of the parties as distinct from the legality of their actions it is unnecessary for me to comment save that I would express the opinion that the contention of the defendants that the plaintiffs had by divers ways, means and stratagems disentitled themselves in equity from any relief would appear to me to be ill founded. It appears to me indeed that nothing in the conduct of any party to these proceedings can be described as inequitable or immoral, that the holders of the majority of the shares have sought to achieve no end that can properly be described as monopolistic or contrary to public policy and that the plaintiffs have done no more than take a course which they were advised was open to them in order to prevent a course of action of which they do not personally approve but to which, in the circumstances and in view of their own conduct they must, as a minority submit.

Judgment will be entered for the defendants with costs,

Judgment for defendants.

Solicitors: *A. G. King,* for plaintiffs; *Cameron* & *Shepherd,* for defendants.

FERNANDES *v.* GUMBS & NASCIMENTO (No. 1)

OVID ALOYSIUS FERNANDES, Plaintiff,

v.

AURELIA GUMBS and CHARLES RODRIGUES NASCIMENTO, (No. 1), Defendants.

[1943. No. 153.—Demerara].

BEFORE DUKE, J. (Acting) IN CHAMBERS.

1944. FEBRUARY 7.

Practice and procedure—Writ of delivery—Application for—Properly made ex parte—Rules of Court, 1900, *Order* 36, *rule* 90.

An application under rule 90 of Order 36 of the Rules of Court, 1900, for a writ of delivery is properly made ex parte.

Ex parte summons by the defendant Aurelia Gumbs for a writ of delivery against the plaintiff Ovid Aloysius Fernandas in execution of the judgment reported at (1943) L.R.B.G. 203.

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

DUKE, J. (Acting): This is an ex parte summons by the defendant Aurelia Gumbs for the issue of a writ of delivery requiring the plaintiff Ovid Aloysius Fernandes to deliver to the defendant Gumbs her grosse transport for Lot 198, Queenstown, Georgetown. By order of Court dated the 15th December, 1943 and entered on 22nd December, 1943, the plaintiff was ordered, on the trial of the counterclaim of the defendant Gumbs, to deliver to her forthwith the said grosse transport. A sealed and certified copy of the order was served upon the plaintiff on the 30th December, 1943, but he has failed to deliver up the said grosse transport to the defendant Gumbs.

This application is made under rule 90 of Order 36 of the Rules of Court, 1900. This rule corresponds with Order 48, rule 1 of the English Rules of the Supreme Court. In England the practice is that an application under Order 48, rule 1 is made *ex* parte: see *Yearly Practice*, 1940, at page 866 and *Annual Practice,* 1943, at page 873. In accordance with that practice, I hold that an application under rule 90 of Order 36 of the Rules of Court, 1900 for a writ of delivery is properly made *ex parte.*

No stay of execution has been applied for, or granted, in respect of that part of the order of Court of the 15th December, 1943, requiring the plaintiff to deliver up to the defendant Gumbs her grosse transport for lot 198, Queenstown. An appeal has, it is true, been filed on the 2nd February, 1944, but it is provided by Rule 16 of the West Indian Court of Appeal Rules, 1920, that "an appeal shall not operate as a stay of proceedings under the "decision appealed from, except so far as the Supreme Court "appealed from, or any Judge thereof may order." The plaintiff has failed to comply with the order of Court as to delivery up to the defendant Gumbs of her grosse transport for lot 198, Queenstown, and I therefore direct that a writ of delivery may issue in accordance with rule 90 of Order 36 of the Rules of Court, 1900.

Application granted.

Solicitor: *R. G. Sharples,* for applicant Aurelia Gumbs.

R. HEYWOOD *v.* M. A. RAFEEK

RUFUS HEYWOOD, Appellant (Claimant),

v.

M. A. RAFEEK, Respondent (Execution Creditor).

[1944. No. 111.—DEMERARA.]

BEFORE FULL COURT: SIR JOHN VERITY, C.J., FRETZ, J. AND BOLAND., J.

1944. MAY 26; JULY 3.

Magistrate's court—Civil jurisdiction—Judgment—Execution—Claim to goods levied upon—Made before expiration of 4 *years after date of judgment—Interpleader summons issued subsequent to expiration—Jurisdiction of magistrate—To hear interpleader claim—Summary Jurisdiction (Petty Debt) Ordinance, cap.* 15, ss. 36, 41 (1).

Words—"Deemed to be discharged"—Summary Jurisdiction (Petty Debt) Ordinance, cap. 15, s. 36.

Construction—"Deemed to be discharged"—How construed—Summary Jurisdiction (Petty Debt) Ordinance, cap. 15, s. 36*—To effectuate real object of statutory fiction—In order to avoid the most grievous injustice or the most revolting absurdity.*

Interpleader—Magistrate's court—Onus of proof.

By section 36 of the Summary Jurisdiction (Petty Debt) Ordinance, cap. 15, every judgment and every execution in the magistrate's court shall respectively be deemed to be discharged at the end of four years after the date of the judgment, and by section 41 (1) a writ of execution shall hold good for four years from the date of the judgment.

Held that in order to avoid the most grievous injustice or the most revolting absurdity and to effectuate the real object of the statutory fiction, the words "shall be deemed to be discharged" will be construed as involving the obvious qualification that no judgment or execution shall be deemed to be discharged while proceedings in pursuance thereof are actually in process of determination.

Ex parte Levy (1881) 17 Ch. D. 746, and *Hill v. East and West India Dock Co.* (1884) 9 A.C. 448, applied.

On the 3rd August, 1939 a judgment creditor obtained a judgment in the civil jurisdiction of the magistrate's court. In pursuance of the judgment, a writ of execution issued on the 9th December, 1939. On the 7th July 1943 certain goods were taken in execution by virtue of the writ. On the 28th July 1943 the appellant laid claim to these goods, and on the 25th August 1943 an interpleader summons was issued. The interpleader claim was dismissed, and the claimant appealed. On the hearing of the appeal, the claimant submitted that under sections 36 and 41 of the Summary Jurisdiction (Petty Debt) Ordinance, cap. 15 the judgment and execution were discharged at the end of four years from the date of the judgment, that they were accordingly discharged prior to the issue of the interpleader summons, and that the magistrate therefore had no power to make any order in proceedings founded on an execution and judgment both of which had already been discharged.

Held that the magistrate was right was right in proceeding with the hearing of the claim.

Question of onus of proof in interpleader claims in the magistrate's court, considered.

Appeal from a decision of the Magistrate of the West Demerara Judicial District dismissing an interpleader claim brought by the appellant Rufus Heywood against the judgment creditor

M. A. Rafeek. The goods claimed by the appellant were levied upon as the property of the judgment debtor James Daniel. The facts and arguments appear from the judgment.

S. L. van Batenburg-Stafford, K.C. for the appellant.

Theophilus Lee, for the respondent.

Cur. adv. vult.

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

This is an appeal from an order of a Magistrate's Court an interpleader summons in exercise of its jurisdiction under the Summary Jurisdiction (Petty Debts) Ordinance, Ch. 15.

There were two main grounds of appeal. The first relates to the validity of the proceedings and the second to the merits of the appellant's claim.

It appears that the respondent, the judgment creditor, obtained judgment against the defendant in a suit in the Magistrate's Court on August 3, 1939. A writ of execution in pursuance thereof issued on December 9, 1939. On July 7, 1943, certain goods were taken in execution by virtue of this writ. The appellant laid claim to these goods on July 28, 1943, and an interpleader summons was issued on August 25, 1943. The Magistrate made his order dismissing the claim on February 7, 1944.

It is submitted on behalf of the appellant that by reason of section 36 of the Ordinance (Ch. 15) the judgment and execution were "deemed to be discharged at the end of four years after the date of the judgment," that the judgment and execution were discharged accordingly prior to the issue of the interpleader summons and that the learned Magistrate therefore had no power to make any order in proceedings founded on an execution and judgment both of which had already been discharged. Counsel sought reinforcement for this view in the terms of section 41 of the Ordinance which provides that a writ of execution shall hold good for four years from the date of the judgment.

Dealing firstly with the supposed discharge of the judgment, it is to be observed that the words of the section are 'shall be deemed to be discharged at the end of four years from the date of the judgment.' The section does not provide absolutely that the judgment shall be discharged nor that thereafter it shall be void or of no effect. It is for this Court to determine what is meant by the phrase "shall be deemed to be discharged," and to give effect to that meaning. The effect of such words was considered in *Ex parte Walton. In re Levy* (1881) 17 Ch. D. 746 and again in *Hill* v. *East & West India Dock Co.* (1884) 9 A.C. 448. In the latter case Lord Blackburn said "In this particular case the construction which has been placed upon the section by the appellant, namely that the words "shall be deemed to have been surrendered" used in their context and in the way which they are used, amount to saying 'shall be to all intents and purposes as if it had actually been so' is a construction which I am not prepared to say is the natural and ordinary sense of the words, but it is certainly a construction which the words might bear. The other construction which has been put upon them is one which the

words in my opinion would rather more reasonably bear of the two, namely that the lease is to be deemed to have been surrendered so far as is necessary to effectuate the purposes of the Act."

His Lordship then referred with approval to the words of Lord Justice James *Ex parte Walton* when he said "When a statute enacts that something shall be deemed to have been done which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

The Lord Justice in that case, which was approved in this regard by the House of Lords, held that in order to give effect to the sole object of the statute the words must be construed with a qualification which was in his view "absolutely necessary to prevent the most grievous injustice and, the most revolting absurdity."

In applying these principles we would seek first to ascertain the object of the statute, which is clearly to enable a creditor to recover his debt from the debtor. We must go further however and enquire as to the purpose of the particular section in relation to the general object of the statute. It is plain that this purpose cannot be to defeat the object of the statute as a whole, but that it is aimed at a particular mischief, a purpose which it shares with all other statutes of limitation. The mischief aimed at, is that of a creditor going to sleep on his rights and then at some distant date awaking and seeking to enforce them, when the debtor may be gravely embarrassed by this belated attempt to revive a stale claim.

The legislature has enacted that four years shall be the length of the time during which the creditor shall be at liberty to take steps to enforce a judgment in the lower court, but that thereafter, in pursuance of the purpose of the statutory limitation, he shall not be at liberty to do so, and the judgment shall to this intent be deemed to be discharged.

What, however, is the present case and how far does it fall within the object of the enactment? The judgment creditor took out his writ some four months after the date of the judgment; the writ was executed within the period of four years; the claimant made his claim within that period. There then arose an issue for determination consequent on an execution properly issued and sought to. be enforced within the prescribed period, but in the course of the proceedings thus properly instituted the period of four years expired. We can think of no more "grievous injustice" or "revolting absurdity" (to quote the words of Lord Justice James) than that in pursuance of a statute to enable a creditor to recover his debts within a prescribed period, when all parties concerned have taken every step open to them within that period and the court in its course of determining an issue arising from those steps, the axe should fall and the powers of the court to continue and conclude its enquiries should be shorn away by the mere passage of time.

In order to avoid such an injustice and absurdity and to effectuate the real object of the statutory fiction, and no further, the Court is entitled to construe the words "shall be deemed to be discharged" as involving the obvious qualification that no such

judgment or execution shall be so deemed while proceedings in pursuance thereof are actually in process of determination. In adopting this course we are not only following the dictates of common sense but are fortified by the authority of the highest tribunal. We are of opinion therefore that the learned Magistrate was right in proceeding with the hearing of the claim and it remains to consider whether he was right also in his conclusions thereon.

The first question which arises in this regard concerns the nature of the issue and the burden of proof which lies upon the respective parties in such proceedings. It is to be observed that there is. a distinction between interpleader proceedings in the Supreme Court and those in the magistrates' courts. Whereas in the former it is the practice for the Court to determine who shall be plaintiff and who defendant and what shall be the issue, in the latter section 57 of Ch. 15 prescribes that in every case the claimant shall be plaintiff and that the matter shall be heard and determined in a summary way as in an ordinary action. While therefore in the Supreme Court it is usual when goods are taken from the possession of the claimant for the burden to lie upon the creditor to prove the debtor's interest in the goods, and if he fail to do so the summons is determined in favour of the claimant and the goods returned to his possession, in the magistrates' courts there is no such practice. It would appear, *prima facie,* that the burden rests upon the plaintiff to prove his claim as in an ordinary action, and that in no case does the burden lie on the creditor to prove the debtor's interest. The matter is not quite so simple, however, and in determining where the onus lies, consideration must be given to the general question: Where, if no evidence were tendered on either side, would the judgment fall? It is indeed this question which determines the nature of the issue in the Supreme Court, but we see no reason why it would not apply, subject to certain modifications, perhaps, in deciding where the real burden of proof lies in such proceedings in a magistrate's court.

In the present case, the goods were taken from the possession of the claimant in the sense that they were taken from the sawmill to which he had delivered them for sale, and this is not contested. In these circumstances the proceedings are initiated with the presumption of ownership in the claimant by reason of possession, and if the claimant rested his case on proof of possession and the execution creditor adduced no evidence the claimant would be entitled to succeed for the burden would lie on the creditor to rebut the presumption raised by the claimant's possession. In this sense the argument of counsel for the appellant is sound. Here, however, the appellant has not rested *on* evidence of possession only, but has sought to prove ownership in accordance with the particulars of his claim, and to this the respondent has replied with evidence which seeks to throw doubt not only upon appellant's possession, but also upon his claim to ownership,

The question for this Court to determine is whether upon the whole of the evidence before him, the learned Magistrate was justified in his conclusion that the claimant had not made "proof of his claim to the satisfaction of the court."

It appears that the notes of evidence and from the learned Magistrate's reasons for his decision that the goods were conveyed by the appellant under a document in the name of the judgment debtor, his father-in-law, and not in his own name; that the judgment debtor was working at a spot not far distant from that from which the goods were transported; that the appellant nevertheless claimed that they were his own property; that the learned Magistrate while not finding the witness Wilkie to have acted fraudulently, nevertheless was not satisfied as to his impartiality and, it is to be presumed, did not therefore place complete reliance on the truth of his explanation of entry on the "pass" of a name other than that of the appellant; that the learned Magistrate did not accept the denials of the appellant that at no time had he said that only one-third of the wood belonged to him, or that at another time he said that three logs only were his personal property.

We are unable to say that the learned Magistrate was wrong in taking the view he did of the evidence or in estimating the credibility of the witnesses in the manner set out in his reasons. It is not an unreasonable inference from the evidence before the Court that the appellant was in possession of the goods which he was transporting under a pass in the name of the judgment debtor as an agent of the latter, at least as far as the conveyance was concerned. Moreover, suspicion as to the *bona fides* of his claim is justifiably created by reason of the fact that he did at different times lay claim to the goods in various ways: as sole owner, as partner in ownership of the whole; as the owner of one-third; as the owner of three logs only. It is impossible for us to say what is the interest to which the appellant lays claim and we are of the opinion that the magistrate rightly dismissed the claim because the evidence adduced at the hearing established that although the claimant was in possession of the goods at the time of the execution that possession was not shown to be by virtue of a right of ownership or to possession as against the rightful owner. In the circumstances, there was no shifting to the creditor of the onus to prove ownership in the debtor which might have arisen if evidence of possession simpliciter had been adduced in support of the claim.

The appeal is therefore dismissed with costs.

Appeal dismissed.

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

MARTHA WOO-MING *v.* E. A. DIAZ

MARTHA WOO-MING, Plaintiff,

v.

E. A. DIAZ, Defendant.

[1944. No. 195.—DEMERARA.]

BEFORE BOLAND, J.: 1944. JUNE 12; JULY 3.

Costs—Possession of demised premises—Specially indorsed writ for recovery of—Judgment by consent on return day of writ—How plaintiffs costs to be taxed—On value of possessory right of tenant—Not on value of premises recovered—Rules of Court, 1900 & 1932, *Appendix I, Scale I and II—Scale III not applicable, to such actions.*

Where on a writ which is specially indorsed for possession of demised premises, judgment is given, on the return day of the writ, by consent, the plaintiff's costs are not taxable on the value of the premises recovered, but on the value of the possessory right of the tenant, that is to say, they are taxable under Scale I or Scale II, according as to whether the value of the possessory right of the tenant exceeds, or does not exceed, $500.

The commuted sums set forth in Scale III of Appendix I to the Rules of Court, 1900 & 1932, do not apply to specially indorsed writs for possession of demised premises.

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

C. Vibart Wight, for the defendant.

Cur. adv. vult.

BOLAND, J.: The question reserved for the decision of this Court is as to the basis on which costs in favour of the Plaintiff are to be calculated, the parties having agreed that an order for possession be made in favour of plaintiff, suspended however on payment in two instalments of a sum agreed upon for mesne profits and that costs of suit be awarded to plaintiff.

The writ in the action is specially endorsed by virtue of Order IV Rule 6 (2) (as amended by Order III Rules of Court 1932) with a claim for possession of premises used as a Steam laundry, after legal notice to quit, the defendant being the plaintiff's tenant at a monthly rental of $24.00. The sum of $60.00 was also therein claimed by way of mesne profits and value of premises is stated to be $4,500.

At the hearing when plaintiff claimed final judgment under Order XII, the defendant, who at no time challenged the plaintiff's valuation of the premises, ultimately withdrew his application for leave to defend, and consented, as stated above, to the order for possession and for mesne profits with costs.

As to the measure of costs, the plaintiff submits that he is entitled to the commuted sum of $65.00 (that is $60.00 plus $5.00 Additional allowance) in accordance with the provisions of Scale III (c) in Appendix I as prescribed by Order XLVI Rule 7 (1) (c) Rules of Court, 1932, contending that the issue on which he has recovered judgment was a dispute in respect of land whose value is in excess of $500.00.

On the other hand the defence contends that the matter before the Court as disclosed by the writ and upon which the plaintiff recovered judgment related solely to the question of the

tenant's right to possession, and that the value of the premises ordered to be delivered up was not in issue and could not determine the scale of costs. The computation of costs, it was submitted, in actions brought by landlords for possession, is governed not by the value of the demised premises, but by the value of the tenant's possessory rights. Accordingly, as the defence submitted, the measure of costs for plaintiff is as indicated in Scale III (b) of Appendix I, that is $50.00 ($45.00 plus $5.00 additional allowance) where more than $250.00 but not more than $500.00 is recovered.

It will be observed that both plaintiff and defendant invoke Order XLVI Rule 7 (1) (c) and Scale III in Appendix I as the relevant rule and Scale of fees governing the allowance or costs in this matter.

A careful perusal, however, of Order XLVI Rule 7 (1) (c) has satisfied me that this is incorrect. By its language this sub rule purports to fix commuted amounts for costs "in all causes and matters, where judgment is obtained under Order XII or in default of appearance or pleading or by confession before trial *where the claim is for a debt or liquidated demand"*.

Note the words *"where the claim is for a debt or liquidated demand"*. This phrase, it seems to me, qualifies all the alternative instances set out in the sub-rule, that is where judgment is obtained (1) Under Order XII (2) In default of appearance or pleading (3) By confession before trial.

It would seem therefore that the sub-rule 7 (1) (c) in Order XLVI applies where judgment is obtained under Order XII only in cases where there is a special endorsement by virtue of sub-rule (1) of Rule 6 in Order IV and not where the special endorsement sets out a claim under any other sub-rule of rule 6 in Order IV, as in this case where the special endorsement is by virtue of Order IV Rule 6 Sub-Rule 2.

I feel fortified in this view on a reference to the wording of the provision for Additional Allowances in Scale III Appendix I. No. (4) instance for Additional allowance — reads "Where the writ is endorsed for *a debt or liquidated demand and other relief permitted* by Order IV Rule 6". Obviously this has no reference to claims other than those in the Sub-Rule (1) of Rule 6 Order IV. It is clear that an Additional allowance may be granted where, as permitted by Order IV Rule 6 (1) a special endorsement contains a claim for a debt or liquidated sum with such ancillary relief as a claim for a declaration that an opposition is just, legal and well founded, and for an injunction restraining the passing of a transport, mortgage or lease, or of a surrender transfer or assignment of a lease.

I have given this matter very full consideration as I understand there has been a practice to assess costs to a successful plaintiff in judgments under Order XII in ejectment suits by reference to Scale III of Appendix I. If that is. so, the practice is in conflict with the unequivocal provisions of the Rules.

In my view the allowance for costs in this case is prescribed by Order XLVI Rule 7 (1) b which gives a scale of fees in Scale II Appendix I.

I do not agree with the plaintiff's contention that this is a matter involving a dispute in respect of land so as to make the value of the land the determining factor for the computation of the costs. The thing in dispute before the Court — the real issue raised by the writ itself — is the question of the possessory rights of the tenant as such — and the order for possession (albeit in this case by consent) takes the form of remedy which the Court always gives to a landlord who successfully challenges the tenant's right to possession. The value of the matter in dispute is surely not the value of the demised premises but the value of the possessory right of the tenant — in other words the value of the tenant's chose in action.

The legislature would seem to have appreciated this distinction when giving inferior courts jurisdiction to deal with claims for possession brought by landlords against tenants. For instance the limit of the jurisdiction of the County Courts in England in ejectment matters was early based upon the annual rental value of the demised premises. Here in this colony the Magistrates' jurisdiction to hear and determine these cases by Ordinance limited to premises whose annual rental is below a certain fixed sum.

I think a year's rent would be a fair assessment of the value of the possession by the tenant who is a monthly tenant, and I value it at that figure in this case.

As the annual rental of the premises in this case together with the sum awarded for mesne profits is in the aggregate much less than $500.00 I am clearly of the opinion that the appropriate scale of costs is the lower scale as set out in Scale II Appendix I.

The Court has no power to award a commuted sum for costs, unless the parties before it agree upon such a sum, and such an order would have to be made by consent.

But in the absence of such a consent order the costs will be taxed in the usual way by the Registrar. I shall however direct
the Registrar that the taxation is to be on the lower Scale –
Under Scale II Appendix I.

Solicitor for the defendant: *A. G. King.*

Re FREDERICK TELEMACHUS WILLS, DECEASED.
JOSEPH LYTTLETON WILLS and ALFRED VICTOR CRANE executors of the last will of Frederick Telemachus Wills, deceased, Plaintiffs.
v.
PEARLINE BERKELEY WILLS, widow, and FREDERICK EUSTACE BERKELEY WILLS, Defendants.
[1944. No. 156.—DEMERARA.]
BEFORE SIR JOHN VERITY, C.J.:
1944. AUGUST 16, 28.

Husband and wife—Deed of separation—Annuity expressed to be *payable during life of wife—Death of husband—Obligation of his legal personal representatives—To continue payment of annuity—Until death of wife.*

Where by a deed of separation an annuity becomes payable during the life of the grantee, there is an obligation upon the grantor to continue payment for the period so expressed, and the obligation is enforceable to the extent of the assets of the deceased grantor against his personal representatives even though they be not named in the instrument creating the obligation.

Randle v. *Gould* & *anor.* (1857) 27 L. J. Common Law, 57, and *Kirk Eustace* (1937) A. C. 491, applied.

Originating summons taken out by the executors of Frederick Telemachus Wills, deceased, for the directions of the Court on the construction of a certain deed of separation entered into between the deceased and his wife.

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

H. C. Humphrys, K.C., for the defendant Pearline Berkeley Wills.

Cur. adv. vult.

VERITY, C.J.: This is an originating summons by which the executors of the estate of the deceased ask the directions of the Court on the construction of a certain deed of separation entered into between the deceased and his wife.

The material clauses of the deed provided that the husband should pay to his wife during her life an annuity and further that in case the husband and wife should at any time resume cohabitation by mutual consent the annuity should no longer be payable and all covenants in the deed were to become void.

The parties at no time cohabited after the execution of the deed and upon the death of the husband the executors found themselves in doubt as to whether (a) the annuity is a charge upon the estate goods and chattels of the deceased; (b) the deed became null and void upon his death; (c) they are liable to pay out of the funds of the estate instalments which did not accrue due prior to his death; and (d) the widow's claim that the annuity is payable during the whole period of her natural life notwithstanding her husband’s death is to be allowed and paid by the executors.

It might have been thought in view of many decisions from that in *Randle v. Gould* & *anor:* (1857) 27 L,J. Com. Law p. 57 down to *Kirk v. Eustace* (1937) A.C. p. 491 that there now remained but little doubt which could reasonably be entertained on the points raised by the executors. Counsel for the executors has sought to distinguish the last mentioned case in point of law although it would appear to be indistinguishable in point of fact, and in doing so he would lay stress upon the references in that case to section (SO of the Law of Property Act, 1925, an enactment which has no counterpart in the laws of this Colony.

It appears to be quite clear on the authorities cited before me that where by a deed of separation an annuity becomes payable during the life of the grantee there is an obligation upon the grantor to continue payment for the period so expressed unless, of course, the payment is to be suspended upon the happening of a certain event such as that provided for in the present deed, a resumption of cohabitation. Further it would appear to be well established that such an obligation is enforceable to the extent of the assets of the deceased against his personal representatives even though they be not named in the instrument creating the obligation.

The relevance of the particular section of the Law of Property Act, 1925, in the case of *Kirk v. Eustace* would appear to arise from the peculiar incidents of the law of real property in England as distinct from the law of personal property, a distinction which does not arise in this colony by reason of the Civil Law Ordinance, Ch. 7, sec. 3 (D). While therefore there is no analogous enactment in the laws of this Colony there is no necessity for it, but this does not mean that the personal representatives are not bound by any obligations entered into by the deceased in his lifetime. On the contrary it would appear that by reason of the assimilation of the English law of personal property to the law of immovable property in. this Colony the whole estate of a deceased person is bound by such an obligation as would bind the personal property in English law without any specific enactment to that effect.

It being my view of the law that the covenant for an annuity was one which bound the husband for the whole period of the natural life of the wife by virtue of its terms and that this obligation is enforceable against his personal representatives after his death, I would answer the questions put by the executors in the following way - (a) Yes; (b) No; (c) Yes, and (d) Yes. As to costs those of both parties are to be paid out of the estate. I have been asked to certify as fit for two counsel but am not of the opinion that either the importance or difficulty of the questions necessarily called for this unusual expenditure of labour and learning in a short matter in Chambers, and I refrain therefore from so certifying. I certify fit for one counsel.

Solicitors: *W. D. Dinally,* for executors;
A. G. King, for defendants.

N. MOHAMED *v.* DUNIADER & J. M. KHAN

NOOR MOHAMED,

Plaintiff,

v.

DUNIADER and JAN MOHAMED KHAN,

Defendants.

1944. No. 1—BERBICE.

BEFORE DUKE, J. (ACTING) IN CHAMBERS.

1944. FEBRUARY.

Opposition to transport—Entry of—Effect of—Interim, injunction until writ filed to enforce opposition or until expiration of time limited to file writ—Interlocutory injunction until hearing and determination of action—Upon bringing of action—Rules of the Supreme Court (Deeds Registry), 1921, *rule* 7.

Opposition to transport—Writ to enforce—Fees for service not paid at time writ filed—Writ set aside—Rules of the Supreme Court (Deeds Registry), 1921, rules 3, 7, 11.

Practice and procedure—Writ of summons—Service of—When fees therefor to be paid—Contemporaneously with filing of writ—Rules of Court, 1900 and 1932, Order 3, rules 7, 3, 10, 11.

Practice and procedure—Writ of summons—Fees for service not paid at time of filing of writ—Writ set aside—Where writ is to enforce opposition to transport—Rules of the Supreme Court (*Deeds Registry*), 1921, *rules* 3, 7, 11.

The entry of opposition to a transport of immovable property operates as an interim injunction to restrain the passing of the transport. The interim injunction continues until the opponent brings his action within the time limited by rule 7 of the Rules of the Supreme Court (Deeds Registry), 1921, and, if no action is brought, then until the expiration of the time limited by the rule for bringing the action. On the bringing of the action within the time limited, the injunction operates as an interlocutory injunction restraining the passing of the transport until the hearing and determination of the action. This interlocutory injunction arises without notice being given to the defendants; it arises by virtue of the entry of the opposition and the subsequent bringing of the action.

A writ to enforce an opposition to a transport was set aside where the plaintiff failed, at the time of the filing of the writ, to pay the necessary fees for the service of the writ.

SUMMONS by the defendants for an order (a) that an opposition entered by the plaintiff be declared abandoned and null and void and be set aside and struck out, and (b) that the writ of summons herein and all proceedings pursuant thereto be declared null and void and be wholly set aside and struck out. The facts and arguments sufficiently appear from the judgment.

L. M. F. Cabral, for the applicants (defendants).

Mungal Singh, for the respondent (plaintiff).

Cur. adv. vult

DUKE, J. (Acting): This is a summons taken out by the defendants Duniader (Duniadar) and Jan Mohamed Khan on the 20th January, 1944, for an order:

> (a) that the opposition entered by NOOR MOHAMMED the plaintiff herein on the 24th_ day of December, 1943 to the passing of transports numbered 1, 2, 3, 4, and 5 and advertised in the **Gazette** on the 11th day of December, 1943 for the first time for the county of Berbice, be declared abandoned and null and void and be set aside and struck out on the ground that it infringes the Rules of the Supreme Court (Deeds Registry), 1921 and the provisions of Order 3, rules 4 and 8 of the Supreme Court Rules of 1900 and 1932.
>
> (b) that the Writ of Summons herein and all proceedings pursuant thereto be declared null and void and be wholly set aside and be struck put on the ground that the said proceedings violate the provisions of rule 7 of the Rules of the Supreme Court (Deeds Registry), 1921, and Orders 3 and 52 of Part I of the Supreme Court Rules of 1900, as amended by the Rules of Court, 1932, and also violate the provisions of the Legal Practitioners (Definition of Functions) Ordinance, 1931.

On the hearing of this summons counsel for the defendants did not argue that in the filing of the writ herein, the provisions of the Legal Practitioners (Definition of Functions) Ordinance, 1931, were violated.

In the *Gazette* of the 11th, 18th and 25th days of December, 1943, the defendants caused to be advertised notice of their intention to pass five transports of certain immovable property. On the 24th day of December, 1943, the plaintiff entered opposition to the passing of the transports of the said immovable property. It is alleged by the defendants that the opponent (the plaintiff herein) did not, as required by rule 6 of the Rules of the Supreme Court (Deeds Registry), 1921, serve a copy of the notice of opposition upon the proponents (the defendants herein) within three days after the filing of the said notice, but a specific penalty is provided by rule 6 for a breach of that rule, namely, that "the court may, in any action brought pursuant to the notice, disallow his costs (if any) of that action."

On the 24th December, 1943, the Registrar of Deeds certified, in accordance with rule 3, that opposition was duly entered to the passing of the transports.. In accordance with rule 7 the opponent (the plaintiff herein) brought this action on the 3rd January, 1944, that is to say, within ten days after the Registrar had so certified, to restrain the conveyances to which the opposition relates, and to enforce the claim in respect of which the plaintiff alleges that a right of action has accrued to him, the said claim being for $3,000, moneys alleged to have been lent by the plaintiff to the defendants jointly on the 20th March, 1943, at No. 79 Village, Corentyne, Berbice.

The notice of opposition was signed on behalf of the opponent (the plaintiff herein) by MR. MUNGAL SINGH, Barrister-at-Law: the writ in this action was issued by the plaintiff in person, and he stated that his address for service is at the chambers of MR. MUNGAL SINGH, barrister-at-law.

At the time of the filing of the writ herein the plaintiff left at the Registry of the Supreme Court three copies of the writ, two copies being for service upon the defendants and one copy being for return of service. The plaintiff, however, did not pay any fees for service of the writ.

In support of their summons the defendants allege that KHATOON NISHA, a niece of the opponent NOOR MOHAMED, has filed a writ against the proponent JAN MOHAMMED KHAN, claiming $3,000 damages against him for breach of promise of marriage; that the claim of the plaintiff for $3,000 moneys lent by him to the defendants on the 20th March, 1943,is fictitious; and that the plaintiff has deliberately abused the rules of procedure of the Court in order to delay the passing of the said transports, and injure the defendants and the five prospective transportees who purchased the various parcels of immovable property from them during the first half of the year 1943 and about three months before the writ was filed by KHATOON NISHA.

The summons herein was served on the plaintiff on the 21st January, 1944, and his counsel has informed me that on the 28th January, 1944 (after the file herein was sent to the Registry in Georgetown) the fees for service were paid to the Registrar in Berbice.

Fees for service of a writ of summons must be paid to the Registrar in advance, and a Marshal cannot serve the writ unless and until the proper fees for service have been duly paid.

A person who wishes to commence an action prepares the original writ which he presents to the Registrar (Order 3, rule 7), and he leaves at the Registry as many copies thereof as may be required for service upon the defendants to be served (Order 3, rule 8). The Registrar places at the head of the original writ the year and the number of the writ (Order 3, rule 11), he dates the original writ as of the day of issue, he affixes the seal of the Court thereto and he files the original writ which is then deemed to be issued (Order 3, rule 7). The Registrar compares with the original writ the copies of the writ of summons to be served upon the defendants, he certifies them to be true copies, and he dates, numbers and seals them in the same manner as the original writ (Order 3, rule 10).

These rules show that it was intended that service should take place as soon as possible after the filing of the original writ, and inasmuch as service cannot take place until the fees in respect thereof have been paid, I am of the opinion that such service should be paid for contemporaneously with the filing of the original writ. This is the practice that has existed among legal practitioners in this Colony, within my personal knowledge and experience, for a period of over 26 years, although there have been cases from time to time, mainly in the county of Berbice, where the plaintiff, at the time of filing the writ, has refused to pay the fees in respect of service.

In ordinary actions, for instance, for slander or for false imprisonment, a defendant would not be prejudiced by reason of failure of the plaintiff to pay the service fees at the time of the filing of the writ: the filing of such writ does not interfere in

any way with the freedom of action of the defendant in disposing of his immovable property. An action brought to enforce an opposition to a transport is an action of a special nature. The Rules of the Supreme Court (Deeds Registry), 1921, prescribe (1) that an action to enforce an opposition to a transport shall be brought within 10 days after the Registrar has certified that an opposition has been entered (Rule 7): such date would normally be the date upon which the opposition was entered (Rule 3); (2) that if no action is brought in the manner and within the time by those Rules prescribed and limited, an application may be made *ex parte* by the proponent for an order that the opposition be declared abandoned (Rule 11). It therefore follows that it could not have been the intention of the rule-making authority of the Supreme Court that failure to pay service fees at the time an action is brought to enforce an opposition to a transport, with, the consequential non-service of the writ, should be regarded as a trivial matter. Further, the entry of an opposition to a transport of immovable property operates as an interim injunction to restrain the passing of the transport. The interim injunction continues until the opponent brings his action within the time limited by Rule 7, and, if no action is brought, then until the expiration of the time limited by the Rule for bringing the action. On the bringing of the action within the time limited, the injunction operates as an interlocutory injunction restraining the passing of the transport until the hearing and determination of the action. This interlocutory injunction arises without notice being given to the defendants; it arises by virtue merely of the entry of opposition and the subsequent bringing of the action. The opponent obtains this remedy, quite inexpensively, and without the proponent being able to object to it. In return for those special favours, the opponent must not be dilatory in the action which he brings to enforce the opposition. Where he fails, at the time of the filing of the writ, to pay the service fees, he is dilatory at the very commencement of the action. Such failure on his part is, in my opinion, an abuse of the procedure of the Court, it is something more than irregularity, it is an illegality, and I therefore agree with the submission of counsel for the defendants that the writ in this action must be set aside with costs, and I certify for counsel.

Writ set aside.

Solicitor for applicants (defendants): *Hyacinthe D. Eleazar.*

GEORGE LIDDELL *v.* MARTIN CORT

GEORGE LIDDELL, Appellant (Defendant),
v.
MARTIN CORT, P.C 4637, Respondent (Complainant).

[1944.No. 179. DEMERARA.]

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

1944. August 23, 29.

*Criminal law and procedure—Larceny—Cycle generator—*Possession *in accused* 8 *or* 9 *months after theft—Not recent possession.*

Where a person is found in possession of a cycle generator, 8 or 9 months after it was stolen, he is not in recent possession of it within the meaning of the law of larceny.

Appeal by the defendant George Liddell from a decision of a Magistrate of the Georgetown Judicial District convicting him of the larceny of a generator.

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

F. W. Holder, acting Attorney-General, for the respondent.

Cur. adv. cult.

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

This is an appeal from a conviction for larceny of a cycle generator. The facts would appear to be that a bicycle was stolen on 21st March. 1942 and was recovered on 22nd March, 1942, the generator having been removed therefrom. On 5th April, 1943 the generator was found in the possession of the appellant who in a statement then made to the police said he had bought it about the end of 1941. In his evidence before the Magistrate he stated that he had bought it in 1942 and further stated that he had told the police the latter part of 1942.

The learned Magistrate appears to have treated this as falling within what is known as the doctrine of recent possession and holding that the appellant had given no explanation which might reasonably be true convicted him.

It is important to observe that before any inference may be drawn as to the guilt of an accused person it is essential that it be established that the article in question was in his possession shortly after it was stolen, for only in such case does any presumption that he was the thief reasonably arise. The fact that he was in possession shortly after the theft may be proved either by direct evidence or by an admission of the accused, but it is absolutely essential that it be established beyond reasonable doubt.

In the present case the only direct evidence is that the article was found in his possession thirteen months after it was stolen, but it is submitted on behalf of the respondent that the statement and evidence of the accused himself show that it was in his possession shortly after the theft. Had the case rested on the statement made to the police there might have been

found support for this contention in *R. v. Evans* 2 Cox C.C. 270, for in that case the accused was found in possession of an article fifteen months after the loss and claimed that it had been in his possession from a date prior to the date upon which it was alleged to have been stolen and had been continuously in his possession ever since. In the present case this is not so, for while in the original statement he did indeed make this claim he abandoned it at the trial and did not admit possession until the latter part of 1942.

In these circumstances it is impossible to conclude that it has been established beyond reasonable doubt at what date the article came into the possession of the accused, save that it was at some time prior to 5th April, 1943 when it was so found.

That being so no presumption of guilt can arise for thirteen months after the theft could not reasonably be considered "recent" in relation to such an article as that the subject of this charge. Even if it were to be considered that the accused has admitted possession during the latter part of 1942, and no more than that can be deduced from his conflicting statements, this would still be eight or nine months after the theft and this again could not be considered so recent as to justify the inference that he was the actual thief.

The unsatisfactory nature of his explanation might arise from a variety of reasons, guilty or innocent, imperfect memory, fear or otherwise, but in the absence of proof by the Crown that he was in fact in possession of the article shortly after it was stolen no legitimate inference can be drawn that he stole the article in March, 1942. He was therefore wrongly convicted, the appeal must be allowed with costs and the conviction and sentence set aside.

Appeal allowed.

RAMSUNDAR (PAGLA) *v.* C. WELCOME, P.C. 4400

RAMSUNDAR (PAGLA), Appellant (Defendant),
v.
CHARLES WELCOME, P.C. 4400, Respondent (Complainant).

[1944. No. 210. DEMERARA.]

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

1944. August 23, 29.

Criminal law and procedure—Statutory offence—Conviction for—Must contain every ingredient of offence required by statute creating of it—Where ingredient omitted—Omission cannot be supplied by inference or intendment—Conviction bad.

Criminal law and procedure—Summary conviction offence—Complaint for—Particulars of offence—Not fully stated as in statute creating offence—Criminal Justice Ordinance, 1932, (*No.* 21), s. 7.

In every formal conviction for a summary conviction offence there must be expressed therein every ingredient of the offence required by the statute creating it, and omission of such a statement cannot be supplied by inference or intendment.

Bagado v. *Welcome* (1942) L.R.B.G. 293, applied.

By section 141 of the Summary Jurisdiction (Offences) Ordinance, cap. 13, every one who, in view of any public way or public place, openly carries without lawful excuse any dangerous weapon in a manner to cause terror to the public, is guilty of an offence. The particulars of offence given of a charge under this section were that the defendant "in a yard within public view at Coverden openly carried without lawful excuse a dangerous weapon to wit a shot gun in a manner to cause terror". The defendant was convicted, and the formal conviction followed the particulars of the offence.

Held that while by reason of section 7 of the Criminal Justice Ordinance, 1932, the defects in the information might not have been fatal, the conviction is not covered by that section, and is bad in consequence of the omission of the words "in view of any public place" and "to the public".

Appeal by the defendant Ramsundar from a decision of the Magistrate of the Georgetown Judicial District convicting him of having in a yard within public view openly carried without lawful excuse a dangerous weapon to wit a shot gun in a manner to cause terror.

W. J. Gilchrist, for the appellant.

F. W. Holder, acting Attorney-General, for the respondent.

Cur. adv. vult.

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

This is an appeal from a conviction for an offence under section 141 of the Summary Jurisdiction (Offences) Ordinance, Ch. 13.

The two main grounds of appeal are that the information and conviction are bad in that they do not allege that the conduct of the appellant caused terror "to the public" and that there is no proof that the appellant carried a dangerous weapon on or in view of any public way or public place.

As to the first point the particulars of offence in each document are described in the following terms:

> "Defendant on Saturday the 2nd of January 1943 in a yard within "public view at Coverden East Bank Demerara in the Georgetown "Judicial District openly carried without lawful excuse a dangerous "weapon to wit a shot gun in a manner to cause terror".

It is to be observed that this description does not follow the statute in two respects. Firstly it states that the offence was committed "in a yard within public view" and does not allege that it was committed either on or in view of either a public way or a public place, and secondly it states that the weapon was carried in a manner to cause terror, and does not allege that it was carried in a manner to cause terror to *the public.*

While by reason of section 7 of the Criminal Justice Ordinance 1932, these defects in the information might not have been fatal, yet as was pointed out in this Court in *Bagado* v. *Welcome* (1942) L.R.B.G. 293, the conviction is not covered by this section and the rule remains as stated in Paley on Summary Convictions (19th Edn.) pp. 456 and 485, that there must be expressed therein every ingredient of the offence required by the statute, and moreover omission of such a statement cannot be supplied by inference or intendment.

The dangers inherent in the omission of some essential ingredient are illustrated in the present instance for the defective statement as the venue of the offence and as to those to whom terror was caused appears to have misled the learned Magistrate so that he failed to observe the absence of any proof that the offence was committed either "on or in the view of any public "way or public place".

It is essential that the prosecution should prove every essential ingredient and one of them is that the weapon should openly be carried on or in view of a public way or public place. Proof of no more than that persons other than the defendant were present is not sufficient to establish the fact upon any of the accepted interpretations of the meaning of the words "public way" or "public place" and there is no evidence other than that which suggests that the appellant carried the weapon in a yard in which there were other persons. There is nothing whatever to show that this yard was in view of a public way as defined by section 2 of the Ordinance or in view of a public place in the accepted meaning of that term.

It is clear not only that the form of complaint was likely to mislead the Magistrate but that he was in fact so misled as is shown by the form of his conviction and by his failure to address his mind to the absence of any evidence that the appellant conducted himself in the manner described either on or in view of any public way or public place.

The appeal must be allowed with costs and the conviction and sentence be set aside. We would observe that care should be exercised in the conduct of all such proceedings to ensure that the necessary documents are so drawn that neither the Court nor the person charged may be misled as to the real nature of the offence and the issues involved. Failure to observe this care may very well result in a miscarriage of justice either on one side or the other.

Appeal allowed.

J. DROOG & B. DUTCHIN *v.* R. F. McWATT

JOHN DROOG and BASIL DUTCHIN, Appellants (Defendants),

v.

RICHARD FRANCIS McWATT, Respondent (Complainant).

[1944. No. 286. DEMERARA.]

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

1944. August 25, 29.

Construction—Act prohibited save with permission of some authority —Implied power in that authority to grant the permission.

Intoxicating liquor licensing—Premises—Meaning of—Licensed or unlicensed premises—Intoxicating Liquor Licensing Ordinance, cap. 107, *s.* 69 (1).

Intoxicating liquor licensing—Removal of rum from one premises to another—Offence of—Complete while rum in transit—Intoxicating Liquor Licensing Ordinance, cap. 107, s. 69.

Intoxicating liquor licensing—Removal of rum from one premises to unlicensed premises—Permit for—Under Cap. 107, s. 58 (2)*—Removal of rum next day from unlicensed premises to other unlicensed premises— Permit therefor not issued under cap.* 107, s. 69*—Permit under s.* 58 *no authority for removal of rum next day—Intoxicating Liquor Licensing Ordinance, cap.* 107, ss. 58 (2) *proviso* (b), 69.

The permit referred to in section 69 of the Intoxicating Liquor Licensing Ordinance, cap. 107, is not the same as the permit issued under proviso (b) to section 58 (2).

When an act is prohibited save with the permission of some authority, power is impliedly conferred upon that authority to grant such permission.

The word "premises" in section 69 (1) of the Intoxicating Liquor Licensing Ordinance, cap. 107, means any premises, whether licensed or unlicensed.

A permit under proviso (b) to section 58(2) of the Intoxicating Liquor Licensing Ordinance, cap. 107, authorising the removal of rum from a spirit shop to unlicensed premises during certain hours on one day does not operate to authorise the removal of the rum from those premises to other unlicensed premises on another day.

The offence under section 69 of the Intoxicating Liquor Licensing Ordinance, cap. 107**,** of removing rum in excess of two quarts from one premises to another is complete while the rum is in transit.

Appeal by the defendants from a decision of the Magistrate of the Georgetown Judicial District convicting them for being concerned in the removal of a quantity of rum in excess of two quarts, from one premises to another without a permit, contrary to section 69 (1) of the Intoxicating Liquor Licensing Ordinance, cap. 107.

C. Lloyd Luckhoo, for the appellants.

F. W. Holder, acting 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 being concerned in the removal of a quantity of rum in excess of two quarts from one premises to another without a permit, contrary to section 69 (1) of the Intoxicating Liquor Ordinance, Cap. 107.

The facts are that a permit was issued for the sale and removal of a quantity of rum from a retail spirit shop to a certain theatre within two hours from 5 p.m. on 25th May, 1943.

On 26th May, 1943, at 10.15 a.m. the appellants were concerned in the conveyance of a portion of this quantity from the theatre for the purpose of returning it to the shop, this portion having been left over after a dance at the theatre for which the original supply had been ordered. Upon being questioned by a revenue runner the permit issued on 25th May for removal from shop to theatre was produced and no other.

Upon this evidence the Magistrate convicted.

It was argued in the first place that there was no evidence connecting the second named appellant with the removal of the rum but we are satisfied that there is enough evidence that he was so concerned.

In the second place it was submitted that the permit referred to in section 69 (1) of the Ordinance must be taken to mean a permit issued under section 58 and that as this latter section refers only to permits for the sale and removal of rum from licensed premises neither section has any application to the removal of rum from any unlicensed premises. In support of this argument counsel referred to the fact that section 69 does not expressly authorise the issue of a permit but merely forbids the removal of rum without a permit.

We are unable to agree with this construction of the section. It is in our view clear that section 69 is intended to refer and does refer to circumstances quite distinct from those dealt with in section 58, and that when an act is prohibited save with the permission of some authority power is impliedly conferred upon that authority to grant such permission.

It was further submitted, however, that section 69 must be construed in relation to section 58 in the sense that by the word "premises" used in the former is intended "licensed premises" to which the latter section refers. We do not think that the word "premises" can be so construed. Throughout the Ordinance it would appear that a distinction is clearly drawn between licensed and unlicensed premises and when the former is intended it is clearly so stated either by the use of the words "licensed premises" or of the words "spirit shop". When therefore the word "premises" alone is used it should be interperted as meaning any premises whether licensed or unlicensed. In that case when the removal of rum from one premises to another is prohibited the prohibition applies to its removal from any premises whatever. It appears to us that the reason for such an enactment is not far to seek it being obviously undesirable that in a country where rum is manufactured large quantities of the spirit should be allowed in transit unaccompanied by any permit or other document disclosing the source and the destination thereof.

Counsel further submitted that in the present case the permit issued in the first instance was all that was necessary and no further permit would be needed for the return of the unused surplus but for the reasons last given we do not agree. The permit issued on 25th May was limited to a specific purpose and was valid for a specific time which had expired. It was therefore of no avail.

Finally it was submitted that the section prohibits the removal of rum from "from one premises to another" without a permit and that until the rum has reached its destination no offence had been completed. That is an argument to which we do not think much weight can be attached. It is indeed negatived by the provisions of the following section which provides for the seizure of the rum and detention of the persons concerned in the course of removal.

Counsel for the appellant invited this Court to express an opinion on two further points either of which he suggested might vitiate the conviction. Firstly as to whether or not the person who made the seizure in the present case was empowered to do so in pursuance of section 70 of the Ordinance and secondly whether it was incumbent upon the Magistrate by his conviction to order that the rum seized should be forfeited. We are not of the opinion that either matter affects the validity of the conviction. The offence may be committed and a conviction follow whether or not the powers of seizure conferred by section 70 are exercised. Those questions do not therefore arise on this appeal against the conviction and it would be undesirable that we should express any opinion thereon.

In view of our findings on each point raised by the appellants the appeal fails and must be dismissed with costs.

Appeal dismissed.

ERIC ALPHONSO ROHEE, Plaintiff,
v.
EVELYN ADA ROHEE, Defendant.

[1943. No. 375.—DEMERARA.]

BEFORE SIR JOHN VERITY, C.J.

1944. SEPTEMBER 11, 12, 13, 21.

Husband and wife—Purchase by husband of immovable property in name of wife—Surrounding circumstances to be considered—To see what the nature of the transaction really intended to be—Presumption of gift by husband to wife.

Where a husband purchases property, or makes an investment, in his wife's name, a gift to her is presumed, in the absence of evidence to the contrary; but in every case all the surrounding circumstances must be considered to see what the nature of the transaction and the intention of the transferor really were.

Action by the plaintiff Eric Alphonso Rohee claiming from the defendant Evelyn Ada Rohee a declaration that he is part owner with the defendant of certain immovable property, or, alternatively, payment to him of a certain sum advanced by him in the purchase of the property.

W. J. Gilchrist, for the plaintiff.

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

Cur. adv. vult.

VERITY, C.J.: In this case the plaintiff sues for a declaration that he is part owner with the defendant of certain immovable property or alternatively payment to him of a certain sum advanced by him in the purchase of the property. The defendant alleges that she is the sole owner of the property and that any part of the purchase money contributed by the plaintiff was by way of a gift for her advancement.

It appears that the plaintiff and defendant were married in September, 1940, and that a decree *nisi* for the dissolution of the marriage made in this Court in October, 1943, was made absolute in April, 1944.

At the time of the marriage a number of monetary gifts were made by friends and relatives of the parties and a conflict arises as to which of those presents were made personally to the bride, which to the bridegroom and which jointly to both parties. Amongst those gifts is included a substantial sum given by the parents of the bride after the marriage.

It further appears that the whole of those gifts together with certain other moneys including sums borrowed by the plaintiff were expended in the purchase of a certain property in Kingston. The title to this property was passed in the name of the defendant alone. Subsequently this property was sold, and by a series of transactions other properties were acquired until finally the money so derived including profits of sales and sums raised from time to time by divers loans was invested in the property now in issue, title to which is in the defendant's name.

The plaintiff claims that he is entitled to the beneficial interest in this property to the extent of the sums advanced by him in the course of the transactions. While the defendant does not admit the proportion in which the plaintiff claims to have advanced his own moneys it is submitted on her behalf that this is immaterial on the ground that the property having been bought by the plaintiff and conveyed on his instructions to the defendant, his wife, during coverture there arises the presumption that the purchase was a gift for her advancement and that there is nothing in the circumstances to rebut this presumption. The rule as to this presumption is stated clearly in Halsbury's Laws of England (2nd Edn.) Vol. XVI at page 663, in the following terms: "Where a husband purchases property or makes an "investment in his wife's name a gift to her is presumed in the "absence of evidence of an intention to the contrary." In commenting upon this presumption the learned author of Lush on the Law of Husband and Wife (3rd Edn. p. 212) adds “But in every case all the surrounding circumstances must be considered to see what the nature of the transaction and the intention of the transferor really was."

While therefore in considering the submission made on behalf of the defendant it may be unnecessary to determine the precise apportionment of the wedding presents as between the husband and wife in this case, it is necessary to consider the evidence in relation thereto as affecting the surrounding circumstances of the transactions which followed upon the wedding.

The plaintiff avers that a number of wedding presents from members of his family notably his sisters were gifts personal to

himself and that certain of them, particularly a gift of $2,800 from the bride's parents, were intended for the joint benefit of husband and wife. The defendant, on the other hand, claims that all these gifts were personal to herself. A consideration of these questions will not only throw some light upon the circumstances but also upon the reliability of the testimony given by the plaintiff and thus affect directly the force of his evidence as to his intention in directing conveyance to his wife of the properties subsequently purchased.

The evidence relating to a number of those presents is slight; no more than a mere statement on one side or the other as to the alleged intention of the donor and in none of such cases was the donor called upon to testify. In regard to two gifts amounting to $500 made by the plaintiff's sisters there is rather more evidence for one of the sisters gave evidence in support of the plaintiff's contention. She states that her sister and herself intended their presents of $300 and $200 to be for the personal benefit of the plaintiff. She states that the money was drawn from the Savings Bank, converted into cash and conveyed in that form by her sister to the house of the bride's parents where the wedding was to take place. The defendant, on the other hand, states that the sum was not brought in the form of cash but that the sister handed her a cheque in favour of herself in her maiden name, and it is submitted that it should be inferred from this fact that the gift was intended for the bride alone. It is indeed curious that all monetary gifts were, as is alleged by the defendant, personal to the bride even when they came from the bridegroom's family, and the balance of probability would tend rather to be in favour of the plaintiff in this regard. But it is perhaps even more curious that in this instance, as in others, the person who made presentation of the gift is not called as a witness. This sister who is alleged to have carried the sum of $500 in cash, though surely a cheque would have been infinitely more convenient, has not been called to testify as to the terms upon which she delivered the gift. In the circumstances it is impossible for me to conclude that the present was in fact made to the plaintiff for his personal benefit.

In regard to the alleged joint gift of the bride's parents the evidence of the plaintiff as to a promise to that effect made by them is entirely unsupported and is denied by both the defendant and her mother and the inclusion by the plaintiff of a sum of $300 as a first payment on account of this alleged joint gift is negatived not only by the defendant's brother who states that this sum was a gift by himself *to* the defendant personally but also by the cheque in payment thereof which is one in favour of the brother as part proceeds of his insurance policy.

The effect of the failure of the plaintiff to establish his contention in each of these two instances is to detract from the weight of his attempt to controvert the defendant's assertion not only that these gifts were handed or sent personally to her, as would appear to be admitted but that they were expressed as being intended for her personal benefit.

Considering at this stage the first of the transactions which Jed to the final purchase of the property now in dispute it is to

be observed that the plaintiff by para. 11 of his Statement of Claim as borne out by his own version of the facts avers that of the $6,700 purchase money his own share was $5,025.52 and that of the defendant no more than $1,674.48, the latter representing half her parents' alleged joint gift, $1,400, half the value of alleged joint wedding presents, $174.48 and $100, personal gifts to the defendant. I have not the slightest doubt that the sum of $2,800 claimed by the plaintiff to be a joint gift was in fact personal to the defendant, as to $2,500 from her parents and as to $300 from her brother. There is documentary evidence (Exh. F) that at about the time of this purchase the defendant withdrew $624 from her savings bank account almost completely exhausting the same thereby and I do not doubt that the defendant applied that sum, as she says, to the purchase of this property. Without taking account for the time being therefore of any other wedding gifts the balance of the apportionment of the purchase money is by those means immediately changed, the defendant's share becoming $3,424. This conclusion in itself indicates an attempt on the part of the plaintiff to exaggerate his own contributions. If I should conclude as the weight of evidence would indicate that the plaintiff has no greater claim to the remainder of the wedding presents, then the balance is still further reversed and the figures are rather those set out by the defendant in para. 8 of the Statement of Defence. These are facts which must be taken into consideration in determining the circumstances in which the first transaction was entered into and the intention of the plaintiff at that date.

It must not be forgotten, moreover, that the relation existing between the parties in 1940 and 1941 were very different from those which arose in 1943 when this action was brought and the present claim was set up by the plaintiff. It would no doubt appear fantastic at the present moment to presume that the plaintiff would devote his personal moneys and even go so far as to borrow moneys for the purpose of making a gift of this nature to the defendant but one must bear in mind that at the date of the commencement of these transactions the parties had but recently been married, that, as I have found, the bride and her parents were contributing more than half the cost of the property to be purchased and that it would be by no means beyond the bounds of probability that the plaintiff might desire to make such a gift.

I am unable to say, therefore, that the presumption arising from the plaintiff's instructions that the property be conveyed to his wife is negatived by the general circumstances or even that any serious doubt is cast upon the propriety of its acceptance in such circumstances. It remains to be considered therefore whether the direct evidence adduced by the plaintiff is sufficient to rebut the presumption. His own evidence is unsupported by that of any other witness. He states that the parents' gift was intended to be a joint gift to enable them to purchase the property for their joint benefit and that this was stated by the defendant's mother in the presence of the defendant. This both the defendant and her mother deny. He states that upon the purchase of the property the defendant's parents desired that the

title thereto be placed in the defendant's name in order to give the public the impression that this was a gift to the bride by her parents. This the defendant and her mother also deny. He states that on each occasion of a transfer of property during the series of subsequent transactions the same fiction was maintained for the same reason. This also is denied by the defendant and her mother. Thirdly he states that upon the purchase of the property at present in dispute, at a time when relations between his family and that of the defendant were already strained he sought to have the title placed in the names of both himself and the defendant who, however, besought him with tears to continue to deal with the matter as before on the ground that any change would give the impression that they themselves were at issue. He states that for this reason and in a last effort to preserve their own relations with each other he reluctantly consented. All this the defendant denies.

On the other hand there is the evidence of the defendant that she wished to invest the money gifts she had received from her parents and others in immovable property; that the gift from her parents was specifically given to her as a contribution towards the purchase of the original property; that the plaintiff fully approved of this project and expressed a desire to contribute also towards that end and that the various succeeding transactions were carried out on her behalf and with her specific approval for her own benefit by the plaintiff at her request. In this she is supported as to the original transaction not only by her mother but by one of her brothers who admittedly was to a certain extent concerned in the negotiations of this first purchase. She is further supported not only by the title but also by the receipts for rent and other documents in her own name and in certain cases signed by the plaintiff as her agent.

It is unnecessary for me to enter into the details of each succeeding transaction involving from time to time the temporary raising of funds from one source or another for there seems to be no doubt that the speculations were on the whole profitable and the financial transactions were or could have been fully covered in the final event by the profits secured from the original investment.

The real issue is to be found in the terms upon which this series of investments was initiated and it appears to me that the weight of the evidence supports rather than negatives the presumption arising from the state of the title. I cannot say that I was so favourably impressed with the testimony of the "plaintiff as compared with that of the defendant and her witnesses that I should feel justified in accepting his unsupported word in the face of the weight of the evidence in opposition thereto. However favourably I may have been impressed with the general demeanour of the plaintiff there were nevertheless occasions upon which I feel impelled to the conclusion that he was the reverse of frank. Such for example as his assertion that his salary was nearly double that sworn to by his sister who employed him, a discrepancy not to be explained away by reference to any bonus, for in his own evidence he was at pains to distinguish between the two. Or again his belated explanation of

certain payments recorded in his own handwriting as having been made by "auntie" as having reference to repayment of her moiety of earnest money in respect of a certain transaction to which no reference is made on the pleadings or in his evidence in chief which discloses a different aspect of the matter and indeed a different figure.

I feel therefore that I must give due consideration to the weight of the evidence which is clearly in favour of the defendant.

I should perhaps refer to one legal submission made on behalf of the plaintiff to the effect that the sum of $2,216 referred to by the defendant as a gift from the plaintiff is unenforceable in law there being no delivery so as to complete the gift. Had the defendant sought to recover the sum named there might have been substance in this argument, but there is no doubt that where a husband makes payment of the purchase money, whether in whole or in part, and directs conveyance of the property to his wife a gift is presumed for her advancement and is complete upon the passing of transport in her name.

The plaintiff has failed to satisfy me that the presumption of a gift arising from his directing or allowing the titles to these successive properties to be passed in the name of the defendant is negatived by all the circumstances of the case and he is not entitled either to the declaration he seeks or to the alternative relief he prays.

Judgment must be entered for the defendant with costs.

Judgment for defendant.

Solicitors: *J. Gonsalves,* O.B.E.; *F. I. Dias.*

ABDOOL D. HACK, Appellant (Defendant),

v.

LESLIE SLATER, Respondent (Complainant).

[1944. No. 260.—DEMERARA.]

BEFORE FULL COURT: SIR JOHN VERITY, C.J., and FRETZ, J

1944. AUGUST 30; SEPTEMBER 21.

Appeal—Question of fact—Conflicting testimony—Ample evidence on which magistrate could act—If be believed evidence on one side—Magistrate did not act unreasonably—Did not weigh evidence on some wrong principle—Decision of magistrate—Will not be disturbed.

Where there is ample evidence upon which a magistrate could properly have come to a conclusion of fact if he believed the evidence for the prosecution, the Full Court, on appeal, would only interfere with the decision of the magistrate if it be shown that he acted unreasonably in reaching his conclusion and would have reached a different conclusion had he viewed the evidence reasonably.

Where there was a clear conflict between the testimony given by the complainant and that given by the defendant, and the magistrate determined that conflict adversely to the defendant, the Full Court on appeal, would differ from the magistrate only with extreme reluctance and if it be plain that the magistrate acted on some wrong principle in weighing the evidence.

ABDOOL D. HACK *v.* LESLIE SLATER

Appeal by Abdool D. Hack from a decision of a Magistrate of the Georgetown Judicial District convicting him of selling a price-controlled article at a price exceeding that fixed by the competent authority under the Defence Regulations, and fining him $500 and costs, in default 180 days' hard labour.

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

F. W. Holder, acting 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 exceeding that fixed by the Competent Authority under the Defence Regulations.

The learned Magistrate found as a fact that the applicant had sold 111/2 gross tubes of rubber solution at a price exceeding the controlled price. There is ample evidence upon which he could properly have come to that conclusion if he believed the evidence of those witnesses for the prosecution who deposed to the sale and this Court would only interfere with his decision if it be shown that the Magistrate acted unreasonably in reaching his conclusion and would have reached a different conclusion had he viewed the evidence reasonably.

It was argued on behalf of the appellant that delay in instituting the proceedings and certain inconsistencies in the evidence of the witnesses for the prosecution coupled with the testimony of the appellant and his own supported by the bill book produced by them to the Police raised at the least a reasonable doubt as to the guilt of the appellant and that he should therefore have been acquitted.

The learned Magistrate had all these facts before him and was entitled to weigh them in reaching his conclusion as to which of the conflicting versions he should believe.

That there was a transaction relating to the sale of rubber solution on the date in question is not disputed and the sole issue related to the quantity of this article sold and the sum of money received.

There was here a clear conflict between two sets of witnesses whom the learned Magistrate saw and heard and this conflict he resolved adversely to the appellant. In such a case a Court of Appeal would differ from the Court before which the testimony was given only with extreme reluctance and if it be plain that the Court below acted on some wrong principle in weighing the evidence.

It is argued that the learned Magistrate in the present case erred in his conclusion that the bill book produced by the appellant to the Police was not a genuine record of the transactions to which it purported to relate and in basing his view on the merits of the conflicting testimony upon this conclusion.

It is true that the learned Magistrate appears to have attached considerable weight to his opinion of this piece of evidence and gives his reasons therefor, but he is careful to say that this is not the only reason for his acceptance of the evidence of the

witnesses for the prosecution and we see no reason why he should not have accepted their evidence if more favourably impressed with it than that of the appellant.

So little confidence did he repose in the evidence of the appellant that he had no hesitation in coming to the conclusion that if acceptance of the evidence for the prosecution involved rejection of the book produced by the appellant he was prepared to hold that the book was not genuine. We might not ourselves have reached this conclusion and may be of the opinion that the conflict might have been more readily resolved on other grounds but the extreme view taken by the Magistrate does, we think, indicate very forcibly the opinion formed by him as to the relative reliability of the testimony given by the witnesses for the prosecution and the appellant respectively and this must be the deciding factor.

It was submitted that the decision of the learned Magistrate amounts to a conviction of the appellant upon his failure to satisfy the Court as to his innocence rather than upon proof by the prosecution of his guilt, but this is clearly not so. The evidence tendered by the prosecution was full and conclusive as to his guilt and could only fail to justify a conviction if the appellant on his part either satisfied the Court as to the falsity of the evidence against him or raised a reasonable doubt as to its truth. In this the appellant failed and we think in view of the whole of the evidence that the learned Magistrate was right in his conclusion.

The appeal is therefore dismissed with costs.

Appeal dismissed.

R. E. WHITEHEAD, Appellant (Defendant),
v.
MIRIAM BARTLEY, Respondent (Plaintiff).

[1944. No. 151.—DEMERARA.]

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

1944. AUGUST 18; SEPTEMBER 21.

Rent restriction—Landlord and tenant—Whether premises, dwelling house or business premises, or partly one and partly the other—Real main and substantial purpose of use of premises by tenant—To be considered—Question of fact—Rent Restriction Ordinance, 1941 *(No.* 23), *s.* 3 (1), (3) *proviso.*

Appeal—Question of fact—Real main and substantial purpose of use of premises let—Decision of magistrate reversed.

Rent restriction—Dwelling house let to tenant—Converted by tenant into business premises—Change of user by tenant—Rent Restriction Ordinance, 1941 *(No.* 23), s. 3 (6)*—Does not apply.*

Certain premises were first rented to the respondent as a residence, but she divided up the drawing and dining rooms, converted them into a number of bedrooms and advertised for boarders. It was the intention of the respondent to carry on a boarding house. She was, however, unsuccessful in obtaining boarders, and she rented rooms to lodgers who supplied their own meals. The respondent lived on the premises and made her living out of letting the rooms.

Held (1) that the real, main and substantial purpose of the respondent's use of the premises was not that of obtaining a dwelling-house for herself, but premises in which she could carry on the business by which she makes her living;

(2) that premises put to such a use are not dwelling houses within the meaning of the Rent Restriction Ordinance, 1941 (No. 23);

(3) that the premises do not fall within the scope of the proviso to section 3 (3) of the Rent Restriction Ordinance, 1941, relating to premises used partly as a dwelling house and partly as business premises inasmuch as the whole premises were converted by the respondent for the purpose of being used as business premises.

Greig v. *Francis*, 38 T.L.R. 510, *Colls* v. *Parnham* (1922) 1 K.B. 325, *Tompkins* v. *Rogers* (1921) 2 K.B. 94, and *Fordree v. Barrell*, 95 J.P. 141, 96 J.P. 278, considered.

It is a question of fact as to what is the real, main and substantial purpose of the premises.

Greig v. *Francis*, 38 T.L.R. 519, applied.

Section 3 (6) of the Rent Restriction Ordinance, 1941 (No. 23) has no application to the substitution of one user for another by the tenant.

Appeal by the defendant R. E. Whitehead from a decision of a Magistrate of the Georgetown Judicial District in favour of the plaintiff Miriam Bartley in an action to recover excess rent alleged to have been paid to the defendant over and above the rent permitted by the Rent Restriction Ordinance, 1941 (No. 23). The facts and arguments appear from the judgment.

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

E.D. Clarke, solicitor, 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 Magistrate of the Georgetown Judicial District in favour of the plaintiff in an action to recover excess rent alleged to have been paid to the defendant over and above the standard rent prescribed by the Rent Restriction Ordinance, 1941.

The defendant appealed on the ground that the Ordinance does not apply to the premises in question, they having at all material times been used for business premises.

On the facts the learned Magistrate found that the premises were first rented to the respondent as a residence, but that she divided up the drawing and dining rooms, converted them into a number of bedrooms, and advertised for boarders. In his reasons for judgment he says "it was clearly her intention to carry on a boarding house. I find, however, that she was unsuccessful in obtaining boarders, but that she did rent rooms to lodgers who supplied their own meals". He further states his conclusion that the premises were let as a dwelling house and so used by the respondent for several years, that she lived there herself and that "she carried on the business of letting rooms, or apartments to lodgers." Upon these findings the learned Magistrate held that the Ordinance applied and gave judgment for the respondent.

Upon the evidence and upon the findings of the Magistrate the appellant submits that "the real, main and substantial purpose of

the premises" was that of a lodging house, that the keeping of lodgings is a business and that the premises do not therefore fall within the Ordinance.

On the other hand the respondent contends that she did no more than sublet certain portions and that even if this should constitute use of a part of the premises for business purposes this would be covered by the proviso to section 3 (3) of the Ordinance and would not exclude the premises from the statute.

The matter is not altogether without difficulty in view of decisions not always easy to reconcile or distinguish but we think that the position is tolerably clear if attention is paid to the principles laid down in the cases to which we have been referred and if it is borne in mind that as was said in *Greig* v. *Francis and anor,* (38 T.L.R. 519) it is a question of fact as to what is the real, main arid substantial purpose of the premises.

It is clear from the case of *Colls* v. *Parnham* (1922) 1 K.B. 325 that the mere fact that the tenant uses part of the premises for taking in boarders while reserving the rest for his own use as a residence is not sufficient to exclude the operation of the statute; it is equally clear from the decision in *Tomkins* v. *Rogers* (1921) 2 K.B. 94 that for the purposes of a section in the English Act relating to business premises, in relation to which there is no analogous section in the local Ordinance, the occupation of a lodging-house keeper is a business. It may also be gathered from the judgments of the Court of Appeal in *Fordree* v. *Barrell* (95 J.P. 141) approved by the House of Lords (96 J.P. 278) that where the tenant sub-lets certain rooms so as to give his subtenants the right against himself to exclusive possession the effect is to exclude the operation of the Act as to those portions which are sub-let while retaining the protection of the Act in regard to the portion retained by the tenant. In that case Lord Justice Scrutton was at pains to distinguish between such a subletting and letting to lodgers who could not exclude their immediate landlord.

It appears to us that the present case can be distinguished from both *Colls* v. *Parnham* and *Fordree* v. *Barrell.* It is not a case of a tenant who with greater accommodation than she needs lets out a part of her dwelling house to a boarder, nor is it one of a tenant who sub-lets portions of the premises to tenants so as to create as against herself several dwelling houses to which her sub-tenants have exclusive right of possession. The real question in the present case is whether the substantial purpose of the premises as used by the respondent was that of a dwelling house or was that of premises used for business purposes.

We think that both the evidence and the conclusions of the Magistrate upon the facts made sufficiently clear that the latter is the case. The respondent by structural alterations converted the building from that of an ordinary dwelling house into one suitable for the carrying on of the business of a lodging house, and indeed by such alterations rendered it less suitable for the purpose of a dwelling house. Her intention in undertaking these structural alterations was obviously to enable her to carry on the business there of a boarding house, and failing in this, she has up to the present carried on in *lieu* thereof the business of a

lodging-house keeper. We think that is clear that in these circumstances the "real, main and substantial purpose" of her use of the premises was not that of obtaining a dwelling house for herself but premises in which she could carry on the business by which as the learned Magistrate has found, she makes her living. Premises put to such a use are, in our opinion, not dwelling houses within the meaning of the Ordinance, nor do they fall within the scope of the proviso relating to premises used partly as a dwelling house and partly for business purposes. The whole premises were converted by the respondent for the purpose of being used as business premises and by so doing she has lost the protection of the Ordinance.

Our attention was drawn by the Solicitor for the respondent to section 3 (6) of the Ordinance which provides for the continued protection of premises which have once come under the Ordinance.

Without going into the question of the precise purpose or necessity for this provision which is taken from section 12 (6) of the English Act there is ample authority for the conclusion that this provision has no application to the substitution of one user for another by the tenant.

In our opinion the learned Magistrate erred in holding that the provisions of the Rent Restriction Ordinance applied to the premises in question. The appeal must therefore be allowed with costs, the judgment of the lower Court in favour of the respondent must be set aside and judgment must be entered for the defendant in the suit with costs.

Appeal allowed.

FRANCES SARAH VAN BATENBURG STAFFORD, Plaintiff,

v.

MARTHA WOO MING, Defendant.

[1943. No. 451. DEMERARA.]

BEFORE BOLAND, J.: 1944. DECEMBER 6, 14.

Sale of land—Half lot of land in city of Georgetown—Exact mathematical half—Portion of lot less than half lot—Prescriptive title cannot be acquired for.

Sale of land—Contract of—Vendor's suit for specific performance— Plan to be annexed to transport—Right of purchaser to demand—Except where burden on vendor materially increased by expense or otherwise—Half lot of land in the city of Georgetown—Plan of—Entailing plan of entire lot as well as survey of a much larger area—Vendor cannot be forced to annex plan to transport.

An owner of a half lot of land in the city of Georgetown is entitled to, and is the legal owner of, an exact mathematical half of the lot.

Where an owner of a half lot of land in the city of Georgetown agrees to sell the half lot, she contracts to transfer to the purchaser the ownership of an exact mathematical half of the lot.

Pereira v. *Pereira* (1931-37) L.R.B.G. 464, applied.

The law prohibiting the diminution of a lot of land in the city of Georgetown to less than a half lot cannot be circumvented by the gain of prescriptive rights of ownership over part of a half lot.

In all simple cases in which a plan would assist the description, the purchaser would have a right to have a plan on the conveyance, and this forms part of the rule that the purchaser is entitled to take a conveyance in his own form. A purchaser is, however, not entitled to have a plan annexed to the transport where the burden laid on the vendor by the purchaser's choice is materially increased by expense or otherwise.

In re Sansom and Narbeth's Contract (1910) 1 Ch. 741, applied.

A. by an agreement in writing agreed to sell to B. the W1/2 of lot 49 or 78 Hadfield and Breda Streets, Georgetown. B. claimed that A. should annex to the transport a plan of the half lot. B. had inspected the place before making the agreement.

Held (1) that in the circumstances of the case it would be placing too great a burden on the vendor if she were forced to annex a plan to the transport, inasmuch as to prepare a plan of the half lot would entail not only a plan of the entire lot, but the making of a survey of a much larger area than that lot;

(2) that, having regard to all the circumstances, the description of the property as the W1/2 of lot 49 or 78 Hadfield and Breda Streets, was a sufficient description for the transport without any further description or annexation of plan, that being the description which the purchaser accepted as sufficient in the contract of sale after inspection of the place.

Action by the plaintiff claiming a decree of specific performance against the defendant in respect of a contract of sale where-under the plaintiff agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff, "the west half of lot number 49 also known as 78 Hadfield and Breda Streets in Werk-en-rust District in the City of Georgetown.

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

J. A. Veerasawmy, for the defendant.

Cur. adv. vult.

BOLAND, J.: The plaintiff is the owner by transport of a parcel of land in the City of Georgetown described in the said transport as "the west half of lot number 49 also known as 78 Hadfield and Breda Streets in Werk-en-Rust District in the City of Georgetown". Apparently her predecessors in title of the half lot never had any more particular description given of the half lot than that which is stated above, but it would appear that for many years this half lot had been partitioned off and divided from the eastern half of the lot and from the contiguous lots. A dwelling house stands on this west half lot, whether built before or after division of the lots into a west half and an half does not appear from the evidence, but that dwelling house has apparently stood there for many years prior to the acquisition of the site by the plaintiff in July, 1940. Although fences have long been maintained on four sides in order to mark the limits of this half lot nevertheless it would appear that in all transports and documents of title the place has had no other description identifying it than "the west half of lot 49 or 78 Hadfield and Breda Streets". What was the area of the entire lot No. 49 has not been given in evidence nor has evidence been tendered showing that the lot was ever given a description identifying it than "the west half of lot 49 or 78 Hadfield and Breda Streets". What was the area of the entire lot No. 49 has not been given in evidence, nor has evidence been tendered showing that the lot was ever given a description set-

ting out its boundaries according to measurement. It was stated at the hearing that at the Town Hall there is kept a chart or plan showing all lots in the City of Georgetown, but neither side tendered any such chart in evidence.

As a result of an advertisement offering the house for rent the defendant's husband, acting as defendant's agent, went and inspected the place. He subsequently interviewed the plaintiff's husband, who throughout acted as plaintiff's agent, and entered into negotiations for its purchase by the defendant with a view to occupying the place as a residence with defendant and family. The negotiations resulted in a written agreement dated 27th July, 1943 signed by both parties whereby the plaintiff agreed to sell to the defendant the said property described therein as "the west half of lot 49 or 78 Hadfield and Breda Streets, Georgetown, with all the buildings and erections thereon". The price agreed on was $9095.00 to include the cost of certain fixtures and it was further agreed that as the defendant was expecting funds on the completion of a sale of a property belonging to her, she would pay the sum of $500.00 on the signing of the agreement and the balance of $8595.00 was to be paid when the transport would be passed on or before the 31st August, 1943. Should transport be passed after that date the purchaser undertook to pay interest on the unpaid balance at the rate of six per cent. per annum. The purchaser was entitled to take possession on the signing of the agreement.

It would seem from the above agreement that the defendant accepted the description of the land given in the contract as a sufficient description of the place inspected by her agent, her husband, and it is difficult to see how the vendor could with safety venture upon a more particular description setting out the dimensions and boundaries, since she herself, a purchaser of the half lot, most likely was in ignorance of the correct area and true boundaries of the entire lot of which this was a half.

As owner of a half of the lot plaintiff was entitled to and is legal owner of an exact mathematical half and that mathematical half she was contracting to transfer to the ownership of the defendant — that and nothing more nor less she would by her transport be transporting, to the defendant on completion of the transaction. That would be in accordance with the decision in *Perreira* v. *Perreira* (1931-1937) L.R.B.G. p. 464, cited by counsel for defendant. Besides conveyance to the plaintiff of anything less than a half lot would have been in breach of the law regulating the transfer of lands in the City of Georgetown, nor does it appear that that law prohibiting the diminution of a lot to less than one half can be circumvented by the gain of prescriptive rights of ownership over a part of a half lot. Accordingly, it seems clear, it was a mathematical half of the lot which the plaintiff would in the contemplated formal transport be transferring to the defendant.

The defendant in pursuance of the said contract of sale on paying $500.00 as agreed went into possession about one week after the date of the agreement.

She is still in possession, but no transport up to now has been passed although the plaintiff has repeatedly requested the defendant to join in advertising transport,

The plaintiff after these repeated requests to defendant to complete the transaction on 24th November, 1943, filed this action claiming specific performance of the agreement and damages.

The defendant resists the claim for specific performance unless the plaintiff will consent to annex to the transport a plan of this west half of the lot. In the Statement of Defence she alleges that since action brought she has had the land surveyed by a certain Sworn Surveyor, and this survey, as alleged in the Statement of Defence, would establish that the fence on the southern side does not correctly fix the southern boundary of the half lot ~ that it would show that the adjoining owner to the south has encroached one foot four inches into the half lot. The defendant pleaded willingness to complete the transaction if the plaintiff would annex the plan of this survey to the transport, and has herself counterclaimed for specific performance of the agreement by a transport with this plan annexed — alternatively the defence claims to be entitled to be permitted to deduct from the balance of the purchase money due to the plaintiff such sum as the Court may in the circumstances consider a reasonable and sufficient abatement having regard to this encroachment.

It may be mentioned that at the trial the defence did not call the surveyor to testify as to his survey nor was any plan produced as pleaded. There was a statement made by counsel for the defence regarding the inability of the surveyor to attend that day at Court, but ultimately the defence closed its case without calling the surveyor. Counsel for defence was content to rest his case on his submission that defendant was entitled to a plan to be annexed to the transport, and he expressed the willingness of the defendant to bear the costs of any survey and plan made by any surveyor selected by the plaintiff to check her own surveyor's plan. The plaintiff opposed the annexing of any plan to the transport claiming to be entitled to give transport in accordance only with the description of the half lot as given in the contract of sale and in her own transport.

The question the Court has to decide is as it seems to me — In the circumstances of this case, is defendant entitled to insist on a plan to be annexed to the transport? Defence has cited the case of *In re Sansom and Narbeth's Contract* (1910) 1 Ch. 741 in which Swinfen Eady, J. (afterwards Lord Swinfen, M.R.) laid down that "in all simple cases in which a plan would assist the description the purchaser would have a right to have a plan on the conveyance, and this forms part of the rule that the purchaser is entitled to take a conveyance in his own form".

Now in this case would a plan assist the description of the property? The Court has not been privileged to see the plan prepared by the surveyor for the defendant as alleged in the Statement of Defence, but one can appreciate how difficult it would be to prepare a plan of the half lot that would be conclusively accurate and true. It would entail a plan of the entire lot of which this is a half, and as presumably the lot itself is One of several lots into which some large tract of land was divided in the early days of the settlement of Georgetown, it would involve a survey of much beyond this half lot,. These

difficulties are clearly explained in the evidence that was placed before the Court in the same case of *Perreira* v. *Perreira* cited by the Defence as indicated by the comments made by Verity, J. in his judgment. That case dealt with the question of the extent and limits of a half lot in a district of Georgetown not far removed from Hadfield Street. It would be placing too great a burden on the plaintiff to satisfy herself as to the correctness of a plan basing its accuracy on a correct delineation of many other lots and half lots. Williams on *Vendors and Purchasers,* Vol. 1, 3rd. Edition at page 595 in commenting upon the decision of Swinfen Eady, J. in *In re Sansom and Narbeth's Contract* reads "It is further submitted that the rule, that the purchaser may take his conveyance in what form he pleases is qualified by the proviso that the burden laid on the vendor by the purchaser's choice be not materially increased by expense or otherwise" Although the defendant undertakes to bear the expense, for the reason given above it would be placing too great a burden on the plaintiff if she were forced to annex a plan to the transport.

Moreover I am of opinion that the demand for a plan was not put forward by the defendant in good faith, but merely as a means of remaining indefinitely on the property without paying the balance of the purchase money.

I did not accept the evidence of defendant's husband that shortly after going into possession, as he alleges, he became anxious about the correctness of the boundaries on noticing the southern fence not running in a direct line. He says that he at once spoke to Mr. Stafford, and that he understood that Mr. Stafford had admitted that the adjoining owner had on Mr. Stafford's remonstrance pushed back his house a few feet. I accepted Mr. Stafford's evidence that before the signing of the agreement the defendant's husband and he, on an occasion when the latter was inspecting the place, spoke about the fence and he Mr. Stafford had explained that he had years before got the adjoining owner to remove certain pillars of a house that he was reconstructing as their bases were slightly projecting across the boundary — and that apparently the Building Authorities had made this adjoining owner put his house a few feet away from the boundary to conform with the Building Laws.

Subsequent to the date of his alleged discovery of the non-alignment of this fence, the defendant commenced and carried through substantial alterations to the structure of the house involving the expenditure of a considerable sum of money, a fact which shows that the defendant and her husband were satisfied as to the sufficiency of the description of the land as given in the contract of sale.

Time had been given to her to pay the balance of the money because the defendant was awaiting funds to come into her hands from the sale of a property of her own — the completion of which transaction had been delayed unavoidably. But after defendant's husband was offered these funds by the party with whom the defendant was treating, defendant's husband declared for the first time that his wife did not intend to go through with the purchase of the half lot without a plan.

Nor can the Court ignore the fact given in evidence that after the writ was filed and before the Statement of Claim, defendant expressed her willingness to take transport and pay the balance due but wished to avoid the payment of costs of action so far incurred by plaintiff, to which the plaintiff would not assent.

Having regard to all the circumstances of this case, I am clearly of opinion that the description of the property as "the west half of lot 49 or 78 Hadfield Street" is a sufficient description for the transport without any further description or annexation of plan — that being the description which the defendant accepted as sufficient in the contract of sale after inspection of the place.

Accordingly the order of the Court is that the contract is one that should be specifically enforced and that the defendant shall deposit into Court on or before the 27th day of December, 1944 the balance of the purchase money that is the sum of $8595.00 with interest thereon at the rate of 6% from 1st September, 1943, to the date of such deposit.

And upon such deposit into Court the plaintiff shall advertise and pass to the defendant transport of the said property as described in the memorandum of agreement; the parties each bearing a moiety of such expenses in accordance with the terms of the agreement.

And in default of advertising and passing such transport by the plaintiff within six weeks after the date of such deposit the Registrar is empowered and authorised to advertise and pass transport of the property in favour of the defendant. If the defendant does not deposit into Court the sum of money which is ordered to be paid in before the 27th December, 1944 the defendant shall immediately deliver up possession of the said property to the plaintiff.

The plaintiff has abandoned her claim for damages, but the defendant shall in the case of such delivery of possession pay a sum of money for mesne profits for period during which "she has been in possession — the amount of mesne profits to be determined on reference to me in Chambers.

The counterclaim is dismissed. Costs on Claim and Counterclaim to the plaintiff.

Judgment for plaintiff.

Solicitors: *J. Edward de Freitas : N. C. Janki.*

H. B. GAJRAJ, LTD. & ANR. *v.* LESLIE SLATER

H. B. GAJRAJ, LIMITED and JAMES A. LALL,
Appellants (Defendants),
v.
LESLIE SLATER,
Respondent (Complainant).

[1944. No. 300. DEMERARA.]

BEFORE FULL COURT: SIR JOHN VERITY C.J. AND BOLAND, J.

1944. December 1, 15.

Defence Regulations—Price controlled article—Sale of—At price exceeding that fixed by order of Competent Authority—Barrel of mackerel —Size not defined in Order—No evidence that what was sold was a barrel of mackerel according to trade usage—No proof that price at which mackerel was sold exceeded price fixed by Order of Competent Authority—Failure of prosecution.

Construction—Enactment—Repealed and substituted—New enactment to take effect on a future date—Former enactment remains in force until repealing enactment takes effect.

Custom—Of trade—Must be proved—By evidence of general usage—Judicial notice—Of trade custom—Cannot be taken.

The appellants were convicted of selling a price-controlled article, to wit, a barrel of mackerel, at a price exceeding that fixed by Order of a Competent Authority under the Defence Regulations. In the Order, the wholesale price of a barrel of mackerel was fixed, but it was not stated what a barrel of mackerel was to contain. No evidence was led to show that the barrel of mackerel, which was the subject matter of the charge, was, according to the custom of the trade, a barrel of mackerel.

Held that it was not proved that the price at which the barrel of mackerel was sold exceeded the price fixed by order of the competent authority, and that the prosecution therefore failed.

The Court is not entitled to, and does not, take judicial notice of a trade custom. A trade custom must be established by evidence of general usage.

By an Order made by the Competent Authority on the 7th January, 1944, the maximum price fixed for mackerel was $33.75 per barrel. This Order was amended by an Order dated 6th April, 1944, whereby the item relating to mackerel was deleted and a new item substituted. This Order was published in the *Gazette* of the 8th April, 1944, and it was provided that the provision as to the deletion of the item relating to mackerel was to come into effect on the 22nd day of April, 1944.

Held that the Order of the 7th January, 1944, was operative on the 13th April, 1944, in relation to mackerel.

Appeal by H. B. Gajraj, Limited and James A. Lall, from a decision of a Magistrate of the Georgetown Judicial District, convicting them of the offence of selling on the 13th April, 1944 a price-controlled article, to wit, a barrel of mackerel, at a price exceeding that fixed by the Competent Authority under the Defence Regulations.

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

F. W. *Holder,* Solicitor-General, for the respondent.

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

Cur. adv. vult.

This is an appeal by both appellants from a conviction for the offence of selling a price controlled article at a price exceeding that fixed by the Competent Authority under the Defence Regulations, 1939. The second named appellant has also appealed against sentence.

The articles alleged to have been sold by the appellants is a barrel of mackerel. The appellants were charged with having sold same on 13th April, 1944 at the price of $40. By an Order made by the Competent Authority on the 7th January, 1944, the maximum price fixed for mackerel was $33.75 per barrel. This Order was subsequently amended by an Order dated the 10th March, 1944 in particulars not material to this appeal, and further amended by an Order dated 6th April, 1944 whereby the Item relating to mackerel in the Order of 7th January, 1944 was deleted and a new item substituted. As to this item the Order was to come into effect on 22nd April, 1944. It was argued on behalf of the appellant that the effect of the Order of 6th April, 1944, was to decontrol the price of mackerel between the date of the coming into effect of that Order and the 22nd April. We think that this is quite clearly not so. The suspension of the coming into operation of this Order in so far as this item is concerned applies equally to the deletion of the original item and the substitution of the new item notwithstanding the fact that the Order as a whole was to become effective on 8th April, 1944.

The main arguments adduced on behalf of the appellants as grounds for appeal, however, relate to the original Order of 7th January, 1944. It is submitted that the Order in so far as it relates to the sale of mackerel by wholesale is void for uncertainty or, in the alternative, that there is no evidence connecting the article sold with the article the price of which is controlled.

List A, Schedule (1) of the Order gives the names of the articles whose prices are thereby controlled according to whether the sale be by wholesale or retail in certain districts as set out in columns. Column 2 states the nature of the article "Mackerel" which is No. 19 of Column 1. Column 3 states the maximum price at which this article may be sold by wholesale: "$33.75 per barrel." The remaining columns state the maximum prices by which it may be sold by retail at so much "per lb." It is contended on behalf of the appellants that there is in the Order no definition of the word "barrel" and that this word must therefore be interpreted according to its ordinary meaning which is to indicate a container of a certain kind without any reference whatever to its capacity or else as a measure of capacity varying with the kind of commodity it contains. It is submitted that the object of the order is to fix the maximum price at which a certain quantity of the price controlled commodity may be sold by wholesale and that if a price be fixed but no quantity the Order is defective and cannot be enforced. Thus, it is argued, if by a barrel the order means a particular kind of container without reference to size or capacity, or if it means a container of varying capacity according to the commodity it contains and the Order does not state what is the capacity of the barrel to which it refers, then there is no statement in the Order of the

quantity of the commodity which may be sold at a price not exceeding that fixed by the Order.

On behalf of the respondent it is contended firstly that there is no uncertainty as to the quantity sold in this case inasmuch as both purchaser and seller knew what was the quantity being sold: the purchaser ordered "a barrel" and the seller sold him "a barrel" and their minds were at one as to the quantity intended. That may or may not be so, although as no barrel appears in fact to have been produced at the time of the sale it is impossible to say that the parties were really in agreement as to the size of the barrel to which each referred. But whether this be so or not it is clear that to place such an interpretation upon the terms of the Order as to leave it to the parties to the transaction to determine what size of barrel they were dealing with would be to leave it to the parties to determine at what price the article, mackerel, should be sold, to comply with the Order, for the parties might agree upon a barrel containing 150, 200 or 300 lbs. of mackerel as they wished and the price would vary in accordance with the quantity agreed. To place such an interpretation upon the Order would be to defeat its object entirely. It does amount indeed to a practical admission of the appellants' contention that the item is so uncertain as to be unenforceable.

Secondly, however, it was contended on behalf of the respondent that the word "barrel" is not used simply in its ordinary meaning which would leave its capacity undetermined, but that it is used as a trade term indicating a barrel of generally recognised capacity so that when a dealer such as the purchaser in this case orders a "barrel of mackerel" from another dealer such as the appellant company it is known that he refers to a barrel of a given capacity and no other. It is to such a barrel, it is submitted, that the order refers.

To this argument the appellants reply that the Court does not take judicial notice of trade terms but that it is upon the prosecution to prove that the word "barrel" in relation to mackerel has in the trade a specific reference to a barrel of a certain fixed capacity and that the word "barrel" as used in the Order refers to such a container. There is much substance in this contention and if it should prove well-founded then it would appear that the prosecution should have failed for there is upon the record no evidence as to there being any understanding in the trade of what is meant by a "barrel of mackerel" or that the barrel sold in this instance was such a barrel. The learned Solicitor-General submitted that the mere offer and acceptance by the parties constituted evidence of an understanding by the parties of the meaning of this word as a trade term, but we are not of opinion that such evidence is sufficient to establish a trade custom, for the proof of a particular instance alone is not sufficient to prove general usage.

Examination of the appellants' contention in this regard leads us to the following conclusions: The Court is not entitled to and does not take judicial notice of a trade custom which must be established by the evidence of general usage; there is nothing in the mere use of the word "barrel" to indicate that in relation to mackerel this word has any particular meaning other than its ordinary meaning and there is no evidence that in the trade the

phrase a "barrel of mackerel" means a barrel containing a certain fixed quantity of mackerel; in the absence of any such evidence the Court must interpret the word "barrel" according to its ordinary meaning as a container of varying capacity; there is nothing either in the Order or in the evidence to indicate what is the capacity of the "barrel" referred to in the Order or what was the capacity of the barrel sold by the appellants; there is therefore nothing to show what was the quantity of mackerel sold by the appellants and as for the purposes of price control it is essential that the price should be related to the quantity sold and not to the nature or description of the container only, the prosecution failed to prove that the price of the article sold exceeded the price fixed by the Competent Authority for a given quantity of article.

We would wish to make it clear that the Order is not in itself void by reason of any uncertainty in relation to this particular item for the contention of the Solicitor-General that the term "barrel" used in this connection has a special trade meaning may be correct and if so then this meaning is capable of proof, the fixed price is capable of determination, and a sale at a price exceeding that so fixed by the Order is also capable of proof. But if that contention is correct then in the present case none of these things have been proved and the prosecution should have failed. In the result therefore the appeal must be allowed with costs and the convictions and sentences set aside.

We would add that we have come to this conclusion with extreme reluctance, realising as we do that it may very well be common knowledge amongst those who deal in this commodity that a barrel of mackerel invariably contains a fixed quantity. If this be so and if the appellants sold no more than that quantity, then, having done so at a price exceeding the maximum price fixed by the Order, they would be guilty of a serious breach of the Order and be deserving of punishment certainly no less severe than that imposed by the learned Magistrate in this case. It is the duty of this Court, however, to interpret the law and to see to it that no person is convicted of a breach thereof save upon strict legal proof of his guilt in accordance with the rules of evidence. In this case the guilt of the appellants has not been so proved by reason in the first place of a lack of precision in the terms of the Order in relation to this particular item and in the second place an absence of the evidence which would be necessary in order to make clear that which the Order left open to proof. It may well be that those responsible for the drafting of the Order had their reasons for not including in this instance the particularity with which the Order describes the capacity of barrels, casks or bags in every other item of similar nature in the same Schedule, although we are ourselves unable to see anything which would prevent their having done so. If, however, the Order fails in such particularity then it is the duty of those responsible for the prosecution to see to it that proof is given of every fact, whether of trade custom or otherwise, essential to show the relationship between the article and quantity sold and the article and quantity the price of which is controlled by the Order,

Appeal allowed.

SHEIK ABRAHIM *v.* ABSALIE KADIR

SHEIK ABRAHIM, Appellant (Claimant),
v.
ABSALIE KADIR, Respondent (Judgment Creditor).

[1944. No. 284—DEMERARA.]

BEFORE FULL COURT: SIR JOHN VERITY, C.J., FRETZ, J., and BOLAND, J.

1944. DECEMBER 15, 19.

Magistrate's court—Execution—Levy of—House on leased land—Movable property—Summary Jurisdiction (Petty Debt) Ordinance, cap. 15, s. 51 (1).

Evidence—Bailiff—Statutory duties of—Under Summary Jurisdiction (*Petty Debt*) *Ordinance, cap.* 15*—In absence of evidence to the contrary—Presumption—That regularly performed and in accordance with Ordinance.*

Magistrate's court—Jurisdiction—House claimed by executor as property of estate of deceased person—No specific bequest of house in will—Residuary bequest to children—Husband of deceased claims house as his —Levy on house by judgment creditor of estate—Interpleader claim by husband—Issue thereon—Ownership of immovable property—Within jurisdiction of magistrate—Validity of bequest not in issue—Within meaning of Summary Jurisdiction (*Petty Debt*) *Ordinance, cap.* 15, s. 3 (3)*—Jurisdiction not ousted.*

For the purposes of levying execution under the Summary Jurisdiction (Petty Debt) Ordinance, cap. 15, any house or other building on leased land is movable property.

In the absence of evidence to the contrary, it must be assumed that a bailiff has performed his duties regularly and in accordance with the provisions of the Summary Jurisdiction (Petty Debt) Ordinance, cap. 15.

Under a writ of execution against A.R. in his capacity as executor of the estate of H. deceased, the judgment creditor A.K. caused the bailiff to levy on a house which was claimed by H's husband as his own property. In his capacity as executor A.R. contended that the house was the property of the estate of H. deceased. In his will H. bequeathed the sum of 25 cents to her husband, and the residue of her estate to her children. There was no specific bequest of the house.

By section 3 (3) of the Summary Jurisdiction (Petty Debt) Ordinance, cap. 15, it is provided that the court shall not have cognizance of any action in which the validity of any bequest under any will is or may be disputed.

Held (1) that, on the interpleader claim filed by H's husband, the issue before the magistrate was no more than the simple question of ownership of movable property, and was within his jurisdiction;

(2) that a dispute as to the ownership of property alleged by the executor to be part of the estate cannot be said to put in issue the validity of the residuary bequest.

Appeal by the claimant Sheik Abrahim from a decision of the Magistrate of the West Demerara Judicial District dismissing his interpleader action against Abasalie Kadir who levied execution on a house as the property of the estate of Haliman, deceased.

C. Lloyd Luckhoo, for the appellant.

C. Shankland, 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 decision of the Magistrate of the West Demerara Judicial District dismissing a claim in interpleader proceedings under section 57 of the Summary Jurisdiction (Petty debt) Ordinance, Ch. 16.

Two of the grounds of appeal go to the jurisdiction of the Magistrate's Court. In the first place, it was submitted that the property levied upon, a house erected on leased land, is immovable property, but counsel for the appellant himself drew the attention of this Court to section 51 (1) of the Ordinance and frankly admitted that this section disposed of his contention. In the second place, he contended that the Magistrate had exceeded his jurisdiction, inasmuch as at the hearing of the claim the validity of a bequest under a will was in dispute.

It appears that the house in question is claimed by the judgment debtor to have been the property of a deceased person of whose will he is the executor, having been sued in that capacity. The claimant alleges that the house was never the property of the deceased, of whom he is the widower, but that it was his own property.

It was submitted that in determining the ownership of the house the learned Magistrate, in effect, determined the validity of the bequest thereof to the children of the testator and that in so doing he exceeded his jurisdiction.

We have made reference to the original will, a copy whereof was admitted in evidence in the Court below but not set out in the appeal record. By her will, the testator bequeathed to her husband the sum of twenty-five cents and to her children the residue of her estate. There is no specific bequest of the property now in dispute and we are unable to agree that a dispute as to the ownership of property alleged by the executor to be part of the estate can be said to put in issue the validity of a residuary bequest. The issue before the learned Magistrate was no more than the simple question of ownership of movable property and was within his jurisdiction.

It was further contended that as there was on the record no evidence that the bailiff made demand for payment before executing the writ, as required by section 45 of the Ordinance, the levy was bad and should be set aside. This point was not raised in the Court below, but in any event there was no evidence that the bailiff did not make such demand, and in the absence of any such evidence the Magistrate was entitled to assume that the bailiff performed his duties regularly and in accordance with the Ordinance.

It was a further ground of appeal that the decision was unreasonable having regard to the evidence. We are of the opinion that the evidence justified the Magistrate in reaching the conclusion that the claimant was not the owner of the house, but that it was the property of the judgment debtor as executor of the estate of the deceased.

All grounds of appeal having failed, the appeal is dismissed with costs.

Appeal dismissed.

ATTORNEY-GENERAL *v.* S.S. "JAMES L. RICHARDS"

ATTORNEY-GENERAL, Plaintiff,

v.

The Steamship "JAMES L. RICHARDS", (No. 2), Defendant.

[1942. No. 401 A.—DEMERARA.]

BEFORE SIR JOHN VERITY, C.J.

1944. November 23, 24; December 22.

Negligence—Ship—In charge of pilot—In compulsory pilotage area— Pilot in employ of Government—Negligence of pilot—Damage resulting therefrom—Owner of ship responsible for—Even if damage caused to property of Colony.

Pilotage—Compulsory pilotage area—Ship in charge of pilot—Duties of master.

Where a ship is negligently navigated, in a compulsory pilotage area, by a pilot in the employment of the Government of the Colony, the owner of the ship is liable for any damage resulting from such negligence.

It is immaterial that the damage was caused to the property of the inhabitants of the Colony.

In well-conducted ships, the Master does not regard the presence of a duly licensed pilot in compulsory waters as freeing him from every obligation to attend to the safety of the ship; but while the Master sees that his officers and crew duly attend to the pilot's orders he himself is bound to keep a vigilant eye on the navigation of the vessel, and, when exceptional circumstances exist, not only to urge upon the pilot to use every precaution but to insist upon such being taken.

Action by the Attorney-General against The Steamship "James L. Richards" claiming the sum of $7,118 as damages caused by a collision between the defendant ship and a pier, the property of the inhabitants of the Colony. The facts and arguments appear from the judgment.

F. W. Holder, Solicitor-General, for the plaintiff.

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

Cur. adv. vult.

VERITY, C.J.: In this case, the plaintiff claims damages in respect of a collision by the defendant ship with a pier, the property of the Government of British Guiana as the result, it is alleged, of negligent navigation.

It appears that the defendant ship — which for the sake of brevity I shall hereafter refer to as the "Richards" — was proceeding down the Demerara River in the early hours of the morning of December 8, 1942, when it came into collision with the Public Works Department pier causing very considerable damage to the pier.

The defendant ship, while admitting the collision and while not being in a position to controvert the amount of damage alleged to have been done, sets up that the collision was caused, not by the negligent navigation of the "Richards" but by that of another ship, the steamer "City of St. Louis" which I shall refer to as the "St. Louis" which was also underway in the vicinity at that time.

There seems to be general agreement that the morning was dark and that at the time of the collision there was light rain

which reduced visibility. It also is undisputed that the "Richards" was travelling downstream at a speed of about 9 knots against an incoming tide of about 2 knots, and that she was carrying no running lights. It is also agreed that the "St. Louis" which had been lying at anchor facing out to sea, was in the course of turning to proceed upstream and that she was lighted, although the nature of the light on board her is a matter in dispute. The maneuvering of the "St. Louis" brought her at one point across stream in the course of the "Richards" which then altered course towards the east bank of the river and struck the pier.

It is contended by the plaintiff that the "Richards" was negligently navigated in that she was proceeding downstream in a waterway in which the presence of other ships was to be anticipated, at full speed and without lights, and that whatever may have been the movements of the "St. Louis" it was this negligent navigation of the "Richards" which was the initial, continuing and proximate cause of the collision with the pier.

The defendant ship alleges, however, that those responsible for the navigation of the "Richards" were justified by war conditions in sailing without lights, that there was but one ship between her and the open sea, that this ship appeared by her lights to be at anchor as the "Richards" approached, and only when it was too late to avoid collision either with the ship or with the pier was it possible for those on the bridge of the "Richards" to recognise that the other ship was in fact moving across their bow. The pilot of the "Richards" knowing that the other ship was the "St. Louis" and loaded with munitions chose, it is submitted rightly, to collide with the pier rather than with the ship in view of the incalculable damage that might have resulted from an explosion in her cargo. The accident was caused it is submitted, solely by the negligence of those responsible for the navigation of the "St. Louis" in moving from her anchorage with anchor lights still burning and across the course of the "'Richards".

There is very considerable conflict in the evidence as to the precise movements and relative positions of the two ships before and at the moment of the collision of the "Richards" with the pier, and the difficulty of resolving this conflict is increased by the fact that both vessels left the colony shortly after the accident and that the only direct evidence as to what occurred is that of the pilot of each ship. The "Richards" was under the pilotage of a licensed pilot in the employ of the Colonial Government's Transport and Harbours Department, while the "St. Louis" was under the pilotage of a river pilot who, although not licensed to pilot ships within the harbour limits, is a man of considerable experience and was acting with the permission of the Harbour Master.

It is desirable to set out in the first place the account of the incident given by each pilot, and I shall deal first with the evidence of the pilot of the "St. Louis". He states that he went on board the ship at about 2.30 a.m. and at approximately 2.50 am. gave the order to weigh anchor. Upon this being done he ordered anchor lights to be put out and navigation lights on and proceeded ahead at half speed in a northerly direction. After

proceeding for 2 or 3 minutes on this course, he turned to starboard to bring the vessel's head round in order to proceed upstream. When the vessel had turned, heading in an easterly direction he stopped her engines and ordered them full speed astern at the same time giving 3 short blasts on the siren to indicate that he was so proceeding. He states that at this time his bows were some 500 feet from the east bank of the river and that the "St. Louis" at no time came within that distance of the bank. He originally stated under examination in chief that he first saw the "Richards" about 500 feet from him at this moment and while he subsequently replied to a question put to him by the Court that he had seen her before he got underway that she was then 800 feet off and apparently at anchor I have grave doubts for reasons which I shall discuss as to his having in fact seen her earlier than he at first recounted. Be that as it may he alleges that at the moment the "St. Louis" started to move astern the "Richards" was 500 feet from him and that there was a space of 500 feet between the "St. Louis" and the Public Works pier. He states that he then saw the "Richards" turn sharply to starboard and run into the pier, the "St. Louis" at the moment of this impact being 1,000 feet away out in the stream. Finally, he states that the "St. Louis" again went ahead, turning upstream towards her destination and at no time approaching within 500 feet of the "Richards".

The pilot of the "Richards", on the other hand, states that he boarded that vessel upstream at about 2.45 a.m. and after discussion with the Second Officer of the ship in regard to lights, to which I shall refer again, proceeded to weigh anchor and ordered the ship ahead at half speed, no navigation or other lights being shown. After proceeding for about half a mile, he ordered full speed ahead and shortly after observed the lights of the "St. Louis". The lights appeared to him to be those shown by a ship at anchor and he assumed that the ship was stationary. He then observed an apparent sheering of the two ships towards one another and coming to the conclusion that the "Richards" was sheering to Port ordered the Quarter-Master to keep her on her course. Again he observed this apparent sheering and then concluded that the "St. Louis" was in motion and following a course which would bring her across his bow. He states that the two vessels were then about 1,800 feet apart and that the "St. Louis" was directly across his course and still going ahead towards the east bank of the river. He states that he then concluded that a collision with either ship or pier was inevitable and that for the reason to which I have already referred, he elected to strike the pier, informed the Captain of his intention, ordered the helm hard starboard and the engines full speed astern. At the last moment he observed another ship just under his starboard bow, put his helm to port, avoided striking this third ship and collided with the pier at an angle approximately 30 degrees. He states that either just before or just after the impact he heard three short blasts on the siren of the "St. Louis" but that the vessel was still underway ahead and setting bodily upstream with the tide, passing his own ship, after she had struck the wharf, within 12 feet.

It is clear that in various respects, but more particularly in regard to the distance between the vessels at the moment of the "Richards" striking the pier, the difference between these two stories cannot be reconciled even by such considerations as lack of accurate observation in the extremity of the moment, or subsequent failure of memory, for no such causes could account for a difference so marked as that between 12 and 1,000 feet.

In giving consideration to these two accounts, I would not wish to tie down either witness to perfect accuracy in the estimation of either time or distance, but I think it fair to each witness to assume that experience in his vocation has rendered him capable of estimating these factors with any rate a moderate degree of accuracy and an examination of their evidence upon this basis may throw some light upon the degree of probability which can be ascribed to either story.

Taking first the account given by the pilot of the "St. Louis" and assuming that he did in fact see the "Richards" when she was 800 feet away then assuming also that she was at that time making headway at a speed of some 7 knots it must be borne in mind that he states that the "St. Louis" was at that moment not underway, indeed that she had not yet weighed anchor. The pilot of the "St. Louis" states that the anchor was hove short, having only to be broken out and that this operation was completed in about 2 minutes. This seems to be the minimum time possible for this operation according to the Harbour Master, himself a Master Mariner of considerable experience. If as this pilot alleges the "Richards" was 800 feet away before he started to weigh anchor and proceeding at 7 knots then by the time he had his anchor up and started to go ahead the "Richards" would certainly have been abreast of the "St. Louis" and probably have passed her. Most certainly, she would have passed the "St. Louis" before the latter vessel turned to starboard after proceeding ahead at half speed for 2 or 3 minutes. His story therefore, that after he had weighed anchor, proceeded ahead, turned to starboard and reached a position in which he was headed east and about 1,000 feet from his anchorage the "Richards" was still 500 feet from the "St. Louis" is palpably absurd. I do not believe in fact that he saw the "Richards" when she was about 800 feet away or that he saw her at all before he weighed anchor, but that his original story is nearer the truth — that he first saw her 500 feet off in the course of his manoeuvre to turn up river. His statement that he saw her 800 feet away apparently stationary was introduced by him in an attempt to explain why, having stated that visibility was from 700 to 800 feet he had not seen her until she reached within 500 feet of the other ship. The more reasonable explanation would have been that visibility had been reduced by the rain. It is plain that upon all the evidence as to the speed of the "Richards" that those on board the "St. Louis" could not have seen her before anchor was weighed, for she must then have been beyond their sight up the river. During the time which it must have taken the "St. Louis" to weigh anchor, proceed at half speed, turn from north to east, and arrive at a position 1,000 feet nearer the east bank than her anchorage, it is clear that the "Richards" at 7 knots must have covered a

far greater distance than the range of visibility even before rain fell. While I am satisfied that the pilot of the "St. Louis" has in this particular stated that which is not true, I am not prepared, for that reason alone, to reject the whole of his account as invention. It is for the most part a reasonable account of what happened and the witness did not strike me, on the whole, as unreliable.

I would turn now to an examination of the story told by the pilot of the "Richards" from the same view point. He states that he first saw the "St. Louis" when he took out the "Richards" and that he first noticed the apparent sheering of the vessels when they were between 2,400 and 3,000 feet apart. That he again noticed this, as did the Captain of the "Richards" when they were about 2,100 feet apart and that the vessels were about 900 feet from each other when he stopped his engines and swung to starboard to avoid collision with the "St. Louis". At the speed of 7 knots the "St. Louis" would have covered a distance between the position from which he first noticed the sheering and that at which he went to starboard in approximately 3 minutes. If, as he suggests, the "St. Louis" was at anchor when he first saw her and did not get underway until the vessels were perhaps 3,000 feet apart, then in the time it took him at full speed to travel some 2,100 feet, the "St. Louis" would have had to get underway, turn and travel easterly some 1,400 feet at half speed. This seems extremely unlikely, although it is not perhaps so patently impossible as the other story. I think that the evidence of this witness is more reliable than that of the pilot of the "St. Louis" although it appears that complete reliance cannot be placed upon the estimates of distance given by either of the witnesses and that I can only take the figures given by them as the roughest of approximations, error on each side being markedly in favour of the witness.

I have, therefore, to consider all the circumstances, endeavour to balance the statements of each witness against the other and attempt to reach a conclusion approximating to what really happened.

It appears to me that the "Richards" proceeding downstream without lights was not observed by anyone on board the "St. Louis" until the latter vessel had almost completed her turn towards the east and was right across the "St. Louis" course, the vessels then being somewhere between 500 and 900 feet apart. Each vessel was then about 500 feet from the east bank of the river and the "St. Louis", although her engines had been ordered astern, was still making headway towards the bank. The vessels were then approaching each other at the combined speed of the "Richards" under power and the leeway of the "St. Louis" on the tide. In these circumstances, the vessels had hardly more than 30 seconds in order to avoid collision, either by the "St. Loius" getting underway astern or the "Richards" altering course so as to pass through what was at that time the narrowing space between the "St. Louis" and the dock. At that moment, the pilot of the "Richards" had to make up his mind what course to pursue and it can hardly be said that in his action he displayed negligence, error of judgment or lack of skill

in the course he pursued. Had he attempted to pass between the "St. Louis" and the dock and had the "St. Louis" failed to lose headway and go astern he would have run the very gravest risk of a collision which, in view of the nature of the cargo of the "St. Louis" might have resulted in a major disaster. But the issue which I think it falls to me to determine is whether the circumstances in which this choice was forced upon the "Richards" were inevitable or were they caused by the negligence of the pilot of the "St. Louis" or that of the pilot of the "Richards" himself.

In the first place, it is to be observed that the "Richards'" was proceeding without lights. In doing so, she was in breach not only of the rules governing the movements of ships at night, but also, it would appear, the specific directions of the Naval authorities and the local Defence Regulations. There can be no doubt, from the evidence of the Harbour Master, that the Captains of many ships at that time proceeded down the river and to sea without lights in what they deemed to be the preservation of their ships from the dangers of enemy action. I cannot attempt to judge the nature of those dangers nor question the wisdom of the Captains in taking such an additional precaution in the protection of their ships and the lives for which they were responsible in those days of extreme gravity. It is clear, however, that in electing to sail in breach of the rules and of the Defence Regulations and contrary to the directions or advice of the Naval authorities, the Captains of these ships did so at their own peril and assumed grave responsibility in relation to the possibilities of marine risks as distinct from those they faced at the hands of the enemy.

It is also to be observed that the pilot of the "Richards" was aware of the presence of the "St. Louis" in the waterway below him and of the nature of her cargo. He may or may not have been aware that she was to sail up river that morning but it bras within his knowledge that vessels proceedings upstream as well as down would elect, if they were sailing, to do so on the rising tide of which he himself was taking advantage. It is also true that he was in a position to see the "St. Louis" by reason of her lights, whatever they may have been, from a considerable distance, while he should have appreciated that those on board the "St. Louis" would be extremely unlikely to see his own ship approaching head on without lights on a dark and over-cast morning until she was very close at hand. He observed deck lights on board the "St. Louis" in addition to what he took to be riding lights, and was aware, moreover, that he would be unable to distinguish her running lights until the position of the two ships in relation to one another had so altered that he would be about 221/2 degrees abaft the beam of the other. He became aware of an unexplained alteration in their relative positions or courses when he was still between 2,000 and 3,000 feet from the "St. Louis" and his attention was again called to this by the Captain of the "Richards" when the vessels were still some 2,000 feet apart.

One would have imagined that in all these circumstances those responsible for the navigation of the "Richards" would

have proceeded with extreme caution. I find, however, that the "Richards" was proceeding unlighted down this comparatively narrow waterway at full speed and that this speed was maintained until the two vessels were within perhaps 700 feet of each other with only a matter of seconds in which to avert a collision.

In view of these facts, I am unable to hold otherwise than that the "Richards" was being negligently navigated up to the moment at which collision either with the "St. Louis" or the dock became inevitable.

In regard to the "St. Louis", it must be borne in mind that the "Richards" was approaching without lights such as those on board the "St. Louis" were entitled to expect would have been carried by any vessel approaching downstream and that it was this absence of lights on the "Richards" which prevented her from being seen until she was too close for the "St. Louis" to have avoided her whatever may have been the latter's precise position at the moment when the "Richards" was, as I believe, first sighted. In the absence of anything to indicate that another vessel was approaching, I am of opinion that the pilot of the "St. Louis" was entitled to get her underway and manoeuvre his vessel in the manner described, an operation which he carried out in the usual way and without negligence.

I am of the view, therefore, that the collision of the "Richards" with the dock arose entirely from the negligent manner in which she was being navigated in proceeding downstream at full speed without lights and without any reduction of her speed, even when it became apparent that another vessel was ahead and possibly underway.

In view of this finding, it is unnecessary for me to determine whether or not the Harbours and Docks Act, 1847, is applicable to this colony or whether or not under that Act, if applicable, the owners of the "Richards" would be liable for damage done to the Public Works pier, irrespective of whether the collision was due to negligence or not. Nor is this a case, in view of my findings of negligence, in which it is necessary to apply the rule as to the burden of proof resting upon the defendant ship upon mere proof of the collision. The facts to be discovered from a careful consideration of the evidence demonstrate clearly, in my opinion, that the negligent navigation of the "Richards" was the direct and sole cause of the damage done to the pier.

Counsel for the defendant ship, however, raised the point that it was not open to the plaintiff on behalf of the Government of British Guiana to claim damages in that the negligence (if any) from which damage resulted was the negligence of a servant of that Government, compulsorily employed by the defendant ship under the Pilotage Laws. The argument is an attractive one on the surface, but not one, I believe, to which the. Courts have ever given support, although there is referred to in Marsden on Collisions at Sea 9th Edition, p. 230, a Scottish case in which the decision may appear to lend some colour to counsel's proposition. In the absence of a full report, which is not available to me, I am not impelled to the view that the case is contrary to the more general principle, it being expressly stated that the

circumstances were peculiar. It must be borne in mind however, that the responsibility of the master of a ship is not at an end because there is a pilot on the bridge, no matter in whose employment that pilot may be. The position generally adopted is made clear by the opinion of the Elder Brethren of Trinity House cited in the work to which I have just referred at p. 229; "That in well-conducted ships the Master does not regard the presence of a duly licensed pilot in compulsory pilot waters as freeing him from every obligation to attend to the safety of the vessels; but that while the Master sees that his Officers and crew duly attend to the pilot's orders he himself is bound to keep a vigilant eye on the navigation of the vessel, and, when exceptional circumstances exist, not only to urge upon the pilot to use every precaution but to insist upon such being taken."

In the present case, moreover, there are factors for which the primary responsibility must rest, I think upon the Captain of the "Richards". This Officer was aware of the instructions of the Naval authorities as regards the lighting of ships while in the river. The pilot was not so aware. When the second Officer of the "Richards" asked what lights were to be shown and the pilot stated that he did not know what the Captain's instructions were, but that ships had been leaving without lights, the Captain who was present said nothing and by his silence assumed responsibility for a course which he must have known was contrary to the instructions he had received. It was, in my view, his duty either to give those instructions to the pilot, or if he took the responsibility of concealing them and sailing without lights contrary thereto, then it was incumbent upon him in discharge of the responsibility he thus assumed to give such directions as would have ensured that the vessel proceeded under way with due caution. He followed neither course and must be held to be in a very material degree personally responsible for the events which followed. There is, I think, nothing contrary to morals and certainly nothing contrary to law in the owners of the ship in these circumstances being visited with liability for the consequences of a course of action which their representative, the Master of the ship, chose to adopt.

Judgment will be entered for the amount claimed with costs.

Judgment for plaintiff.

Solicitors: *V. C. Dias*, acting Crown Solicitor; *J. Edward de Freitas.*

BOODHAN SINGH *v.* STANLEY CHIN, P.C. 4346

BOODHAN SINGH, Appellant (Defendant),
v.
STANLEY CHIN, P.C. 4346, Respondent (Complainant).

[1944. No. 427.— DEMERARA].

BEFORE FULL COURT: SIR JOHN VERITY, C.J., AND BOLAND, J.

1944. December 29.

Appeal—Conviction in magistrate's court—Specific illegality substantially affecting the merits of the proceedings—Statement made by officer of police—Tending to show that defendant had previously committed a similar offence—Note thereof made by magistrate—No indication in magistrate's notes or reasons of decision—That statement did not affect his decision to convict—Conviction set aside.

The officer of police who conducted the prosecution made, in the course of his address to the magistrate, a statement which tended to show that, four days prior to the date of the offence charged, he had committed an offence similar to that with which he was then charged. The magistrate made a note of this statement, and he did not state, either in his notes or in his memorandum of reasons of decision, that, in arriving at his decision to convict the defendant, he did not take the statement into consideration.

Held that the conviction could not stand, and must be set aside Appeal.

APPEAL by Boodhan Singh from the decision of a Magistrate of the Georgetown Judicial District convicting him of selling a price-controlled article at a price exceeding that fixed by order of the Competent Authority made under the Defence Regulations, 1939.

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

F. W. Holder, Solicitor-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 in the Magistrate's Court for the Georgetown Judicial District for the offence of selling a certain price-controlled article at a price exceeding that fixed by an Order made under the Defence Regulations, 1939. The article to which the charge relates is "Limay" salted cooking butter and the price fixed by the Order is 48 cents per pound. It is alleged that the appellant sold five pounds for $2.64.

One of the grounds of appeal is that there was a violation of proviso (f) of section 52 of the Evidence Ordinance, Ch. 25, the appellant having been asked in cross-examination when giving evidence in the Court below if it was not true that he had the week before charged a witness for the prosecution 12 shillings for 5 pounds of this butter. From the record of appeal, it would appear that the appellant's denial of any such incident occurred in his re-examination by his solicitor, but in view of the fact that there was no testimony in conflict with his denial it is perhaps unnecessary to enquire further, for it must be assumed that the learned Magistrate accepted his denial, and if this stood alone, we do not think that the propriety of the conviction could be successfully challenged.

A further ground of appeal is, however, that there being no such evidence the prosecuting Officer of Police nevertheless stated to the Court that, if a certain witness were to be believed, the appellant had four days before the alleged commission of the offence charged the witness $2.88 for a 5-pound tin of butter. It is submitted that this statement was highly prejudicial and affected the mind of the Court in arriving at its decision.

There appears to be no doubt that at some stage of the proceedings there was some such suggestion, but the truth of it appears to have been denied not only by the appellant but, also by the witness concerned who stated that he had never bought butter from the appellant before. There is on the record, therefore, no foundation for the statement made by the Police Officer in the course of his address to the Magistrate. In such circumstances, one would have imagined that the learned Magistrate would have interposed to inform the Officer that there was no such evidence and that any such evidence would have been inadmissible and that the Magistrate would either have declined to note the statement, or would have made it clear at the time or in the course of his reasons for his decision that it in no way affected his mind.

On the contrary, however, the Magistrate noted the statement without comment and appears indeed to have deemed it of importance for there is little else in his note of the prosecuting Officer's address nor is there any indication either in his notes or in his memorandum of reasons that he did not allow it to affect his decision.

The statement was certainly highly prejudicial in that it tended to show that the appellant had previously committed an offence similar to that with which he was then charged. No evidence to that effect would have been admissible and no such statement should have been made. If made, the learned Magistrate should have stated clearly that he did not take it into consideration. As he made a note of it and gives this Court no such assurance, we are unable to conclude that he did not allow it to affect his consideration of the matter and for this reason the conviction cannot stand.

The appeal is allowed with costs and the conviction and sentence set aside.

Appeal allowed.

Solicitor for appellant: *F. Dias,* O.B.E.

EDWIN LAM v. LESLIE SLATER

EDWIN LAM, Appellant (Defendant),

v.

LESLIE SLATER, C. S. of P., Respondent (Complainant).

[1944. No. 326. DEMERARA.]

BEFORE FULL COURT: SIR JOHN VERITY, C.J., AND BOLAND, J.

1944. December 29.

Appeal—Conviction in magistrate's court—Specific illegality substantially affecting the merits of *the proceedings—Evidence led for prosecution—Tending to show that defendant had previously committed a similar offence—Wrongly admitted—No assurance that evidence was excluded by magistrate from consideration when he arrived at his decision to convict—Conviction set aside.*

Evidence—Criminal law—Commission of other offences—Evidence of — When admissible—To prove design or system—To defeat any suggestion of *honest mistake—To negative possibility of accident.*

On the hearing of a complaint for the offence of imposing a condition upon the sale of a price-controlled article contrary to an Order made by the Competent Authority under the Defence Regulations, 1939, evidence was led on behalf of the prosecution which tended to show that the defendant had previously committed an offence similar to that charged. The evidence was inadmissible. The defendant was convicted. On appeal, the Court did not feel assured that the magistrate appreciated the inadmissibility of the evidence, or that he did not allow it to affect his consideration of the charge.

Held that the conviction could not stand and must be set aside.

Circumstances under which, on the hearing of a criminal charge, evidence of other offences may be admissible, considered.

Appeal by Edwin Lam from the decision of a Magistrate of the Georgetown Judicial District convicting him of imposing a condition on the sale of a price-controlled article, to wit, potatoes, contrary to an Order made by the Competent Authority under the Defence Regulations, 1949. The condition alleged was that 735 pounds of potatoes were sold on the condition only that there should at the same time be purchased one barrel of beef.

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

F. W. Holder, Solicitor-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 in the Magistrate's Court for the Georgetown Judicial District for the offence of imposing a condition upon the sale of a price-controlled article, contrary to an Order made by the Competent Authority under the Defence Regulations, 1939.

There are a number of grounds of appeal, but it will be convenient to deal in the first place with that which relates to the admission by the learned Magistrate of certain evidence which tended to show that the appellant had previously committed an offence similar to that charged.

The record shows that evidence was tendered and admitted to the effect that on a certain day the appellant in selling a quantity of potatoes to a witness called by the prosecution, imposed a condition that the purchaser should at the same time purchase a bag of salt. The evidence also goes to show that on that occasion the appellant stated that he was expecting another supply of potatoes, but that if the witness desired to purchase any he would then have to buy also a barrel of salt beef. The evidence proceeds to show that on the date upon which the offence charged is alleged to have been committed the witness returned with the intention of buying more potatoes and that the appellant then imposed the threatened condition that he would at the same time be required to buy a barrel of beef.

It is to the evidence regarding the imposition of a condition on the first occasion that exception is taken on behalf of the appellant.

The Solicitor-General submitted that the evidence as to the first incident is so bound up with that essential to the proof of the charge that, although it tended to show the previous commission of a similar offence, it was not inadmissible and he urged therefore that the conviction should be allowed to stand.

We are of opinion that the proof of this previous incident does not fall within any of the exceptions to the general rule that no such evidence should be given. It was not admissible to show design or system for no such proof was necessary; it was not admissible to defeat any suggestion of honest mistake, for none was made; it was not admissible to negative the possibility of accident, for there was and could be no such suggestion. It was not admissible, as suggested by the Solicitor-General, as essential to the proof of the offence charged, for the previous incident was in itself no part of the subsequent offence and there would have been no difficulty in proving the latter without any reference whatever to the previous alleged imposition of a condition. The mere fact that on the previous occasion a threat of a future imposition was alleged to have been made and that the charge of imposing this condition was, for this reason apparently, drawn to include both dates, does not justify the admission of evidence of this highly prejudicial nature. The evidence was clearly inadmissible and the question remains as to whether on the record we are satisfied that the learned Magistrate did not take it into consideration in arriving at his decision.

The Magistrate admitted the evidence and he does not say that he excluded it from his consideration. On the other hand, he does specifically exclude from his consideration certain evidence which it was suggested by the prosecution tended to show that on four other occasions he had imposed a similar condition. We cannot in the circumstances feel assured that the learned Magistrate appreciated the inadmissibility of this particular piece of evidence, or that he did not allow it to affect his consideration of the charge. The conviction cannot therefore stand and it is unnecessary to give consideration to other grounds of appeal. The appeal must be allowed with costs, the conviction and sentence being set aside.

We observe that this is the second appeal at one sitting of this Court in which it has appeared that in relation to charges under the Defence Regulations the prosecution has sought to impute to the defendant the commission of other similar offences and in which it has not been made to appear that the Magistrate rejected such imputations from his consideration. Lest there be any misapprehension, either in the minds of those responsible for the prosecution of these offences or in the mind of the Magistrate, we would stress that, no matter how important it may be that these Regulations be strictly enforced and offences thereunder rigorously prosecuted, there must be no departure from those Rules of procedure and evidence which are designed to secure the conviction and punishment of offenders, only upon those principles which lie at the foundations of our laws and liberties.

Appeal allowed.

A. SINGH *v.* S. A. HUTCHINS

AGNES SINGH, Plaintiff,

v.

SYLVIA ALEXANDRA HUTCHINS, Defendant.

[1943. No. 171.—DEMERARA.]

BEFORE DUKE, J. (Acting).

1944. FEBRUARY 8, 9.

Money-lender—Onus of proof—On person alleging same.

Money-lender—Business of—System, repetition and continuity—What does not amount to—Money-lenders Ordinance, cap. 68, s. 2.

The onus of proof that a person is a money-lender lies on the person alleging the same.

The plaintiff agreed to lend money to the defendant in order that she might effect repairs to her house, and in pursuance of that agreement advanced the money from time to time. When the last advance was made, the defendant made a promissory note in favour of the plaintiff. The defendant's husband and agent informed 'the plaintiff that the rate of interest on mortgages was 10 per cent, per annum, and interest at that rate was calculated for cue year and included in the amount for which the promissory note was made. The defendant informed the plaintiff that she would obtain a mortgage and repay the plaintiff from the proceeds of the mortgage. The plaintiff also lent on one occasion the sum of $12 to another person, and interest was charged and paid on that loan.

Held that there was not such system, repetition and continuity in the loans as to justify the Court in holding that the plaintiff was a money-lender.

OPPOSITION ACTION by the plaintiff to the passing by the defendant of a mortgage, and claiming the sum of $569 due on a promissory note made by the defendant in favour of the plaintiff.

E. W. Adams, for the plaintiff.

B. B. Marshall, for the defendant.

DUKE, J. (Acting): In this action the plaintiff Agnes Singh, the wife of Sree Kissoon Singh to whom she was married subsequent to the 20th August, 1904, claims from the defendant Sylvia Alexandra Hutchins, the wife of Alfred John Eloff Hutchins to whom she was married subsequent to the 20th August, 1904:

(a) a declaration that the plaintiff's opposition filed on the 29th May, 1943, to the passing by the defendant of a mortgage of the west half of lot 93 or 111, D'Urban and Leopold Streets, Werk-en-Rust, Georgetown, is just legal and well-founded;

(b) the sum of $569 due by the defendant to the plaintiff on a promissory note made on the 20th February, 1940, by the defendant and her husband in favour of the plaintiff for the sum of $782;

(c) an injunction restraining the defendant from passing the said mortgage until payment of the said sum, and of the costs of this action; and

(c) costs.

On the 15th, 22nd and 29th days of May, 1943, the defendant caused to be advertised in the *Gazette*, notice of her intention to pass a mortgage on the west half of lot 93 or 111, D'Urban and Leopold Streets, Werk-en-Rust, Georgetown in favour of Claudius Randolph Chan. On the 29th May, 1943, the plaintiff entered an opposition to the passing of the mortgage on the ground that the defendant was indebted to her in the sum of $569 being the balance of an amount due owing and payable by the defendant to the plaintiff on a certain overdue promissory note dated the 20th February, 1940, made by the defendant and A. J. E. Hutchins jointly and severally and payable in favour of the plaintiff on demand. On the 8th June, 1943, the plaintiff filed the writ herein to enforce the opposition.

The defendant admits that on the 20th February, 1940, she, along with her husband, made a promissory note in favour of the plaintiff for the sum of $782. Her husband deposes that he paid to the plaintiff the sum of $238 on account of the promissory note, leaving a balance of $544 due upon the note. The plaintiff deposed that she was not in a position to deny that the sum of $238 was so paid, and counsel for the plaintiff asked that judgment be not entered for the plaintiff for $569 as claimed in the writ and statement of claim, but for the sum of $544.

The defendant has pleaded that on the 20th February, 1940, on which date the promissory note sued upon was made, the plaintiff was a money-lender within the meaning of section 2 of the Money-Lenders Ordinance, cap. 68, and that she was not registered under the Money-Lenders (Registration) Regulations, 1938, (or any previous Regulations) made under that Ordinance. The plaintiff has never been registered as a money-lender.

Evidence was led on behalf of the defendant with the object of showing that the plaintiff made loans to Philip Edmund Burgess, Albert Prince, Albert Cottam and Ivan Vyfhuis. Burgess stated that the plaintiff lent him $2, and charged him 60 cents interest; the plaintiff stated that she had advanced $2 to Burgess in respect of certain plumbing work to be done for her at 7, Fort Street, Kingston, by Burgess. I am not satisfied that the plaintiff did in fact lend any money to Burgess. Prince did not give evidence, and Burgess has not convinced me that the plaintiff did in fact lend $20 to Prince with interest of $7 for 3 months. Cottam gave evidence, but he did not impress me as being a witness upon whose evidence the Court could rely. After considering the evidence of Burgess, Cottam and the plaintiff, I am not satisfied that the plaintiff did in fact lend $12 to Cottam with interest of $7.20 for 3 months. Vyfhuis and Burgess deposed that the plaintiff lent to Vyfhuis the sum of $12 with interest of $7.20 for 3 months; the plaintiff deposed that she lent Vyfhuis $5 that the money was repaid within a month, and that no interest was charged. It is unnecessary for me to determine what was the actual amount of the loan, but I find that the loan was not made free of interest. I am, however, not satisfied that the rate of interest was 20 per centum per month.

It was suggested to the plaintiff that she had made loans to persons other than Burgess, Prince, Cottam, Vvfhuis, the defendant

and her husband. These suggestions were denied by the plaintiff, and no evidence was called by the defendant in support of them: they must therefore be entirely disregarded.

The defendant and her husband made promissory notes in favour of the plaintiff as follows. The dates given below are those stated by the defendant in her defence, and they are only approximately correct:

January 2, 1939	.. .. $ 185	
January 13, 1940	 70	
January 27, 1940	 220	
February 6, 1940	.. .. $ 63	$ 538

On the 20th February, 1940, the plaintiff lent the defendant and her husband a further sum of money which, with agreed interest amounted to the sum of $244; the four previous promissory notes for the total amount of $538 were returned to the defendant's husband, and a promissory note for the sum of $782 (the sum total of $244 and $538) was made by the defendant and her husband in favour of the plaintiff.

The plaintiff and the defendant's husband do not agree as to now much of the sums for which the four aforesaid promissory notes were made represented capital, and as to how much represented interest.

Their respective versions are as follows: —

		Plaintiff	Mr. Hutchins
January 2, 1939	__	$165 capital	$125 capital
		$ 20 interest	$ 60 interest
January 13, 1940	__	$ 65 capital	$ 60 capital
		$ 5 interest	$ 10 interest
January 27, 1940	....	$200 capital	$150 capital
		$ 20 interest	$ 70 interest
February 6, 1940	....	$ 60 capital	$ 50 capital
		$ 3 interest	$ 13 interest

With respect to the transaction of the 20th February, 1940, while the plaintiff deposes that she lent the defendant the sum of $220 with agreed interest of $24, the defendant's husband has deposed that the plaintiff lent the defendant and her husband the sum of $165 and that she charged the sum of $79 as interest thereon.

The defendant's husband has deposed, and he is corroborated by Burgess, that apart from the five loan transactions hereinbefore specified, the plaintiff lent the defendant and her husband, in the latter part of the year 1938, the sum of $35 at an agreed interest of $15, and the sum of $200 at an agreed interest of $40. The defendant's husband also deposed that between the 27th January, 1940, and the 6th February, 1940, the plaintiff lent the defendant and her husband the sum of $50 at an agreed interest of $10. The defendant's husband stated that the promissory notes made in respect of these three transactions were paid off by him, that the notes were returned to him by the plaintiff and that he destroyed them. The plaintiff denies that these loans were made by her.

The defendant's husband as well as Burgess swore positively that the sum of $200 was withdrawn by the plaintiff from her account with the Post Office Savings Bank, that Burgess obtained the money at the General Post Office on an authorisation signed by the plaintiff, that Burgess took the sum of $200 to the plaintiff at her residence at 7, Fort Street, Kingston, that a note was made for $240 by the defendant and her husband, and that the sum of $200 was handed to the husband of the defendant. The plaintiff has produced her savings bank book in evidence. This book was opened on the 18th December, 1936, and the first withdrawal did not take place until the 18th January, 1940, on which date the sum of $515.78 stood to the credit of the account. Yet the defendant's husband and Burgess have sworn that in 1938 the plaintiff withdrew the sum of $200 and lent it to the defendant and her husband at an agreed interest of $40. I am satisfied that the defendant's husband and Burgess are not speaking the truth when they depose that the plaintiff lent to the defendant and her husband the sum of $35 and $200 prior to the 2nd January, 1939, and the sum of $50 between the 27th January, 1940 and the 6th February, 1940.

I accept the plaintiff's evidence that she withdrew the following amounts from the Post Office Savings Bank for the purpose of loans to the defendant and her husband.

January 18, 1940	$ 60	
January 26, 1940	$200	
February 13, 1940	$ 30	
February 19, 1940	$200	$490

I also accept the plaintiff's evidence as to the interest which she charged the defendant and her husband on the loans in fact made to them. The defendant's husband stated that the money was borrowed for the purpose of effecting repairs on his wife's property and for his own uses. The defendant may believe what her husband has told her as to the moneys which he actually received from the plaintiff, but the Court does not believe him. The defendant's husband had his own uses to be provided for, and the amounts appropriated to his own uses could easily be explained by him to his wife by his telling her that he had only received from the plaintiff (1) $125 when he had in fact received $165; (2) $60 when he had in fact received $65; (3) $150 when he had in fact received $200; (4) $50 when he had in fact received $60; and (5) $165 when he had in fact received $220.

The plaintiff deposes (and I believe her) that the defendant's husband told her that moneys were required for repairs to buildings belonging to the defendant, that all the money would not be required at one and the same time, that she would not suffer by reason of the loans as he would pay her a rate of interest as if she were investing her money 'on mortgage, and that when the repairs were completed, a mortgage would be obtained, and the plaintiff would be repaid.

I do not believe Burgess when he swears that the plaintiff had asked him in 1938 to canvass for money-lending clients for her. He did in fact introduce his friend, the defendant's hus-

band, to her and ask her to lend money to the defendant and his wife: he also took to her another friend of his, Ivan Vyfhuis, who begged her to lend him a small sum of money, but the plaintiff never announced or held herself out in any way as a person who carried *on* the business of money-lending.

The question now falls for determination whether the loan transactions with Ivan Vyfhuis and with the defendant and her husband constituted the plaintiff a money-lender within the meaning of section 2 of the Money Lenders Ordinance, cap. 68.

In *EDGELOW v. MAC ELWEE* (1917) 37 L.J.K.B. 738, McCardie, J., said:

> The Money-lenders Act, 1900 precludes an unregistered money-lender from enforcing any contract made in the course of his money-lending business: *Bonnard* v. *Dott* (1906) 1 Ch. 740, and *Gant v. Hobbs* (1912) 1 Ch. 717, Section 6 of the Act defines a money-lender as follows: "The expression 'money-lender' in this Act shall include every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business". A man does not become a money-lender by reason of occasional loans to relations, friends or acquaintances, whether interest be charged or not. Charity and kindliness are not the bases of usury, nor does a man become a moneylender because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money-lending, and the word "business" imports the notion of system, repetition and continuity: *Newton v. Pyke* (1908) 25 Times L.R. 127 *per* Walton, J. *Fagot* v. *Fine* (1911) 105 Law Times 583 *per* Bankes J. and Lush J., and *Newman* v. *Oughton* (1911) 1 K.B. 792 *per* Ridley J. and Avory J. The line of demarcation cannot be defined with closeness or indicated by any specific formula. Each case must depend upon its own peculiar features, and it is always a question of degree.

The definition of "money-lender" in section 6 of the Moneylenders Act, 1900 is the same as in section 2 of the Money-lenders Ordinance, cap. 68.

The plaintiff had agreed to lend money to the defendant and her husband for the repairs of buildings belonging to the defendant. When the repairs were completed, the defendant was to mortgage her property and repay the plaintiff. The advances were to be spread over a period of time. The first advance ($165) was made in January 1939. The second and third advances ($165 and $200 respectively) were made in January 1940; and the fourth and fifth advances ($60 and $220 respectively) were made in February 1940. A promissory note was then made for the aggregate (1) of the promissory notes (which included interest) made in respect of the first four advances, and (2) of the amount of the fifth advance and interest. The interest in respect of each advance was calculated for one year and was approximately at the rate of ten per centum per annum. The defendant's husband who acted as her agent, told the plaintiff that the interest was

what she would have obtained, if she had lent out the money on mortgage. The plaintiff also lent, on one occasion, the sum of $12 or $5 to another person, and interest was charged and paid in respect of the loan.

I am unable to find that in these transactions there was such "system, repetition and continuity" as to justify me in holding that on the 20th February, 1940 the plaintiff was carrying on the business of money-lending. The loans to the defendant and her husband constituted one transaction, and the loan to the other person constituted another. The, transactions with Vyfhuis and with the defendant and her husband are insufficient for me to draw the inference that the plaintiff was carrying on the business of money-lending.

The onus is on the defendant to prove that the plaintiff was carrying on the business of money-lending. She has failed to discharge this onus.

There will therefore be judgement for the plaintiff for the sum of $544 and costs, for a declaration that the opposition entered by the plaintiff on the 29th May, 1943 to the passing by the defendant of a mortgage of the west half of lot 93 or 111, D'Urban and Leopold Streets, Werk-en-Rust, Georgetown, is just, legal and well-founded, and for an injunction restraining the passing of the mortgage until the judgment debt and costs have been fully satisfied.

Judgment for plaintiff.

Solicitors: *D. P. Debidin; E. D.* Clarke.

JOHN CHUNG TIAM FOOK,
Appellant (Defendant),
v.
JOHN DYAL SINGH, L|Cpl. of Police, No. 4268,
Respondent (Complainant).
[1944. No. 426. Demerara.]

BEFORE FULL COURT: SIR JOHN VERITY, C.J., AND BOLAND, J.
1944.December 29.

Defence Regulations—Control of Prices Order, 1944—*Notice No.* 63 *of* 10th *January,* 1944—*Price-controlled goods sold offered or exposed for sale by wholesale—Marking, or other indication, of prices—Paragraph* 5 (2) of *Order—Hanging up list of prices in front of store—Not sufficient —Presence of retailer or Commodity Control officer when absence of marking detected—Not necessary.*

Appeal—From magistrate's court—Sentence—Out of proportion to nature of offence committed by offender—Varied.

By paragraph 5 (2) of the Control of Prices Order, 1944, "the wholesale selling prices of all price-controlled articles sold, offered or exposed for sale, by wholesale shall be legibly marked thereon or otherwise indicated in plain figures for the information of retailers and officers of the Commodity Control."

Held (1) that merely to hang up a list in the front part of the store is not a sufficient compliance therewith;

(2) that it is not necessary to prove that, when the absence of marking was detected, a retailer or a Commodity Control officer was present.

A fine imposed by magistrate was reduced by the Full Court where the fine was out of proportion to the nature of the offence committed by the offender.

Appeal by the defendant John Chung Tiam Fook from the decision of a Magistrate of the Georgetown Judicial District, convicting him of exposing for sale by wholesale a certain price-

controlled article, namely, candles, when the selling price of the article was not legibly marked thereon or otherwise indicated in plain figures for the retailers and officers of the Commodity Control, contrary to Order No. 63 made on the 10th January, 1944, by a Competent Authority under the Defence Regulations, 1939.

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

F. W. Holder, Solicitor-General, for the respondent.

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

This is an appeal from a conviction in the Magistrate's Court for the Georgetown Judicial District for the offence of failing to mark the wholesale prices on certain goods exposed for sale by wholesale, as required by an Order made by the Competent Authority under the Defence Regulations, 1939.

Amongst other grounds of appeal, it is submitted on behalf of the appellant that there was in this instance sufficient compliance with the Order in that the appellant had hung up in his store two sheets of cardboard on which were written lists of goods together with their wholesale prices. Although the learned Magistrate held that as a matter of fact the pieces of cardboard produced by the appellant at the hearing were not those which he had in his store at the time of its inspection by the Police we are not of the opinion that there is any evidence to justify him in this particular conclusion and will assume therefore that the appellant did, as he alleges, expose these price lists in his store.

We are not however of the opinion that this is compliance with the Order. Rule 5 of the Order requires that the prices of such articles shall be legibly marked on the article or otherwise indicated. The same Rule and Rule 9 require certain lists also to be exposed on the premises, and it is clear that the Order requires something different from a list when it requires that the prices shall be marked on the article and when, as an alternative to such marking, it requires that the prices of the articles be otherwise indicated. There are a number of different ways in which the price of a specific article may be indicated without actually marking the price on the article itself and wholesalers who do not wish to mark the articles should adopt one or other of such ways. Merely to hang up a list in the front part of the store is not in our view compliance with the Order.

It was also submitted that the learned Magistrate did not arrive at a reasonable conclusion on the evidence in finding that the particular articles themselves were not marked by a price tag as alleged by the appellant. We are of the opinion that there was evidence upon which the learned Magistrate could reasonably arrive at that conclusion and we would not interfere with his finding on this regard.

It was also submitted that because the Order requires this marking for the information of retailers or Commodity Control Officers it is essential to prove that a retailer or a Commodity Control Officer was present when the absence of marking was

detected. We are not of the opinion that there is any merit in this submission.

Finally, it was submitted on behalf of the appellant that the sentence was unduly severe. The learned Magistrate states in his reasons that in determining the measure of penalty he took into consideration the size of the appellant's business. We may remark that there is no evidence on the record as to the size of this business, but in any event although the means of the convicted person may properly be taken into account in determining the amount of the fine which should be imposed; this is not the only factor. The nature of the offence is, perhaps, the primary consideration, and in regard to the present case we cannot but feel that the fine imposed by the learned Magistrate is out of proportion to the offence which was no more than that of omitting to mark as required by the Order only a small number, as it would appear, of the articles exposed for sale in his store.

We would have been more impressed with the plea that this omission was due to an honest belief that the hanging up of the list of prices was sufficient compliance with the Order, if the appellant had not sought, by evidence which the Magistrate did not believe, to establish that he has in fact marked these articles and in such case might have been disposed to substitute no more than a nominal fine for the substantial penalty imposed by the Magistrate. In the circumstances of the case, however, we think that justice will be better served by reducing the penalty from one of two hundred dollars to one of fifty dollars and the order of the Magistrate be varied accordingly. Subject to this variation, the appeal is dismissed with costs.

Appeal dismissed; order varied.

BOURKES ESTATES, LTD. *v.* COM. OF INCOME TAX.

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from an order of a Judge of the Supreme Court of the Windward Islands and Leeward Islands sitting in Chambers (St. Christopher Circuit).

Between:

BOURKES ESTATES, LIMITED, Appellants,

and

THE COMMISSIONERS OF INCOME TAX, Respondents.

BEFORE THEIR HONOURS MR. 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.

1944. JANUARY 18.

Appeal—West Indian Court of Appeal—Jurisdiction of—Under West Indian Court of Appeal Act, 1919, s. 3 (1)*—May be restricted in any Colony by local legislation—West Indian Court of Appeal Act (Chapter* 25 *of the Federal Acts of the Leeward Islands), s.* 3.

Section 3 of the (Colonial) West Indian Court of Appeal Act (Chapter 25 of the Federal Acts of the Leeward Islands) restricts the right of appeal (to the West Indian Court of Appeal) to a final judgment or decision of a Judge of the Supreme Court sitting as a Court of first instance. Section 3 (1) of the (Imperial) West Indian Court of Appeal Act, 1919, while establishing the West Indian Court of Appeal and conferring upon it power to hear appeals, provides that such jurisdiction is subject to any provision made by the Legislature of any Colony to which the Act applies.

Held that this subsection was sufficiently wide to enable the General Legislature of the Leeward Islands to limit appeals in the manner provided by section 3 of Chapter 25.

The judgment of the Court was as follows: —

A preliminary objection to the jurisdiction of this Court to entertain this appeal has been raised on behalf of the Respondents. The appeal is one from a decision of a Judge in chambers dismissing an appeal against a decision of the Commissioners of Income Tax. Section 43 (9) of the Income Tax Ordinance 1923 of this Presidency provides that the decision of the Judge hearing an appeal from the Commissioners shall be final, provided that the Judge may, if he so desires and shall, on the application of the appellant or the Commissioners, state a case on a question of law. The appellant in the present instance did not apply to have a case stated nor did the Judge state one of his own motion, but the appellant has appealed direct to this Court contending that he has an inherent right so to do under section 3 of the West Indian Court of Appeal Act 1919 of the Imperial Parliament. Mr. Boon contended further that it is not competent for the Legislature of a Colony to limit the right of appeal in any way and that section 3 of the (Colonial) West Indian Court of Appeal Act (Chapter 25 of the Federal Acts of the Leeward Islands) is *ultra vires* in so far as it purports to restrict the right of appeal to a final judgment or decision of a Judge of the Supreme Court sitting as a Court of first instance.

The learned Acting Attorney-General for the Leeward Islands, per contra, submits that section 3 (1) of the Act of 1919, while establishing the West Indian Court of Appeal and conferring upon it power to hear appeals, provides that such jurisdiction is subject to any provision made by the Legislature of any Colony to which the Act applies and that this provision was sufficiently wide to enable the General Legislature of the Leeward Islands to limit appeals in the manner provided by section 3 of Chapter 25. In our view this contention is well founded. Provisions restricting the right of appeal to this Court are to be found on the Statute books of other Colonies to which the Act applies, e.g. The Judicature Ordinance (Ch. 3 No. 1) of Trinidad and Tobago section 32 and the West Indian Court of Appeal Ordinance (Ch. 243) of Grenada section 4 and it has never before been suggested, so far as we are aware, that any such provisions were *ultra vires.* If the Appellant's contention were to be adopted any litigant aggrieved by any decision of any Court (including a Magistrate's Court) would be entitled to appeal direct to this Court notwithstanding any local legislation to the contrary. It cannot be supposed that the Imperial Parliament contemplated such a state of affairs and in our opinion the powers conferred upon the local legislatures were designed to enable them to regulate appeals in a reasonable manner.

It was not contended by counsel for Appellant (nor indeed could it be) that this is an appeal from a Court of first instance, and this being so we are of opinion that in view of section 3 of Chapter 25, this Court has no jurisdiction to entertain it. The appeal must therefore be struck out with costs.

It has been suggested on behalf of the Appellant that the provisions of the Presidency Income Tax Ordinance 1923 relating to appeals by way of case stated are void for repugnancy. It is not however necessary for this Court to determine this point or do we think it desirable to express an opinion upon it, as in view of our decision the matter is not one which could come before this Court. On the other hand it might fall to be determined by the Court of Appeal of the Windward Islands and Leeward Islands,

Appeal struck out.

K. P. A. PENCHOEN *v.* H. C. DINZEY & ANR.

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of the Windward Islands and Leeward Islands (St. Christopher Circuit).

Between:

KING PITMAN ARCHIBALD PENCHOEN,

Appellant (Plaintiff),

and

HUBERT CHARLES DINZEY and FRANCIS SPENCER WIGLEY,

Respondents (Defendants).

BEFORE THEIR HONOURS MR. 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.

1944. JANUARY 22.

War—St. Kitts-Nevis Defence Force—Eligibility for—St. Kitts-Nevis Defence Force Ordinance, 1913 *(No.* 4), *section* 3 (3)*—On actual service— Force called out—By proclamation of the Governor—How period of such service is determinable—Only by order of Governor—Section* 28.

War—St. Kitts-Nevis Defence Force—Purposed dismissal of a member by commanding officer—Under sections 22 *and* 46 *of Army Act—In excess of jurisdiction and null and void—Even though there was such power if commanding officer had purported to act under section* 22 *of the St. Kitts-Nevis Defence Force Ordinance,* 1913.

War—St. Kitts-Nevis Defence Force Ordinance, 1913 (No. 4), *section* 50 (2)*—Interpretation of—Meaning of "maliciously".*

The appellant resided in the Presidency of St. Kitts-Nevis. He was accepted, enrolled and sworn in as a member of the St. Kitts-Nevis Defence Force which consisted of but one company.

Held that he was properly accepted as a member of the Force under section 3 (3) of the St. Kitts-Nevis Defence Ordinance, 1913, (No. 4).

Where the St. Kitts-Nevis Defence Force was called out "on actual service" by a proclamation of the Governor issued on the 1st September 1939 under section 23 of the St. Kitts-Nevis Defence Force Ordinance, 1913 (No. 4) the period of such service can only be determined, as is stated in the section, by order of the Governor.

The appellant, a member of the St. Kitts-Nevis Defence Force, was charged with escaping from close arrest contrary to section 22 of the Army Act. He pleaded guilty, and his commanding officer, the respondent D. thereupon dismissed him from the Force on the 22nd August 1942 and forwarded a report of the proceedings to the Commandant. The Governor did not confirm the sentence of dismissal, the appellant was so informed, and on the 11th November, 1942 it was notified by a company order that the sentence of dismissal not having been confirmed, the appellant resumed duty as a member of the Force. The respondent D. was not empowered, under section 46 of the Army Act, to impose dismissal as a penalty for breach of section 22 of the Act. Under section 22 of the Defence Force Ordinance, 1913 (No. 4) the respondent D., as commanding officer of the St. Kitts-Nevis Defence Force, was empowered to discharge any member thereof, and his powers under that section were not subject to confirmation by the Governor. The appellant submitted that the order

of dismissal should be treated as having been made under section 22 of Ordinance No. 4 of 1913, and that order operated as a valid discharge from the St. Kitts-Nevis Defence Force, even though the commanding officer made no claim to act under that Ordinance.

Held that as the respondent D. purported to act under section 22 of the Army Act, and not under section 22 of the Defence Force Ordinance, 1913 (No. 4), the sentence of dismissal imposed on the appellant by the respondent D. was in excess of jurisdiction and null and void, and that the appellant never ceased to be a member of the St. Kitts-Nevis Defence Force.

Section 50 (2) of the Defence Force Ordinance, 1913 (No. 4) is a protective clause in favour of officers acting in the execution of their duties, and the object of such clauses is to afford a measure of protection to persons who, although exceeding their powers, have acted in the supposed pursuance of and with a *bona fide* intention of discharging their duty under a statute. The word "maliciously" in the subsection does not mean "intentionally".

Wall v. *Macnamara* (1779) 1 T.R. 536, referred to.

The judgment of the Court was as follows: —

This is an appeal from a judgment of the Supreme Court of the Windward Islands and Leeward Islands by which Malone J. (now Chief Justice) dismissed a claim by the Appellant for damages in respect of alleged false arrest and imprisonment and for a declaration as to status.

It appears from the evidence that the appellant volunteered for service in the St. Kitts-Nevis Defence Force established under the Defence Force Ordinance, 1913, that he was accepted, enrolled and sworn in as a member of that Force, and that in consequence of his refusal to appear on parade he was placed under close arrest on 17th August, 1942. He escaped from custody and following upon his re-arrest was charged under section 22 of the Army Act, and pleaded guilty, was sentenced to dismissal from the Force at an Orderly Room enquiry held by the Commanding Officer of the Force (Capt. H. C. Dinzey, first Respondent). Subsequently the appellant was informed that this sentence had not been confirmed by the Governor and by a company order it was notified that the sentence of dismissal not having been confirmed the appellant resumed duty as a member of the Force. Further the Appellant's legal adviser was informed by letter signed by the second respondent Captain F. S. Wigley that the Appellant was still a member of the Force and that further proceedings would be taken against him under the Army Act.

The Appellant's claim for damages for false arrest and imprisonment rests in the first instance upon the contention that he was at no time a member of the Defence Force by reason of the fact that at the time of his acceptance as such he was not possessed of all the qualifications required by the Ordinance under which the Force was established, or in the alternative that, if he were a member, then the Force not being on "actual service" within the meaning of that Ordinance at the material time, he was not liable to arrest or imprisonment thereunder.

In regard to the first of these contentions it is enacted by the relevant provisions of the Ordinance (section 3 subsection 3) as follows: —

"No person shall be accepted as a member of the Defence Force who "does not reside in the town or district to which the company that he "desires to join belongs, or who is not in receipt of an income of fifty "pounds a year, or whom the commanding officer of the force deems "unfit to be a member of the force:

"Provided that the Governor may, if he thinks fit, accept any person, "otherwise suitable, who does not possess the foregoing property "qualification."

It was contended on behalf of the Appellant that the requirements of this sub-section are to be read conjunctively and that they are mandatory so that the acceptance of any person who does not possess each of the three prescribed qualifications is prohibited, and the enrolment of any such person is a nullity. On the other hand it was argued on behalf of the Respondents that the first and second of the qualifications were to be read disjunctively in relation to each other though conjunctively in relation to the third. It was further contended by the learned Acting Attorney-General on their behalf that the provisions of this section are directory only, and that the Appellant having been duly enlisted in all other respects became a member of the Force and remained one unless and until duly discharged.

The learned trial judge held that the provisions of the subsection are to be read conjunctively but that they are directory only, and that the Appellant was duly enlisted and at the time of the arrest and imprisonment was a member of the Defence Force.

It must be borne in mind however that the Appellant's contention is based upon the proposition that he did not possess that qualification which required that he should at the time of his acceptance reside in the district to which the company he desired to join belonged. In order to establish this contention he must prove firstly that the company he desired to join belonged to a specified district and secondly that he did not reside in that district.

By section 4 (1) of the Ordinance it is provided that the Governor shall determine the number of companies of which the Defence Force shall consist and by sub-section (3) it is provided that each company shall be designated by such style as the Governor may direct.

There is no positive evidence as to the determination or directions of the Governor in this regard, but there is evidence that at the date of the Appellant's acceptance the Defence Force consisted of but one company and that the Force so constituted was designated the St. Kitts-Nevis Defence Force. There is no evidence that the company of which the Force consisted was designated by any other style nor that it was assigned or belonged to any district or limited area within the Presidency.

It is contended by counsel on behalf of the Appellant that by certain Regulations and Standing Orders made on 30th June, 1910, by the Governor under the Defence Force Ordinance, 1903, reference is made to "the Basseterre Company" (regulation 19) and to the "A" or Basseterre District and the "B" or Mounted Infantry District (regulation 59) and that by a well-known rule of evidence there is a presumption of continuance which would

justify the conclusion that the state of affairs then existing continued till the present time unless there be evidence to the contrary. But any such presumption is displaced by the uncontradicted testimony of the Commanding Officer that the Force has been composed of one company only from 1920 up to the present time.

Further, despite the fact that the Force is designated in the Ordinance as the St. Christopher-Nevis Defence Force (thus indicating that it is not confined to any particular district) the learned counsel for the Appellant invites us to hold that the present Force must be regarded as the representative of the former Basseterre Company only. As to this, there is a presumption of construction against the legislature intending what is inconvenient or unreasonable, so even if the present Force was identical with that in existence under the Defence Force Ordinance 1903, we would be slow to impute to the Legislature of this Presidency an intention to preclude every person residing outside a particular area from serving his King and country.

In point of fact however the present Force is not identical with the previous one.

The Defence Force Ordinance 1903 was repealed by that of 1913. Section 52 of the latter Ordinance provides that members of the older Force shall be deemed to be members of the new Force to be established under that Ordinance, but it does not provide that the Force established under the Ordinance of 1903 shall be deemed to be the Force established under that of 1913. Upon the repeal, therefore, of the former Ordinance, the Force established thereunder ceased to exist and with it the companies of which it was comprised. No presumption of continuance can, in such case arise. Nor is the Appellant's position made better by any contention that the Regulations of 1910 are still in force by virtue of any saving clause in the original Ordinance of 1913 or by any other rule of law, for those Regulations do not contain any declaration as to the Governor's determination as to the number of companies or the style by which they were to be designated, nor could they keep alive a Force or any part thereof the existence of which had been terminated by a statute.

The only evidence before the Court therefore is that at the date of the Appellant's acceptance as a member, the Force consisted of but one company and there is no evidence that this company "belonged" to any district of more limited extent than that of the Presidency of St. Kitts-Nevis. The Appellant failed therefore to establish that the company he desired to join belonged to any particular district within the Presidency. The only reasonable conclusion to be drawn from the evidence as presented to the trial judge is that the district to which the company belonged is the whole Presidency. As then the Appellant admittedly resided within the Presidency he possessed the requisite residential qualification and was, in our view, properly accepted as a member of the Force. Upon being duly enrolled and taking the oath he became a member of the Force for all purposes and was a member at the times of his arrest and imprisonment.

This being so, it is immaterial for the purposes of this case

whether section 3 (3) of Ordinance 4 of 1913 is mandatory or directory or whether the conditions of acceptance are conjunctive or disjunctive, for upon any of the interpretations put forward, the Appellant was lawfully accepted as a member of the Force.

In regard to the second contention of the Appellant that he was not subject to such discipline the Force not being on "actual service" at the material times, it is not disputed that by proclamation dated the 1st September 1939 the Force was called out on actual service in the manner prescribed by section 28 of the Ordinance. That section further provides that the period of such service shall continue as long as the Governor-in-Council shall consider necessary, and shall be determined only by order of the Governor. We entirely agree with the learned trial judge that there is no evidence that this period of actual service had been so determined at the date of the Appellant's arrest and imprisonment. Not only is there no proof of any order by the Governor to that effect, but in so far as the order releasing the members of the Force from further attendance at camp may be presumed to have been authorized by the Governor, it was expressly conditioned by the warning that the period of "actual service" had not been determined thereby. It is indeed patent, in our view, that that order can in no sense be interpreted as an order by the Governor under section 28 (5).

On both grounds then the appellant has failed to establish the basis of his claim for damages for false arrest and imprisonment. This claim was therefore rightly dismissed by the learned trial judge and in relation thereto his appeal fails.

It follows from our decision on this part of his claim that the Appellant is not entitled to a declaration that he never was a member of the Force. There remains for decision the question whether he is now a member. The answer to this depends upon whether Captain Dinzey's action in dismissing the Appellant *on* 22nd August, 1942 effected his discharge from the Force.

The First Respondent on the occasion in question held an Orderly Room enquiry into 3 charges against the Appellant. On the second charge (escaping from close arrest contra section 22 of the Army Act) the Appellant pleaded guilty and Capt: Dinzey thereupon dismissed him from the Force, and forwarded a Report of the proceedings to the Commandant. A reply was subsequently received that the Governor had not confirmed the sentence of dismissal and a notification to that effect was as previously mentioned published in Company Orders on 11th November, 1942.

The first point to be considered is whether an officer when dealing with a case summarily under section 22 of the Army Act is empowered to impose a penalty of dismissal. The short answer to this is that the penalties which may be imposed in a summary case are set out in section 46 of the Act and dismissal is not among them. It was however submitted on behalf of the Appellant that even though Capt: Dinzey could not impose dismissal as a penalty under section 46 of the Act, he was *in* his capacity of commanding officer of the Force, empowered under section 22 of the Defence Force Ordinance 1913 to discharge

any member thereof, and that his powers thereunder are not subject to confirmation by the Governor. The Court was therefore invited in treat the order of dismissal as having been made under that section and to hold that as such it operated as a valid discharge. It is however quite clear from the charge sheet (Exhibit "D".) and the evidence of Capt: Dinzey that the latter purported to act under the Army Act. Is this Court then entitled to deem him to have exercised his powers under the Ordinance even though he made no claim to do so? We do not think so. It not infrequently happens that a Court is empowered to try a case either summarily or on indictment and to award a heavier sentence in the latter event. But if such a Court when dealing with a case summarily were to impose a penalty in excess of that allowed upon summary conviction such a sentence could not be supported on the ground that it was not in excess of that which the same Court might have imposed had it dealt with the case upon indictment. The test in all such cases is whether or not the sentence was in excess of the jurisdiction which the tribunal purported to exercise.

It appears to us then that the sentence of dismissal imposed by Capt. Dinzey was in excess of jurisdiction and null and void, and that it cannot operate as a valid discharge. In our view therefore the Appellant never ceased to be a member of the Force and his application for a declaration that he is not now a member must fail.

In the result the appeal will be dismissed with costs.

In view of the grounds of our decision it is not incumbent upon this Court to decide the other points raised during the hearing. But lest those members of the Force who are more concerned about getting on with the war than getting out of the Army, should be left under the misapprehension that they are liable to be mulcted in damages for acts done in the *bona fide* exercise of their duty we think it is desirable to make a few observations upon the submission of Counsel for the Appellant upon the interpretation of section 50 (2) of the Ordinance.

The learned Counsel's contention, as we understand it, amounts to this: that if a military officer should interpret the law in the same sense as a trial judge subsequently does, but if the latter's decision is reversed upon appeal, the officer is to be held liable for gross negligence. In the present case this Court has supported the finding of the learned trial judge but even if we had not done so, we would not be prepared to subscribe to the novel doctrine that a military officer is to be liable for damages because his decision on a point of a law is not more correct than that of a Judge.

Counsel for the Appellant further submitted that the word "Maliciously" in section 50 (2) means no more than "intentionally". Such an interpretation ignores the fact that this subsection is a protective clause in favour of officers acting in the execution of their duties, and that the object of such clauses is to afford a measure of protection to persons who, although exceeding their powers, have acted in the supposed pursuance of and with a *bona fide* intention of discharging their duty under a statute. The attitude of the Courts towards military officers in

this respect was stated by Lord Mansfield as follows:

> "In trying the legality of acts done by military officers in the "execution of their duty, particularly beyond the seas where cases may "occur without the possibility of application for proper advice, great "latitude ought to be allowed, and they ought not to suffer for a slip of "form, if their intention appears by the evidence to have been "upright.....Thus the principal inquiry to be made by a court of "justice is, how the heart stood; and if there appears to be nothing "wrong there great latitude will be allowed for misapprehension or "mistake".....**(Wall v. Macnamara)** (1779 1 T.R. 536).

So far from there being any evidence that the respondents acted maliciously we agree with the learned trial judge that they were actuated solely by a desire to preserve the discipline of the Force, and that their attitude toward the Appellant was, if anything, over conciliatory.

Appeal dismissed.

IN THE WEST INDIAN COURT OF APPEAL

On appeal from the Supreme Court of the Windward Islands and Leeward Islands (Grenada Circuit).

Between:

DUDLEY MOORE PAUL on behalf of himself and all other the trustees of the estate of JOHN MICHAEL GAY, deceased,

Appellant,

and

R. O. WILLIAMS, R. L. MILLER, L. AUBREY RAPIER on behalf of themselves and all other the members of the Church Council of the Church of England in the Colony of Grenada,

Respondents.

[GRENADA. 1942. No. 2.]

BEFORE THEIR HONOURS MR. 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.

1944. JANUARY 27.

Will—Construction—According to its plain meaning and intention—Intention of testator as expressed in will—Words used must be fit and proper for purpose—Intention can only be effectuated—If words sufficient—Intention cannot be effectuated—If law does not permit.

Will—Bequest—First payment at expiration of one calendar month after testator's death—No vested interest acquired by legatee—Subsequent payments "only so long as the Rector or officiating minister shall discharge the duties of the Office to the satisfaction of the parishioners being members of the Church of England"—Construction—No vested interest divested—Not a condition subsequent.

Will—Bequest—Words qualifying—Whether constituting condition subsequent or a limitation—Test to be applied—Whether or not there is

created by the terms of *the bequest a gift complete in itself, separate and distinct from the qualification—Quantum or duration of gift—Not ascertainable without reference to qualifying words—Words qualifying bequest—How construed—*As *words of limitation—Not as a condition subsequent.*

Will—Bequest—Subject to words of limitation—Where words uncertain—Gift void for uncertainty—To the satisfaction of parishioners—Uncertainty.

The Court will seek to give effect to the intentions of the testator as expressed in his will, which is to be construed according to the plain meaning and intention, notwithstanding that the result of so construing it may be to defeat the object he had in view. It is the duty of the Court to ascertain, from the words of the will by the ordinary rules of construction, the meaning and intention of the testator. But this duty is subject to the condition that though the intention as collected from the will is to govern the construction, yet there must be words used fit and proper for the purpose, and it is the duty of the Court to effectuate the intention only if the words be sufficient and the intention be such as the law permits.

Cunliffe v. *Brancker* (1876) 3 Ch.D. 393, *Tatham v. Drummond* 34 L.J.Ch. 1, *Roe d. Dodson* v. *Grew* 97 E.R. 106, *Doe d. Tremewen* v. *Permewen* 113 E.R. 479, applied.

A testator charged certain of his real property with the following bequest: "To the Church Council of the Church of England in this Colony for and toward the salary of the Rector or officiating minister for the time being of the Parish of Saint John the sum of One Hundred pounds per annum in quarterly payments the first of such payments to be made on the expiration of one calendar month after my decease and such annuity or yearly sum to be payable only so long as the Rector or officiating minister shall discharge the duties of the Office to the satisfaction of the parishioners being members of the Church of England".

Held (1) that the Church Council did not secure a vested interest in the gift by virtue of the provision for the first payment at the expiration of one calendar month after the testator's death, and that the words "and such annuity or yearly sum to be payable only so long as the Rector or officiating minister shall discharge the duties of his Office to the satisfaction of the parishioners being members of the Church of England" did not operate as a divesting of any vested interest or as a condition subsequent;

Heath v. Lewis, 43 E.R. 374, applied.

(2) that the only words which determine either the quantum or duration of the gift are "only so long as the Rector or officiating minister shall discharge the duties of the office to the satisfaction of the parishioners", that without them there is no means of ascertaining either quantum or duration, that they therefore form an integral part of the bequest, are not a provision separate and distinct therefrom, and must consequently be treated as words of limitation and not as a condition subsequent;

Re Moore's Trust (1883) 39 Ch.D. 110 applied; *Clavering* v. *Ellison*, 11 E.R. 709 and *Sifton* v. *Sifton* (1938) A.C. 656 distinguished.

(3) that the words of limitation were so uncertain that their true effect could not be determined, the limitation on the gift was therefore void for uncertainty, and the Court could give no effect thereto;

Hunter v. *Attorney-General* (1899) A.C. 317, *Sifton* v. *Sifton* (1938) A.C. 656 and *Clayton and anor.* v. *Ramsden and anor.* (1943) applied.

(4) that the gift failed altogether.

Sifton v. Sifton (1938) A.C. 656, per Lord Romer, applied.

The judgment of the Court was as follows: —

This is an appeal from the Supreme Court of the Windward

and Leeward Islands in a case in which the plaintiffs sought to recover a certain sum alleged to be due under the will of John Michael Gay, deceased, which charged certain of the real property of the testator with the following bequest:

> "To the Church Council of the Church of England in this Colony for "and toward the salary of the Rector or officiating minister for the time "being of the Parish of Saint John the sum of One hundred pounds per "annum in quarterly payments the first of such payments to be made on "the expiration of one calendar month after my decease and such "annuity or yearly sum to be payable only so long as the Rector or "officiating minister shall discharge the duties of the Office to the "satisfaction of the parishioners being members of the Church of "England."

The defendants who are the trustees under the will withheld payment upon receiving certain indications of dissatisfaction on the part of persons representing themselves to be parishioners and members of the Church of England. The learned trial judge, upon suit by the plaintiffs representing the Church Council, held that the words qualifying the bequest purported to create a condition subsequent, but that the condition is void for uncertainty, and the gift is therefore absolute and the plaintiffs are entitled to payment without consideration thereof. The defendants have appealed.

In the Court below the appellants argued that the words imposed a continuing condition, that this condition was not uncertain but that the respondents, having failed to discharge the onus of proving that this condition had been fulfilled, were not entitled to payment. At the hearing of the appeal this argument was further developed, and it was submitted that such a continuing condition is not a condition subsequent but a limitation on the gift, so that should the limitation be void for uncertainty, the gift fails.

At the trial, which commenced before a judge and jury, a great deal of evidence and argument was addressed to questions on the doctrine and ritual practised by the present Rector, as to the theological leanings of the testator, the meaning of a number of words contained in the bequest, and as to whether or not there was evidence of satisfaction or dissatisfaction of the parishioners who were members of the Church of England. At the conclusion of the evidence, however, the jury was discharged, with the consent of Counsel, on the ground that there was "no conflicting question of fact for their decision." The learned trial judge thereafter delivered a judgment which, although it indeed rests upon a point involving no question of fact but upon a question of law only, does nevertheless purport to decide certain questions of fact which might arise were it to be found that the learned judge had erred in law. No such questions would appear to arise, however, if the present contention of the appellants is well founded.

It has therefore to be determined in the first instance what is the true construction of this clause in the testator's will, and whether the terms thereof create a gift subject to a condition subsequent, or whether they create a gift subject to limitation.

Only when this question has been determined, does it become necessary to discuss the consequences which will, by the operation of law, flow from the nature of the bequest; and only then can it be determined whether or not it is necessary to consider the various questions raised in the Court below and by Counsel for the Respondent in this Court, involving matters of fact.

It is to be borne in mind that the Court will seek to give effect to the intentions of the testator as expressed in his will, which is to be construed according to the plain meaning and intention, notwithstanding that the result of so construing it may be to defeat the object he had in view (*Cunliffe v. Brancker* (1876) 3 Ch. D. 393). It is the duty of the Court to ascertain, from the words of the will by the ordinary rules or construction, the true meaning and intention of the testator — (*Tatham v. Brummond* 34 L.J. Ch. 1). But it is to be observed that this duty is subject to the condition that though the intention as collected from the will is to govern the construction, yet there must be words used fit and proper for that purpose (*Roe d. Dodson v. Grew* 97 E.R. 106) and it is the duty of the Court to effectuate the intention only if the words be sufficient and the intention be such as the law permits (*Doe d. Tremewen v. Permewen,* 113 E.R. 479).

It is by the application of these general principles that we approach the construction of the clause involved in this case. The words used by the testator whether or not any of them be uncertain in their effect, are plain and unambiguous in their meaning, and it is by a consideration of that meaning that the -nature of the bequest and its effect in law is to be determined.

Counsel for the appellants cited a number of cases in which, it was submitted, words of similar import have been held to constitute a limitation rather than a condition subsequent, and to these cases we have given careful consideration. We have not overlooked the submission of Counsel for the respondent, that a number of the cases are cited in Halsbury's Laws of England as though they were examples of conditions subsequent. The distinction between these two kinds of qualified bequest, while perhaps a fine one is nevertheless fundamental and may be vital, and it rests upon both principle and authority. One of the tests which may be most readily applied would appear to be whether or not there is created by the terms of the bequest a gift complete in itself, separate and distinct from the qualification. In the case of *Moore's Trust* (1888) 39 Ch. p. 110, the decision of Kay J., approved by the Court of Appeal, makes it clear that when the duration of a gift by way of periodical payments is to be found solely in the words which qualify the bequest, then those words impose a limitation and not a condition subsequent, for without them there is no means of ascertaining the time during which the payments are to be continued, and therefore the *quantum* of the bequest is undetermined. It follows that wherever the qualifying words form an integral part of the bequest, so that by their omission the bequest is incomplete, then those words create a limitation and not a condition subsequent. Upon this principle the case of Moore's Trust and the present case may clearly be distinguished from

Clavering v. Ellison, 11 E.R. p. 709 and *Sifton v. Sifton,* 1938, A. C. 656, which were relied upon both by Counsel for the respondents and by the learned judge. In the former case the testator bequeathed to his grand children, the residue of his estate, provided that they were educated in a certain place and in a certain form of religion. Here there was a completed gift subject to a condition, and the omission of the condition did not affect in any way the nature or *quantum* of the bequest. In the latter case the testator bequeathed to his daughter a sum sufficient for her maintenance until she was forty years of age after which the whole income of her estate was to be paid to her annually. The payments were, however, by a separate and distinct provision, to be made only so long as she continued to live in Canada. Here again, the original bequest was in itself complete in all its terms, and by the omission of the condition neither the *quantum* nor the duration of the gift was left undetermined, or in any way affected. In Moore's case however, neither quantum nor duration were determined by the terms of the bequest save in the provision to be found in the words "while so living apart from her husband," and in the present case the only words which determine either the *quantum* or duration of the gift are those "only so long as the Rector or officiating minister shall discharge the duties of the office to the satisfaction of the parishioners.." without them there is no means of ascertaining either quantum or duration. They form therefore an integral part of the bequest, are not a provision separate and distinct therefrom and must therefore be treated - as words of limitation and not as a condition subsequent.

It was contended by Counsel for the respondents that by virtue of the provision for the first payment at the expiration of one calendar month after the testator's death, the Church Council secured a vested interest in the gift and that the effect of the provision, if it is effective at all, would of necessity be a divesting of this interest, and from this the conclusion was drawn that the provision created a condition subsequent, an event upon the arising of which an estate was to be determined. It would appear from the decision in *Heath v. Lewis* 43, E.R. 374, that this contention is not well founded, for although in that case the first of the periodical payments was to be made "at the end of one calendar month after the decease" of a named person, the provision "if she shall so long remain sole and unmarried" was held to be a limitation as distinguished from a condition.

There is therefore no doubt in our minds that the words used by the testator, if given their plain meaning, create a limited gift and not a gift subject to a condition subsequent, and that its effect is therefore subject to the incidents of the former.

The question which falls next to be determined is whether, as contended by the respondents and as held by the learned trial judge, the words of limitation are so uncertain as to be inoperative and on this point both *Sifton v. Sifton* and *Clayton* & *anor v. Ramsden & anor* (1943) 1 A.E.R. p. 16 provide authority which in our view is apt. In the former case the words under consideration were "only so long as she shall continue to reside in Canada." These words which would appear on the face of

it sufficiently plain in their meaning were held to be so uncertain in their effect as to be incapable of practical application, for it could not be determined by reference to the words alone, whether the condition must be fulfilled by continuous unbroken residence in Canada, or whether it would be sufficient if the beneficiary resided for some part of each year in Canada, and if so whether six months, or three months or even one month only would suffice. The judge of first instance in that case endeavoured to overcome the difficulty by, in effect, substituting his own words for those of the testator, so that to spend substantially all her time in Canada should be sufficient to satisfy the provision. This, it was held, he could not properly do. The words of the testator himself are the determining factor, and if words used are so uncertain that their true effect cannot be determined then the provision must fail and it is not open to the Court, as was said by Lord Halsbury in *Hunter v. Attorney-General* 1899 A.C. at p. 317," to interpret the will in such a way as in a large and general sense may be said to satisfy the wishes of the testator nor to invent provisions and impose conditions which the testator has not introduced," a course which his lordship said would let in a mode of interpreting wills which would cast upon the Court the necessity of making the will for the testator — not interpreting the words which he has actually used. Likewise in *Clayton v. Ramsden* the words of the testator "if she married a person who is not of Jewish parentage" were held to be void for uncertainty, because it was impossible to determine by consideration of them alone what degree of Hebraic blood was intended, whether through one parent only, or both, or through grand parents also. In the present case a similar difficulty arises as to the intended effect of the words "to the satisfaction of the parishioners". Did the testator mean this in its most literal sense — all the parishioners without exception? Or did he mean a majority of the parishioners and if so what majority? Or would he have been content if a substantial number of the parishioners were satisfied? It is impossible for the Court to determine this and we are precluded on the authority of the cases to which we have referred from "making the will for the testator" by substituting for his words, words of our own which we might consider both reasonable and certain. The limitation on the gift is therefore void for uncertainty, and the Court can give no effect thereto.

What then is the result of these conclusions? It was submitted on behalf of the respondents that whether the qualifying provision was of limitation or was a condition subsequent, the result would be the same if the provision were void for uncertainty; the provision would go and the gift stand absolute. No authority was cited in support of this proposition and we think that it is ill founded. Turning again to *Sifton v. Sifton* we find that Lord Romer deals with this point in the following terms: — "In substance no doubt there is not much difference between a trust to pay until the happening of that event. But the legal effect in the two cases of the event being described with insufficient certainty are widely different. In the first case the trust will fail altogether. In the second case the trust will remain and it will be the clause in abrogation that will fail,"

It is to the former case that the clause now under consideration is analogous and, having held that the clause is a gift subject to limitation and not to a condition subsequent, and having also held that the limitation is not described with sufficient certainty, we must though with considerable reluctance, come to the conclusion that the trust fails altogether, and that the respondents in this case are not entitled to any payment thereunder.

The appeal must therefore be allowed and the judgment of the lower Court be reversed, judgment being entered therein for the defendants.

We would add that we have no doubt that the conclusion at which we have arrived will be received by all parties concerned with the profound regret which we ourselves experience. It is indeed lamentable that differences of view should have necessitated a decision which deprives the Church, to the fundamental doctrines of which all parties claim allegiance, of a measure of that financial support essential to its welfare and which the testator beyond doubt intended to bequeath. It is the more regrettable in that for upwards of half a century the relations between clergy and parishioners have been such that no question has hitherto been raised. It was for this reason that we sought to give the parties opportunity to arrive at some amicable settlement by reason of which no decision on the point need have been delivered. We regret that the unhappy differences have proved incapable of adjustment up to the present time and that this judgment will preclude the possibility of any such adjustment in the future. For this reason and although not invited to do so by either party we have considered whether or not it might be possible, in view of the fact that this is a charitable trust, to treat the uncertainty as a difficulty in the operation of the machinery of the trust only, as is perhaps suggested by the learned trial judge in the course of his judgment and thus seek by means of a scheme to give effect to the charitable intention of the testator. We do not however find ourselves in a position to do so, for we are in no doubt that the trust itself has failed and there is therefore nothing to which a scheme can be applied. We can but console ourselves with the reflection that while the testator would not have wished the Church to be deprived of the fruits of his liberality so long as the parishioners were satisfied, whatever he may have meant by the words he used, neither would he have wished that payment should be made to the Church Council without condition and in all circumstances.

We consider that in all the circumstances, and in view of the authorities cited, which reinforce the view which we expressed at the outset, the costs of all parties, both here and in the Court below, should be borne by the estate.

Appeal allowed.

REX *v*. DHANRAJ SINGH

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL by way of case stated by a judge of the Supreme Court of British Guiana sitting in its Criminal Jurisdiction for the County of Berbice. (Indictment No. 2630, Berbice).

REX

v.

DHANRAJ SINGH

[1943. No. 6. BRITISH GUIANA.]

BEFORE THEIR HONOURS MR. H. W. B. BLACKALL, Chief Justice of Trinidad and Tobago (President); SIR JOHN VERITY, KT., Chief Justice of British Guiana; and MR. CLEMENT MALONE. Chief Justice of the Windward Islands and Leeward Islands.

1944. FEBRUARY 11, 14, 16.

Appeal—West Indian Court of Appeal—As Court for Crown Cases Reserved—Whether power, on case stated, to amend conviction.

Criminal law and procedure—Trial on indictment—Respective functions of judge and jury.

Criminal law and procedure—Murder—Self defence and provocation — Questions for jury—Direction by trial judge.

Where the issue of self-defence is raised in a trial on indictment, it is for the jury to consider whether or not the prisoner had reasonable cause to fear serious injury, whether he had reasonable opportunity to retreat, and whether or not in the particular circumstances the use of the weapon by the prisoner was reasonably necessary to repel the attack.

If there is material to raise an issue, it is for the jury to determine that issue, after receiving the proper directions of the judge as to the law. Whether or not there is adequate material to enable the jury to determine the issue in a manner favourable to the accused is also a matter for the jury, once there has been established sufficient material to raise the issue.

The prisoner approached a bridge upon which Eric Houston, the deceased, and certain other persons, were standing. Houston accused the prisoner of stealing his fish, and an altercation ensued in the course of which Houston threatened to "cuff" the prisoner. The prisoner gave evidence that, following upon the threat to "cuff" him, Houston and three other men, one of whom was armed with a stick, rushed at the prisoner, Houston being in front. The prisoner averred that he made two swings in quick succession with his axe to keep off the four men, and in so doing he struck Houston thrice with the back of the axe thus inflicting fatal injuries upon Houston. The prisoner is a woodcutter and was carrying the axe with him in the ordinary course of returning from work.

The trial judge directed the jury (1) 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" on the indictment; and (2) 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.

Held (1) that the trial judge erred in directing the jury that there was no material upon which they could find that the accused acted in self-defence;

(2) that if the jury had chosen to believe the prisoner's

evidence and if they were satisfied that he had reasonable cause for fear, that he had no reasonable opportunity for retreat, and that his use of the axe in the manner he described was reasonable in all the circumstances, then they would have been entitled to acquit the prisoner on the ground that he had acted in self-defence;

(3) that there was sufficient evidence of provocation to go to the jury.

Quaere: whether, where a person has been convicted of murder by a jury, the West Indian Court of Appeal, sitting as a Court for Crown Cases Reserved, is empowered to substitute a verdict of manslaughter.

Case stated on the 19th November, 1943, by DUKE, J. (Acting), under sections 174 to 177 of the Criminal Law (Procedure) Ordinance, cap. 18:

DHANRAJ SINGH was indicted for the murder of ERIC HOUSTON on the 11th August 1943. His trial took place before me on the 17th, 18th, and 19th days of November 1943, at the October Criminal Session for the County of Berbice. On the 19th day of November 1943the jury found him guilty of murder, and he was sentenced to death.

2. Before DHANRAJ SINGH was so sentenced, his counsel requested that I reserve certain questions of law which had arisen on the trial for the consideration of the West Indian Court of Appeal. I readily consented to do so, and I directed that the sentence of the Court be not carried into effect until the hearing and determination by the Court of Appeal of the questions of law which I consented to reserve.

3. The questions of law which are reserved are: —

(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.

4. In R. v. LARKIN (1943) 1 ALL E.R. 219, C.C.A., HUMPHREYS, J. (delivering the judgment of Viscount CALDECOTE, L. C. J., ASQUITH, J. and himself) said:

> Where facts are proved and accepted, then whether these facts amount to a crime or not must be a question of law, not of fact. Where the facts are in dispute, it is always for the jury to determine what are the true facts. They must have a direction as to what their verdict must be if they accept the facts one way, or if they accept the facts the other way. But where the facts are proved in such a way that there can be no question about them, then it is perfectly right of the judge to tell the jury: "Those facts amount to a lawful or an unlawful act". In this case, in our opinion, it was perfectly right for OLIVER, J., not to leave to the jury any question of acquittal, but to tell the jury, as he did, on the facts of the case, accepting the evidence of the accused man to the highest extent, that it was not open to them to return a verdict of not guilty.

And in R. v. TOMPSON (1943) 2 ALL E.R. 134, C.C.A., LEWIS, J. (delivering the judgment of VISCOUNT CALDECOTE, L.C. J., HUMPHREYS, J. and himself) said:

> In any criminal case the judge has, no doubt, a right and a duty to withdraw from a jury an issue upon which there is

no evidence, but except in such a case every question of fact upon which there is evidence is within the province of the jury and it is for the jury to come to a conclusion upon it after a proper direction from the judge. Similarly, a judge has a right and a duty to point out to a jury that the evidence before them is all one way, and that they cannot find, if they accept the uncontradicted evidence, a particular verdict. The case of R. v. LARKIN (1943) 29 Cr. App. Rep. 18 is an example of this. OLIVER, J., on the evidence given, told the jury that they could not find a verdict of not guilty, but that it was a case of murder or manslaughter, and, even if they accepted the prisoner's evidence to the full, the verdict must be one of manslaughter.

5. In the late afternoon of Wednesday, the 11th August, 1943, ERIC HOUSTON, SAMAROO, MARTIN MENDONCA, ALFRED MENDONCA, WILLIE and others were on the public road bridge lying between Plantation No. 43 Corentyne on the west and Plantation Good Hope or No. 44, on the east. This bridge is known as the Good Hope bridge. Some of the persons were by the northern rail of the bridge while others were leaning against the southern rail of the bridge. The rails were made not of iron, but of wood. ERIC HOUSTON was leaning against the southern rail of the bridge.

6. The case for the prosecution was as follows. ERIC HOUSTON was a fisherman, and he had been speaking about certain fish which he alleged was stolen from him. DHANRAJ SINGH, who besides being a woodcutter is also a fisherman, was walking along the public road in. a westerly direction and was proceeding from Plantation No. 45, Corentyne to his residence at Plantation No. 43, Corentyne. DHANRAJ SINGH had his woodcutter's axe with him. On the approach of DHANRAJ SINGH, ERIC HOUSTON, who was leaning against the southern rail of the bridge said that it was DHANRAJ SINGH who had stolen his fish. The prisoner said "Don't call me a thief". ERIC HOUSTON said "Every now and then, I will call you a thief". The prisoner then cursed the mother of ERIC HOUSTON who then said "if you say that word again I will "full" your mouth with "cuff". The prisoner then walked up to ERIC HOUSTON who was still leaning, unarmed, against the southern rail of the Good Hope bridge. The prisoner struck ERIC HOUSTON with his woodcutter's axe. ERIC HOUSTON, still unarmed, made one step forward. The prisoner again struck ERIC HOUSTON another blow with the axe. Both blows hit ERIC HOUSTON on the left side of the chest, and they were delivered with some degree of force. ERIC HOUSTON and SAMAROO, who were on the northern side of the bridge, held on to the axe. SAMAROO obtained possession of the axe, ERIC HOUSTON fell on the road either dead or dying, and SAMAROO threw the axe aside. The prisoner picked up the axe, and ran in the direction of his home. P.C. MASWILL RAMAIN, who was on the No. 43 public road, cycled in an easterly direction to the bridge, left his cycle there, and ran behind the prisoner who was running in a northerly direction along a dam on the eastern side of No. 43. The prisoner reached his yard, and he pushed the axe into the manicole roof of his fowl coop. He then ran to the stairway of his house, he picked up a piece of button wood stick and he sat down on his step, holding the stick. The acts of the prisoner were observed by DATIA, the fourteen year old daughter of SAMAROO, who lives about 15 yards from the prisoner. When P.C. ROMAIN reached the premises of the prisoner, he asked him where was the axe with which he had struck the man. The prisoner replied that he did not strike the man (meaning ERIC HOUSTON) with an axe, but that he had struck him with a stick, and he showed the policeman the stick which he then had in his hand. P.C. ROMAIN held the prisoner. WILLIAM BOBB, with whom P.C. ROMAIN had been speaking on the No. 43 public road, came up. P.C.

ROMAIN handed over the prisoner to BOBB. The policeman proceeded to search for the axe. DATIA came up and showed him where the axe was hidden. The prisoner was brought out to Good Hope bridge along with the axe and the button wood stick. The policeman examined ERIC HOUSTON, and ascertained that he was dead. Another policeman came up and the prisoner, along with the axe and the stick, was conveyed to No. 51 Police Station. P.C. ROMAIN remained with the dead body of ERIC HOUSTON until it was removed to No. 51 Police Station. Later in the evening the prisoner was charged with the murder of ERIC HOUSTON, he was cautioned and he made a statement. In that statement, the prisoner stated that on the same morning ERIC HOUSTON had told him that he believed that he the prisoner had stolen his fish, and that one SOONDRI had advised him to summon ERIC HOUSTON; that that afternoon at about 6.30 when he was on Good Hope bridge SAMAROO started the same conversation about the fish, that he stood up and listened, that ERIC HOUSTON told him that he was a thief and that he believed that it was the prisoner who had stolen his fish; that the prisoner told ERIC HOUSTON not to call him a thief and that ERIC HOUSTON asked him what he can do to him; that the prisoner told ERIC HOUSTON to stop it and ERIC HOUSTON asked what the prisoner could do to him; that ERIC HOUSTON told the prisoner to put down his stick; that ERIC HOUSTON jumped down from the rail and said that he was going to "full" his face with cuff; that ERIC HOUSTON fired a cuff and knocked the prisoner on his hand; that the prisoner struck ERIC HOUSTON two blows with his stick; that SAMBACH came to part ERIC HOUSTON and the prisoner; that ERIC HOUSTON'S feet went in the middle when he went to fire the cuff; that ERIC HOUSTON'S foot slipped and he fell; and that the prisoner fell. In that statement the prisoner alleged that ERIC HOUSTON fired a cuff which struck his (the prisoner's) hand, and that he struck ERIC HOUSTON two blows with a stick. The prisoner did not say that those two blows were struck with an axe, he did not say that MARTIN MENDONCA, ALFRED MENDONCA, SAMAROO, and WILLIE, or any of them, rushed at him, neither did he say that MARTIN MENDONCA struck him with a stick or had a stick. A *post mortem* examination on the dead body of ERIC HOUSTON disclosed, on external examination, a contusion, 6/8 of an inch by about 3/8 of an inch, above the left nipple directed downwards and to the middle line; and a contusion 6/8 of an inch, by 1/8 of an inch, on the left side on the front of the chest, nearer the middle line of the body, directed downwards and towards the middle line. On internal examination, it was ascertained that among other injuries, there were multiple contusions of the left lung extending deep into the substance of the lung tissue--one was 41/2 inches long by 2 inches in width, another was 3 inches long by 2 inches in width, and a third was 31/2 inches long by 21/2 inches in width. Death was due to the multiple contusions of the left lung, the result of the two external wounds. ERIC HOUSTON was well built, and very muscular.

7. The case for the defence was as follows. The prisoner did not know on Wednesday morning the 11th August, 1943 that he was accused of stealing fish, and he was not then so accused. On that day he went to No. 45 to cut wood, and when he was returning to his home at No. 43 at 5.30 p.m. he had his woodcutter's axe with him. He had no intention to enter into a fight. There were more than nine men on Good Hope bridge, some on one side and some on the other side. When he was about 2 feet from the bridge, there was a "big heavy laugh" coming from those on the bridge. ERIC HOUSTON said that he the prisoner was a scamp and that he had stolen his fish: this was said in the presence of everybody. The prisoner told ERIC HOUSTON not to call him a thief. ERIC HOUSTON said "what can you do, if you talk too much, I'll full your face with a cuff" ERIC HOUSTON who was unarmed, MARTIN MENDONCA who had a piece of stick, ALFRED MENDONCA who was unarmed, and SAMAROO who

was unarmed, then rushed the prisoner, ERIC HOUSTON being in front. The prisoner received no blows or cuffs from ERIC HOUSTON, MARTIN MENDONCA, ALFRED MENDONCA or SAMAROO. He, however, made two swings, in quick succession, with his woodcutter's axe to keep the four men from him; and he struck ERIC HOUSTON twice with the back of the axe-head. SAMAROO, ERIC HOUSTON and the prisoner held on to the axe. After the prisoner had struck ERIC HOUSTON twice with the axe, MARTIN MENDONCA struck the prisoner with a stick, on the left nipple. His shirt got torn and his left little finger was sprained. The prisoner was examined by the district doctor on Friday the 13th August, 1943, and the doctor found two trivial linear scratches each about 2 inches long below the left nipple: he found no sign of injury to the left little finger. The prisoner loosed the axe. SAMAROO threw it down, the prisoner picked it up, and ran away with it. He hid it on the top of the manicole roof, he picked up a stick and sat on the step. The prisoner told P.C. ROMAIN that he had struck ERIC HOUSTON with a stick, but he had really used an axe. He told an untruth because he was afraid. The prisoner was taken to No. 51 Police Station where he was told that ERIC HOUSTON was dead. He made a statement at the Police Station to Corporal BOWEN in which he said that he had used a stick; this was untrue, as he had really used an axe. The prisoner would not have used an axe if ERIC HOUSTON, MARTIN MENDONCA, ALFRED MENDONCA and SAMAROO had not rushed him.

8. In the course of my summing-up I directed the jury as follows:

> I direct you, as a matter of law, that on the facts of this case, accepting the evidence of the accused man to the highest extent, it is not open to you to say that the accused DHANRAJ SINGH is excused from punishment for causing the death of ERIC HOUSTON, or was justified in causing his death. It is not open to you to say that DHANRAJ SINGH killed ERIC HOUSTON in self-defence. It is not open to you to return a verdict of Not Guilty, and say that he has committed no offence. If you were even disposed to return such a verdict notwithstanding my direction to you, I would not accept it, but, of course, you realise and you appreciate that in every respect you are bound and you will be guided by the directions which I am giving you on points of law.

In giving that direction to the jury I followed R. v. LARKIN, supra, R. v. TOMPSON, supra, and I relied on the following passage in ARCH-BOLD'S Criminal Pleadings (1938) 30th edition, pages 891 to 892:

> if two men fight upon a sudden quarrel, and one of them after a while endeavours to avoid any further struggle, and retreats as far as he can, until at length no means of escaping his assailant remain to him, and he then turns round and kills his assailant in order to avoid destruction, this homicide is excusable, as being committed in self-defence.

I also had in mind that Viscount SIMON, L.C. in delivering the judgement of the House of Lords (Viscount SANKEY, Lord RUSSELL of KILLOWEN, Lord WRIGHT, Lord PORTER and himself) in MANCINI v. DIRECTOR OF PUBLIC PROSECUTIONS (1941) 28 Cr. App. R. 71 made the following observations relating to the law as to self-defence:

> The main case set up on behalf of the accused at the trial was self-defence and the judge devoted the first portion of a very careful summing-up to this question. MANCINI'S counsel found no fault with that part of the Judge's charge at all. It was in fact, if anything, too favourable to the accused, for MACNAGTEN, J., did not invite the jury to consider whether, even if it were true that MANCINI was menaced with the pen-knife, that would justify the use of MANCINI'S *terrible*

weapon (an instrument with a two-edged blade, with a sharp point and sharp sides, at least five inches long) so as to constitute a case of necessary self-defence, nor did the Judge make any observations on the question whether MANCINI could have *not escaped* from the threatened danger *by retreating* from the club.

9. In my opinion there was no material in this case upon which a plea of self-defence could be founded. If I was wrong in so directing the jury, then the conviction should be quashed, and a verdict of Not Guilty on the indictment substituted for the verdict of Guilty of Murder; and it would then be unnecessary to consider the other question of law reserved herein.

10. In my charge to the jury, I directed them that the only question for their determination was whether the prisoner was guilty of murder or whether he was merely guilty of manslaughter, and I explained to them the law as to provocation as stated in *Mancini* v. *Director of Public Prosecutions,* supra. The jury retired. After they had been in retirement for 21/2 hours, I directed that they should be brought back into Court, when I ascertained that they had not arrived at a verdict.

11. I thereupon directed 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 whole evidence there was *no* such provocation. The jury again retired to consider their verdict, and they subsequently returned a verdict of Guilty of Murder.

12. In *Mancini* v. *Director of Public Prosecutions* (1941) 28 Cr. App. R. 73, Viscount Simon, L.C. said

> In the present case the appellant's counsel contended that the Judge should have directed the jury as to what would amount to provocation sufficient to reduce the felonious act to manslaughter, and should have told them that, if they took the view that Mancini's act was provoked in this sense, they should acquit him of murder, and moreover that if, without being satisfied on the point, they felt a reasonable doubt whether the act was or was not so provoked, Mancini was still entitled to be acquitted of murder and should be found guilty only of manslaughter. *All this, however, depends on the view that there was evidence before the jury which might, if believed, be regarded as amounting to sufficient provocation. It is here, I think, that the contention of the appellant breaks down.*
>
> It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death. "In deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which causes death, to the offender's conduct during that interval and to all other circumstances tending to show the state of his mind" *(Stephen's Digest of the Criminal Law, Article* 317). The test to be applied is that of the *effect of the provocation on a reasonable man,* as was laid down by the Court of Criminal Appeal in *Lesbini* (11 Cr. App. R. 7; (1914) 3 K.B. 1116), so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (1) to consider whether a sufficient interval had elapsed since the provocation to allow a reasonable man time to cool, and

(2) to take into account the instrument with which the homicide was effected; for to retort, in the heat of passion induced by provocation, by a *simple blow* is a very different thing from making use of a *deadly instrument* like a concealed dagger (which was the instrument which caused the death in MANCINI's case). In short, *the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter*. In ARCHBOLD's Criminal Pleadings (1938) 30th edition at page 395,

it is stated:

As a general rule, no words or gestures, however opprobrious or provoking, will be considered in law to be provocation sufficient to reduce homicide to manslaughter, if the killing is effected with a deadly weapon, or an intention to do the deceased some grievous bodily harm is otherwise manifested. 13. In *Mancini* v. *Director of Public Persecutions* (1941) 28 Cr. App.

R. 65, 66, 75, 76, the facts, so far as they are material to the issue as to provocation were as follows:

MANCINI was the manager of an enterprise called the PALM BEACH BOTTLE PARTY, with premises in the basement of 37,WARDOUR Street……..On the first floor there was housed the WEST END BRIDGE and BILLIARDS CLUB, of which MANCINI was a member. DISTLEMAN was also a member of that club, and between three and four o'clock on the morning of May 1, when he and a number of other members (including a man named FLETCHER and MANCINI himself) were on the premises, he (DISTLEMAN) received a fatal wound in the left shoulder; a main artery was severed. The nature of the wound established that it must have been caused by an instrument with a two-edged blade with a sharp point and sharp sides, at least five inches long. At the trial MANCINI . . . admitted that he had such an instrument in his pocket—he described it as a knife about seven inches long—which he said that he had bought some weeks previously because his life was threatened by gangs of roughs . . . There had been an earlier violent altercation in the club when MANCINI was not present, as the result of which FLETCHER sustained head wounds, and had to go with his friend DISTLEMAN to Charing Cross Hospital, where two stitches were put in. It was after this that he and DISTLEMAN returned to the Club.

There was evidence that FLETCHER was at enmity with MANCINI, owing to the latter's having at an earlier date taken steps to exclude FLETCHER from the bottle party. When FLETCHER and DISTLEMAN re-entered the club and found MANCINI there, MANCINI, according to the evidence of the club door-keeper, came across to FLETCHER and seized him by the neck or top of the coat. DISTLEMAN went to FLETCHER'S aid, seized MANCINI'S shoulder or arm, and aimed a blow at him. It was at this point that MANCINI whipped out his dagger and inflicted the fatal blow on DISTLEMAN, and a little later slashed FLETCHER'S hand so that it was severely cut. DISTLEMAN, mortally injured, made his way out of the room, but he collapsed at the bottom of the stairs and died in a few minutes. In the course of his judgment, Viscount Simon, L.C. said:

The only knife used in the struggle was MANCINI's dagger, and this followed DISTLEMAN's coming at him and aiming a blow with his hand or fist. Such action by DISTLEMAN would not constitute provocation of a kind which could extenuate the sudden introduction and use of a lethal weapon like this dagger, and there was therefore no adequate material to raise the issue of provocation . . . there was not sufficient evidence to justify a verdict of manslaughter arising from the use of the dagger.

14. On the authority of *R.* v. *Larkin,* supra, and of *R.* v. *Tompson,* supra, and relying upon the citations specified in the foregoing paragraphs 1 directed the jury that the" evidence on behalf of the Crown, as well as the evidence on behalf of the prisoner did *not* constitute provocation of a kind which would reduce the crime from that of murder to that of manslaughter. If I was right in so directing the jury, the conviction should be affirmed. If I was wrong in so directing the jury, then the conviction for murder should be amended by substituting therefor a conviction for manslaughter: see *R.* v. *Prince* (1941) 28 Cr. App. R. 60 and section 176 (1) of the Criminal Law (Procedure) Ordinance, Cap. 18. If the conviction is so amended, I would point out, with respect to punishment, that felonious homicides, and serious crimes of violence not resulting in death, are not of infrequent occurrence in the County of Berbice.

J. A. Luckhoo, K.C., for Dhanraj Singh.

S. E. Gomes, Assistant Attorney-General, for the Crown.

Cur. adv. vult.

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

In this case the prisoner, Dhanraj Singh, was convicted of murder and sentenced to death but before sentence the trial Judge consented, at the request of counsel for the defence, to reserve certain questions for the consideration of this Court under section 175 of the Criminal Law (Procedure) Ordinance.

It appears from the case stated that the evidence for the prosecution was to the effect that the prisoner approached a bridge upon which Eric Houston, the deceased, and certain other persons were standing; that Houston accused Dhanraj Singh of stealing his fish and that an altercation ensued in the course of which Houston threatened to "cuff" the prisoner, who thereupon struck him twice with an axe inflicting injuries which resulted in Houston's death.

It appears that the prisoner on the other hand gave evidence to the effect that following upon the threat to "cuff" him, Houston and three other men, one of whom was armed with a stick, rushed to him, Houston being in front. He averred that he made two swings in quick succession with his axe to keep off the four men, and in so doing struck Houston with the back of the axe-head thus inflicting the fatal injuries. It is common ground that the prisoner is a wood-cutter and was carrying the axe with him in the ordinary course of returning from work.

Upon this evidence the learned Judge directed the jury (1) 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" on the indictment, and (2) 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.

The question reserved by the learned Judge for our consideration is whether he was right in giving the jury such directions.

There was upon the evidence a clear conflict as to the facts, but in view of the nature of the directions given to the jury it is not possible for this Court to conclude from their verdict whether they accepted the evidence for the Crown or that of the prisoner. In the former case it might well be that no question either of self-defence or of provocation would have arisen. In the circumstances, however, we are bound to examine these questions on the basis that the jury might conceivably have accepted the prisoner's story in its entirety. It is therefore to his evidence that we must apply the relevant principles of law, and it is by an examination of that evidence that we are to determine whether or not the learned trial Judge rightly directed the jury that there was "no material" upon which they could find that the accused acted in self-defence and "no adequate material" upon which they could find that there was, in law, such provocation as to justify the reduction of the crime to manslaughter.

The learned Judge relied in part upon the decision of the Court of Criminal Appeal in *R.* v. *Larkin* (1943) 1 A.E.R. 219, in which Humphreys, J. observed "Where the facts are proved in such a way that there can be no question about them, then it is perfectly right for the Judge to tell the jury 'Those facts "amount to a lawful or an unlawful act'". In that case the Court held that the trial judge was right in telling the jury that on the facts of the case, accepting the evidence of the accused man to the highest extent, it was not open to them to return a verdict of not guilty.

It is submitted by counsel for the prisoner, however, that that case goes on further than saying on the particular facts there proved, the judge was right in so directing the jury, and he points out that the Court of Criminal Appeal in the same case made it quite clear that "where the facts are in dispute it is "always for the jury to determine what are the true facts" and further that "they must have a direction as to what their verdict "must be if they accept the facts one way, or if they accept the "facts the other way."

In the present case the learned Judge reached the conclusion that even if the jury were to accept the evidence of the prisoner to the highest extent, there was no material upon which they could find that he had acted in self-defence.

In this connection we must bear in mind what was said by the Lord Chancellor in *Mancini* v. *Director of Public Prosecutions* (1941) 28 Cr. A.R. 73, when he expressed the view that on the evidence in that case there was "no adequate material to "raise the issue of provocation." The significant words in that phrase of Lord Simon in relation to the present question are the words "no adequate material to raise the issue", for if there is material to raise an issue it is for the jury to determine that issue after receiving the proper directions of the judge as to the law. Whether or not there is adequate material to enable the jury to determine the issue in a manner favourable to the accused

is also a matter for the jury once there has been established sufficient material to raise the issue.

While therefore it is for the judge to direct the jury as to the evidence which is necessary in law to raise the issue of self-defence, and to direct them that if there be *no* such evidence no such issue lies for their determination, yet it is not within his province to withdraw the issue from the jury once it has been raised merely because in his view there is not adequate material whereon the issue might be determined by the jury in favour of the accused. In the present case then it is necessary for us to consider whether the evidence given by or on behalf of the accused is material upon which the issue of self-defence is raised.

The evidence of the prisoner as to this would, if accepted by the jury, prove that the prisoner was approaching the bridge alone; that he was rushed by four men, one of whom was armed with a stick; that he had his axe with him upon his lawful occasions; that he swung it twice to keep off the four men, and that he would not have used the axe if they had not rushed him.

What the learned Judge then had to consider in directing the jury as to this aspect of the case was not whether in his view these circumstances were sufficient to justify the act of the prisoner, but whether they were sufficient to raise the issue for determination by the jury. In dealing with this question it would have been proper for the trial judge to have explained to the jury the factors essential to justify the use of force in self-defence. It would have been proper for him to have told them that they must be satisfied that the prisoner had reasonable cause to fear and did in fact fear serious injury to life or limb, that he had retreated as far as was safe or that it would not have been safe to retreat at all, and it would have been proper for him to have told them that they must be satisfied that the prisoner used no more force than was reasonably necessary to repel the attack, having regard to all the circumstances in which he was placed by those who attacked him. It would then have rested with the jury if they were disposed to believe the prisoner's story, to consider whether or not the prisoner had reasonable cause to fear serious injury, whether he had a reasonable opportunity to retreat and whether or not in the particular circumstances the use of the axe was reasonably necessary to repel the attack. All these questions are, in our view, questions of fact which fell within the province of the jury and raised an issue which it was for them to determine.

We are of the opinion therefore that the learned trial Judge erred in directing the jury that there was no material upon which they could find that the accused acted in self-defence for this direction must have been the result of the Judge himself having come to a conclusion upon those preliminary questions of fact which he should have left to the jury. We are of the opinion also that the learned Judge erred in directing that they could not return a verdict of "not guilty" on the indictment for, if after proper directions, they had chosen to believe the prisoner's evidence and if they were satisfied that he had reasonable cause for fear, that he had no reasonable opportunity for retreat and that his use of the axe in the manner he described was reasonable

in all the circumstances, then they would have been entitled to acquit the prisoner.

It well may be that after being directed on all these points the jury would have disbelieved the prisoner's story *in toto* or might not have been satisfied on one or more of the essential factors, but what course their minds might have followed we are not in a position to say, for the directions given to them by the learned Judge precluded them from considering the conflict of evidence and withdrew from their judgment those issues which were raised by the prisoner's version of the affair.

The answer to the first of the questions reserved must therefore be in the negative.

In view of the opinion at which we have arrived upon the first question reserved for our consideration, it will suffice to deal more briefly with the second. Here again there was in our opinion sufficient evidence to go to the jury. The fact that the learned Judge was unable to discover any adequate evidence of provocation does not mean that the jury would necessarily have been unable to do so. In *Rex* v. *Welsh* (11 Cox 337), Keating, J., in summing up in a case in which the defence of provocation put forward was even less convincing than the present, said "Now I am “bound to say that I am unable to discover in the evidence in "this case any “provocation which would suffice, or approach to suffice, to reduce the “crime to manslaughter. It has been laid down that mere words or “gestures will not be sufficient to reduce the offence and at all events the “law is clear that the provocation "must be serious. I have already said that “I can discover no proof of such provocation in the evidence. If you can “discover it, you can give effect to it; but you are bound not to do so “unless satisfied that it was serious.”

In that case the learned Judge intimated to the jury in no uncertain terms that he did not accept the adequacy of the alleged provocation but he nevertheless left the final decision in their hands. If in the present case the trial Judge had done likewise and the jury had returned a verdict of guilty this Court would not have disturbed it, but since he withdrew it entirely from their consideration we are of the opinion that this amounted to misdirection.

In view of our answer to the first question reserved the conviction must be quashed, for the plea of self-defence, if accepted, entitled the accused to an acquittal.

It is therefore unnecessary for us to determine whether as regards the defence of provision this Court would be empowered to substitute a verdict of manslaughter. We will confine ourselves to saying that no cases have been cited to us in support of the proposition that we have such a power, while on the other hand there have been many cases in which the Court for Crown Cases Reserved confined itself to quashing the conviction even where satisfied that a different offence had been committed. Thus in *Rex* v. *Hamilton Thompson* (C.C.R. 1866 p. 233) where the prisoner had been convicted of larceny the Court, although of opinion that he had committed the offence of obtaining money by false pretences, merely quashed the conviction.

Conviction quashed.

RAMRAJ, Appellant (Defendant),

v.

GRACE M. WILLIAMSON, Respondent (Plaintiff).

[1943. No. 214.—DEMERARA.]

BEFORE FULL COURT: SIR JOHN VERITY, C.J., AND

DUKE, J. (Acting).

1944. JANUARY 7.

Magistrate's court—Plaint in—What it must contain—Person of common understanding to know what is intended—Summary Jurisdiction (*Petty Debt*) *Ordinance, cap.* 15, *s.* 8; *Summary Jurisdiction* (*Civil Procedure*) *Rules,* 1939, *Part* 5, *rule* 1 (*d*).

Damages—Bicycle damaged and rendered useless—Special or general damages—If proved—Recoverable.

Appeal—Judgment of magistrate's court as to damages—Varied by Full Court—On the evidence given in inferior court.

In the magistrate's court there are no pleadings in the sense that pleadings are understood in an action in the Supreme Court, and it is sufficient that the plaintiff should state his claim in writing in such a manner as to enable a person of common understanding to know what is intended.

Amount of damages awarded in magistrate's court varied on appeal on the evidence given in the inferior court.

APPEAL from the decision of a Magistrate of the Georgetown Judicial District in an action for damages for negligence.

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

J. L. Wills, for the respondent.

Cur. adv. Vult

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

This is an appeal against a judgment of the Magistrate's Court for the Georgetown Judicial District in an action for damages for negligence.

The plaintiff (respondent) claimed $100 in respect of damage done to her bicycle by reason of the alleged negligent driving of a motor car belonging to the defendant (appellant).

The appellant submitted in the first place that the evidence did not disclose that the damage was the result of the negligence of the driver of the car, but rather that the rider of the bicycle by her negligence was the effective cause of the accident. We are satisfied however that the effective cause was the negligent driving by a person under the influence of liquor of a car which was at the time of the collision entirely out of control and that if the conduct of the rider of the bicycle contributed to the accident this conduct was in itself directly caused by the negligent and. dangerous manner in which the car was being driven.

It was further submitted on behalf of the appellant that the respondent was bound by the particulars set forth in her plaint, that she did not therein claim special damages and that she is not therefore entitled to such damages. And it was further argued that in the present case the plaintiff was not entitled to general damages in more than a nominal sum.

It should be pointed out that in the Magistrate's Court there are no pleadings in the sense that pleadings are understood in an action in the Supreme Court and that it is sufficient that the plaintiff shall state his claim in writing (Summary Jurisdiction (Petty Debts) Ordinance, Cap. 15, sec. 8) "in such a manner as to enable a person of common understanding to know what is intended." (Summary Jurisdiction (Civil Procedure) Rules, 1939, Pt. V.r. 1 (d)). In this case the respondent has stated that her bicycle was damaged and rendered useless, she has alleged no other loss or injury and has claimed $100 damages. This is sufficient to enable the appellant to know what was intended and in respect of such a claim the respondent could properly recover such proved damages as she would be entitled to in law whether special or general.

The last question is as to whether there is evidence to support the finding of the learned Magistrate that such damage amounted to $65.

There is evidence that the bicycle cost $31.36 in 1939. There is some evidence not altogether satisfactory and, in so far as it rests upon alleged statements by third parties, inadmissible, that the plaintiff was unable to get the bicycle repaired. There is also evidence tendered by the appellant that the bicycle could have been repaired at a cost of $25.08 or perhaps $3 or $4 less. In the latter case it would have been open to the Magistrate to add a sum as compensation for depreciation by reason of the impossibility of replacing certain parts of the original make and otherwise as the result of the nature of the damage and of the repairs rendered necessary thereby. There is some evidence of

the increased cost of bicycle parts since 1939 and therefore of some measure of appreciation in the value of a bicycle which might reasonably be set off against depreciation by reason of the wear and tear between 1939 and 1941 when the accident occurred. There is, however, no evidence on the record from which we are able to conclude that the learned Magistrate had material upon which to base his assessment of damages at the sum of $65.

It might be open to this Court to refer the matter to the Magistrate to assess damages in accordance with the actual loss proved before him but we think that there is evidence upon which we may with equal propriety assess the damages ourselves and we therefore adopt this course.

Whether the damages be based upon the assumption that the bicycle could not be repaired or that it could be repaired it appears that upon the principles we have set out above the loss suffered by the respondent would not be less than the original cost of the bicycle in 1939 that is to say $31.36. In all the circumstances and in view of the insufficiency of the evidence to justify a finding that the respondent suffered any further loss or if so to what extent we assess the damages at that sum and the judgment of the lower Court will be varied so as to substitute the sum of $31.36 for the sum of $65 therein. There will be no order as to costs of this appeal.

Order varied.

G. E. HANOMAN & ANR. *v.* HARNANDAN & ANR.

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of British Guiana.

GEORGE EDWIN HANOMAN and RAGHUNANDAN,
Appellants,
v.
HARNANDAN and KATIE HUNOOMAN, Respondents.

[1943. No. 4.—BRITISH GUIANA.]

BEFORE THEIR HONOURS MR. H. W. B. BLACKALL, Chief Justice of Trinidad and Tobago, (President); SIR JOHN VERITY, Knt., Chief Justice of British Guiana; and MR. CLEMENT MALONE, Chief Justice of the Windward Islands and Leeward Islands.

1944. FEBRUARY 15, 16, 17, 24.

Practice—Judgments or orders—Whether interlocutory or final— Order final—Where it disposes of the rights of the parties—Order interlocutory—Where it does not—Originating summons for construction of will—Order on—Final order.

Originating summons—For construction of will—Whether a legatee has relinquished his rights under will—Not an issue to be determined on the summons.

Appeal—Order made on originating summons for construction of will — Determining rights of legatees thereunder — Final, not an interlocutory order—Appealable to West Indian Court of Appeal—Supreme Court of Judicature Ordinance, cap. 10. s. 94.

Appeal—West Indian Court of Appeal—Supreme Court of Judicature Ordinance, cap. 10, s. 94 (a)*—Prohibitions contained in—*Cap. 10, s. 94 (b) *(i)—Not overridden by.*

Will—Real meaning of testator to be ascertained—Terms of will and surrounding circumstances—To be considered in determining real intention of testator—Real intention of testator to be given effect—Notwithstanding existence of some rule of construction.

Immovable property—Joint tenancy—Characteristics of—Unities of possession, interest, title and time—Applicable to chattels in England— Also to immovable property in Colony.

Will—Construction—Absolute gift—Subsequent clause—Estate so *given diminished—Absolute gift cut down—Absolute gift as diminished— Effect given to.*

Will—Construction—Absolute gift of residue to nine sons, including R, in equal shares—Subsequent clause—"I desire that my son R, interest in my Estate shall cease at his death"—Imperative, and not precatory, words—Devise to R. cut down to a life interest.

Trust—Will—Absolute gift—Subsequent clause—"I desire that my son's interest in my Estate shall cease at his death"—Imperative and not precatory words.

Will—Construction—Tenancy in common—Benefit of survivorship— Devise to two in common—Devise over—To take effect only after the death of both—Interest taken by survivor—Life interest in whole.

Will—Construction—Life interest to widow as long as she remained a widow—Life interest also to daughter, in the event of her remaining unmarried—Commencement of daughter's life interest—On the death of testator—Not on death or re-marriage of widow—Gift of residue not to take effect until cessation of life interests — Death of Widow — Interest taken by daughter—Life interest in whole estate.

Will—Specific pecuniary bequests in clause 1*—Bequest of life interests in clause* 2*—In clause* 3*, absolute gift of residue to nine sons, including R—Absolute gift to R cut down to a life interest—Commencement of life interest to R—Not on death of testator—At same time as his brother's shares in residue would be vested in them—When such shares vest—On cessation of life interests.*

An order is a final order where it finally disposes of the rights of the parties. If it does not, it is an interlocutory order.

Bozson v. *Altrincham Urban Council* (1903) 1 K.B. 548, *per* Lord Alverstone, C.J., applied.

An originating summons was taken out, and the judge in chambers was required to construe a will. Specific questions were raised, and the judge was asked to determine the status of the devisees and legatees. He answered each of the questions propounded.

Held (1) that under the order made by the judge, each of the parties interested under the will knew quite definitely what his or her rights were, and he or she could take whatever steps were deemed necessary to ensure the carrying out of the provisions of the will; that the order settled the status of the parties and their respective rights; that all that remained was for them to enforce those rights provided that they had not relinquished them; and that the order was a final order; and

(2) that whether any party had relinquished his rights was not an issue which the trial judge was called upon to determine on the summons, even though an effort was made, in the affidavits filed, to raise that issue.

The prohibitions contained in section 94 (a) of the Supreme Court of Judicature Ordinance, cap. 10, are not overridden by the provisions of section 94 (b) (i) of that Ordinance.

The principles by which the Courts in England are guided when deciding whether a tenancy is joint or in common are relevant in determining whether, in this Colony, a tenancy is joint or in common. The four unities of possession, interest, title and time which characterise a joint tenancy of real estate in England apply also to a joint ownership of chattels.

Where there is an absolute gift and then a clause diminishing the estate so given, the absolute gift has in effect been cut down, and the Court can only give effect to it as so diminished.

Re Richards, Williams v. *Corvin*, 50 L.T.N.S. 22, applied.

The fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended, and the Court should not feel itself prevented by some rule of construction from giving effect to what the language of the will read in the light of the surrounding circumstances, convinces it was the real intention of the testator.

Perrin v. Morgan (1943) A.C. 420, applied.

If in a will after words creating a devise to two in common you find, by other words, that the devise over is only to take effect after the death of both, the effect of that is to control the former words, and the surviving tenant, when there is a tenancy in common and not a joint tenancy, by implication takes an interest for his life in the whole after the death of the other.

Pearce v. *Edmeades*, 3 Y. & C. 246, and *Re Telfair, Garrioch* v. *Barclay*, 86 L.T. 496, applied.

A testator who was *inops consilii* made provision in clause 1 of his will for specific pecuniary bequests. Clauses 2 and 3 of the will were as follows:

"2. I devise to my wife Sookray 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, Harnan-dan, 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."

The testator died on the 2nd February, 1935 and Sookray Hunooman died on the 9th June, 1940.

Held (1) that there was nothing in the phraseology of clause 2 of the will to justify the Court in drawing the conclusion that the commencement of Katie's life interest was to be postponed until after the death of her mother Sookary, and that the life interests of the testator's widow and daughter were to commence simultaneously as from his death;

Perrin v. *Morgan* (1943) A.C. 399, applied.

(2) that the testator envisaged the possibility of his wife's life interest ceasing upon the happening of an event other than her death, namely, her re-marriage, thus indicating that survivorship was not a necessary incident of the devise; and that the words used in clause 2 created a tenancy in common and not a joint tenancy;

Ryves v. *Ryves,* 11 Eq. 539, applied.

(3) that the words in clause 3 of the will "I further desire that my son Raghunandan's interest in my estate shall cease at his death" are not lacking in clarity, and that the testator made it perfectly plain that his desire was that Raghunandan should not have anything more than a life interest, and that the expression used was imperative and not precatory, and operated to cut down the devise to Raghunandan to a life interest;

Re Richards, Williams v. *Corvin,* 50 L.T. 22, applied.

(4) that there was nothing whatever in the terms of the will to indicate that Raghunandan was to enter into enjoyment of his life interest at a date anterior to that upon which his brothers' shares of the residue would be vested in them, and it would be doing violence to the language of the will to so construe it;

(5) that the testator intended that the provisions in clauses 2 and 3 of the will should follow one another in point of time, and that by the words "all the residue" in a separate clause following upon the creation of life interests, he intended to postpone and has in effect postponed the vesting in possession of the interest of the nine sons until the cessation of those life interests;

(6) that no interest of the sons becomes vested in possession until the cessation of the life interests of Sookary and Katie, and the life interest of Raghunandan does not vest in him in possession until after the death of Sookary and Katie;

(7) that on the death of the testator, Sookary and Katie acquired life interests in his estate, and that upon the death of Sookary, Katie, by the terms of the will, was entitled to the benefit of survivorship, and she became solely entitled to a life interest in the whole estate;

Pearce v. *Edmeades,* 3 Y. & C. 248, and *Re Telfair, Garrioch* v. *Barclay,* 86 L.T. 496, applied.

(8) that Raghunandan was entitled to a life interest in one-ninth of the residue;

(9) that the life interest of Raghunandan was not held by him in common or jointly with Sookary or Katie, but can only be enjoyed by him when the life interests of both have ceased;

(10) that upon the death of Katie each brother will be entitled to enter into possession of his interest in one-ninth of the residue, and that all but Raghunandan will then be vested in possession absolutely of all that they are entitled to;

(11) that Raghunandan will at the same time be entitled to enter into possession of his interest in one-ninth, an interest which will terminate at his death; and there being no gift over, there will be an intestacy as to this one-ninth of the estate.

Appeal by the plaintiffs George Edwin Hanoman, in his capacity as residuary legatee under the will of Hunoornan. deceased, and Raghunandan, also known as and called Henry Hugh Hunoornan, in his capacity as one of the legatees under the will of Hunoornan, deceased, from a judgment delivered by Duke, J. (Acting) in Chambers on the hearing of an originating summons (No. 131 of 1943, Demerara) in which Harnandan also called Joseph Gordon Hunoornan as executor of the estate of the said Hunoornan, deceased, and Katie Hunoornan, singlewoman, were defendants. The trial judge construed the will of Hunoornan. which was as follows :

IMMIGRANT'S WILL.

I, Hunoornan, male, No. 3730, Ex *Mufussilite*. 1873, hereby revoke all for (sic) Wills and codicils made by me and declare 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 the sum of Five hundred dollars ($500.00) each and to my grandson Ralph Hunoornan the sum of Three hundred dollars ($300.00) on his attaining the age of 21 years.
2. I devise to my wife Sookary Hunoornan 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 life time of one or all my sons my immovable property shall not be sold or transported 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.
4. I appoint my sons Harnandan, alias Joseph Gordon Hunoornan, and Robert Ranjeetsingh as Executors of this my Will and guardian of my minor children, and as such executor 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 operative parts of the formal order (dated the 2nd September, 1943, and entered on the 16th September, 1943) of the trial judge were as follows: —

This Court doth declare that upon the true construction of the will of the aforesaid Hunooman deceased.

(a) (1.) the words "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 will of the aforesaid HUNOOMAN deceased, being a condition operating as a restriction on alienation, are void, and that anyone 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 aforesaid will;

(a) (2) the 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 aforesaid will of the aforesaid HUNOOMAN deceased, mean that, during the lifetime of the plaintiff RAGHUNANDAN, he is entitled to a life interest in one-ninth of the residue under clause 3 of the said will, and that subject to the said life interest of the plaintiff RAGHUNANDAN his eight brothers (named in clause 3 of the will) are entitled to the residue under clause 3 of the said will;

(b) the life interest of the plaintiff RAGHUNANDAN in one-ninth of the residue of the estate under clause 3 of the aforesaid will was not held by him in common or jointly,with SOOKARY HUNOOMAN the widow of the deceased HUNOOMAN and/or the defendant KATIE HUNOOMAN, and the life interest of the plaintiff RAGHUNANDAN can only be enjoyed by him in possession when the life interests bequeathed to SOOKARY HUNOOMAN and to the defendant KATIE HUNOOMAN have ceased or determined.

(c) on the death of the aforesaid HUNOOMAN on the 2nd February, 1935 SOOKARY HUNOOMAN so long as she remained a widow together with the defendant KATIE HUNOOMAN acquired life interests in the estate of the aforesaid HUNOOMAN deceased; and that, on the death of SOOKARY HUNOOMAN on the 9th June 1940, the defendant KATIE HUNOOMAN became solely possessed of, and entitled to, a life interest in the estate of the said HUNOOMAN deceased; and

(d) the words "in the event of my daughter KATIE remains unmarried she, also to have a life interest" in clause 2 of the will of the said HUNOOMAN impose a restraint on the marriage of the defendant KATIE HUNOOMAN, that the restraint is void and of no effect, and that the defendant KATIE HUNOOMAN may marry as often as she pleases and yet retain her life interest in the estate of the said HUNOOMAN deceased.

The plaintiffs appealed against the declarations contained in paragraph (a) (2), (b) and (c) of the formal orders, and they asked that it be decreed:

(a) That RAGHUNANDAN took a one-ninth absolute interest in the residue of the estate, and

(b) That SOOKARY and KATIE took each a life interest or share as tenants in common, and that on the death of SOOKARY, her half share of the estate fell into the residuary estate, or

(c) In the alternative, if RAGHUNANDAN did not take a one-ninth absolute interest in the residue of the estate, that it be decreed that RAGHUNANDAN took a life interest or share along with SOOKARY and KATIE as tenants in common of the estate, and on their respective deaths, their respective shares fell into the residuary estate.

J. A. Luckhoo, K.C., and L. *M. F. Cabral,* for the appellants.

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

1944. FEBRUARY 15. Counsel for the respondent took the preliminary objection that the order appealed from was not a final order, and that no appeal lay to the West Indian Court of Appeal. Counsel for the appellants replied, and decision was reserved.

The judgment of the Court on the preliminary objection was delivered on the 16th February 1944 by the Chief Justice of the Windward Islands and the Leeward Islands as follows:

The respondents in this appeal have taken a preliminary objection going to the jurisdiction of this Court to hear the appeal, and contend that the order made by Mr. Justice Duke was an interlocutory and not a final order, and being an interlocutory order no appeal lies to this Court.

The test for determining the question as to whether an order is interlocutory or final is, we think, that stated by Lord Alverstone, C.J., in *Bozson* v. *Altrincham Urban Council* (1903) 1 K.B.D., at p. 548: "Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think that it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

In the present case an Originating Summons was taken out and the learned Judge was required to construe the will of Hunooman. Specific questions were raised and he was asked to determine the status of the devisees and legatees. He has answered each of the questions propounded and, in our view, he has settled the status of the parties and their respective rights. This order, it appears to us, is therefore a final order. Each

of the parties interested under the will by that order knows quite definitely what his or her rights are, and he or she may take whatever steps are deemed necessary to ensure the carrying out of the provisions of the will.

It has been urged by counsel for the respondents that the rights of Raghunandan had not been finally settled, but it seems to us quite clear that the rights of this party have been settled by the order and all that remains for him to do is to enforce those rights, provided he has not relinquished them. Whether he has or has not relinquished those rights was not an issue which the learned trial Judge was called upon to decide.

The submission made by counsel for the appellants that the prohibitions contained in paragraph (a) of section 94 of Chapter 10 are overridden by the provisions of paragraph (b) (i) of the same section is not sustainable, in our view, but as we have held that the Judge's order is not interlocutory, the objection taken by the respondents is overruled.

1944. February 16, 17. Argument was heard on the appeal, and decision was reserved.

The judgment of the Court, on the appeal, was delivered on the 24th February, 1944 by the President as follows:

This is an appeal against a decision of Duke, Ag. J. on certain disputed points of construction of the will of Hunooman deceased. It will be convenient to deal first with the life interests devised to Sookary and Katie Hunooman in relation to one another. They are set out in clause 2 of the will which reads as follows: —

> "I devise to my wife Sookary Hunooman a life interest in my estate as long as she remains 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."

The first point to be determined is whether the life interests of the testator's widow and daughter were to commence simultaneously as from his decease or whether the widow was given a life interest in the whole estate and that it was only following upon her death that Katie's life interest was to come into operation.

In arguing in favour of the latter construction Mr. Humphrys submitted that the testator intended that his widow should enjoy the whole estate for her life, and he invited the Court to construe the word "also" in clause 2 as being equivalent to "following upon the death of Sookary." In support of this he referred to the case of *Perrin et al. vs. Morgan et al.* ((1943) L.R.A.C, 399) and, using a familiar expression, invited us to "sit in the testator's chair". This the Court is entitled to do, but when seated there it must keep its feet on the ground, for the Court is not to make a fresh will for the testator merely because it suspects that the testator did not mean what is plainly said. As there is nothing in the phraseology of clause 2 to justify this Court in drawing the conclusion that the commencement of Katie's life interest was to be postponed until after her mother's death, we are of opinion that these life interests came into being upon the death of the testator.

The next point for consideration is whether upon Sookary's death Katie succeeded to a life interest in her mother's moiety, or whether that moiety fell into the residue; in other words whether the devise operated to create a joint ownership or an ownership in common. As to this the four unities of possession, interest, title and time which characterise a joint tenancy of real estate" in England apply also to a joint ownership of chattels. Although then the English common law of real property does not apply to immovable property in this Colony, the principles by which the Courts in England are guided when deciding whether a tenancy is joint or in common are relevant. Now it may be stated as a general rule that joint ownership is not favoured on account of the right of survivorship that attaches to it, and that in a will any words that denote an intention to give to each of the legatees a distinct interest in the subject of the gift will be sufficient to make them tenants in common.

A case in point is *Ryves vs. Ryves* (11 Eq. 539) where the testator gave the residue of his estate to his brother and sister but in case the brother died in the lifetime of his sister without issue, then he gave his share and interest in the property to his sister absolutely. Malins, V.C. in the course of his judgment in that case stated that if the gift had been simply to the brother and sister of the testator followed by words of limitation, there would have been no question but that they would have taken as joint tenants, but since the sister was not to take as being the surviving joint tenant, but was to take only upon the death of her brother without issue during her lifetime, this showed an intention to create a tenancy in common. In the present case the testator envisaged the possibility of his wife's life interest ceasing upon the happening of an event other than her death, viz. her re-marriage, thus indicating that survivorship was not a necessary incident of the devise. This supports our view that the words used in clause 2 created a tenancy is common and not a joint tenancy.

It was however submitted on behalf of the respondent that there may be the benefit of survivorship in a tenancy in common, and that the gift of the residue in the present case implied that there was such a benefit. In order to arrive at a conclusion as to this it is necessary to consider the meaning of clause 3 and its effect upon the construction of clause 2.

Dealing first with the claim of Raghunandan, it is contended on his behalf that despite the last sentence in clause 3 of the will he takes one-ninth of the residue absolutely, or alternatively that he is entitled to a life interest in one-ninth of the estate concurrently with the other life tenants.

In support of the first mentioned construction it was submitted that the devise of the residue to the testator's nine sons (of whom the second appellant is one) "for their sole benefit" was indicative of a clear intention that Raghunandan should, like his brothers, take one-ninth absolutely, and that the words "I further desire" being merely precatory and not imperative, are not strong enough to cut down his estate to a life interest. It was pointed out that to do so would result in a partial intestacy viz. as to the second appellant's share and that there is a

presumption against a testator intending this. The force of that presumption however varies according to the context and circumstances, and although the avoidance of intestacy is to be regarded in construing doubtful expressions, it is not enough to induce the Court to construe plain words otherwise than according to their plain meaning. Can it be said then that the words "I further desire that my son Raghunandan's interest in "my estate shall cease at his death" are lacking in clarity? We do not think so. The testator, it seems to us, made it perfectly plain that his desire was that this appellant should not have anything more than a life interest and that the expression used was imperative and not precatory.

Now it has been held that where there is an absolute gift and then a clause diminishing the estate so given, the absolute gift has in effect been cut down, and the Court can only give effect to it as so diminished. (Re *Richards; Williams vs. Corvin,* 50 L.T.R. (N.S.) 22). We are of opinion therefore that the last sentence of clause 3 being in our view imperative and unambiguous operates to cut down the devisee to Raghunandan to a life interest.

When then was this life interest to commence? In order to determine this we must first consider what the testator meant by the words "All the residue of my property" in clause 3. The fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended, and the Court should not feel itself prevented by some rule of construction from giving effect to what the language of the will read in the light of the surrounding circumstances, convinces it was the real intention of the testator. *(Perrin v. Morgan) ibid* p. 420).

Now the word "residue" is in itself a relative term, but in the present case the testator, who was *"inops consilii"*, indicated by the inclusion of Raghunandan with his eight other sons that they were all to be in the same class of beneficiaries, the only distinction between the second appellant and his brothers being that while the latter take their respective shares of the residue absolutely, the former was to have only a life interest in his. There is nothing whatever in the terms of the will to indicate that Raghunandan was to enter into enjoyment of that life interest at a date anterior to that upon which his brothers' shares of the residue would be vested in them, and it would, in our opinion, be doing violence to the language of the will to so construe it.

As we have found that the intention and effect of clause 3 of the will is to make provision for a class of persons, (the testator's nine sons) by devise to them of all the residue of the estate, such provision relating to the same property and vesting the respective interests in possession at the same time, although the interest of Raghunandan is not the same as that of the other sons, it remains to be considered at what time does this property so vest.

It appears to us to be clear that the testator intended and has indeed by the wording of his will effected that his estate should be distributed in the following way: by clause 1 he makes pro-

vision for specific bequests; by clause 2 he makes provision for his wife and daughter, by clause 3 he provides for his sons. Not only do these provisions follow one another in form but we have no doubt that the testator intended also that they should follow each other in point of time, and that by the words "all the residue" in a separate clause following upon the creation of life interests he intended to postpone and has in effect postponed the vesting in possession of the interest of the nine sons until the cessation of those life interests. The effect of this construction is that ho interest of the sons becomes vested in possession until the cessation of those life interests, and the life interest of Raghunandan does not vest in him in possession until after the death of Sookary and Katie.

It has effect, moreover, upon the rights of Katie, for although she and Sookary held their life interests in the estate as owners in common and not as joint owners, Katie may nevertheless, by the terms of the will, be entitled to the benefit of survivorship.

In *Pearce vs. Edmeades* (3 Y. & Coll. 246) which was followed in *Re Telfair; Garrioch vs. Barclay* (86 L.T. 496) it was held by Lord Abinger, L.C.B. that "if, in a will, after words creating a devise to two in common “you find, by other words, that the devise over is only to take effect after “the death of both, the effect of that is to control the former words," and in that case he held that the surviving tenant, when there is a tenancy in common and not a joint tenancy, "by implication takes an interest for his life in the whole after the death of "the other."

In the present case we are in no doubt but that the testator by clause 3 of his will designed to postpone the gift of the residue of his estate until the determination of the life interests created by clause 2, and it follows that the devise over is only to take effect after the death of both life tenants. That being so, in accordance with the principle laid down in the two cases to which we have referred, upon the death of Sookary in 1940, Katie Hunooman took an interest for life in the whole of the estate.

Although we have expressed our reasons in terms differing in some respects from those used by the learned trial Judge, there is but one point on which we differ from his conclusions. We are of the opinion that he was right in holding:

(1) that on the death of the testator, Sookary and Katie Hunooman acquired life interests in his estate and that upon the death of Sookary, Katie became solely entitled to a life interest in the whole estate;

(2) that Raghunandan was entitled to a life interest in one-ninth of the residue; and

(3) that the life interest of Raghunandan was not held by him in common or jointly with Sookary or Katie but can only be enjoyed by him when the life interests of both have ceased.

We think, however, that the learned trial Judge erred when he declared that, subject to the life interest of Raghunandan his eight brothers are entitled to the residue under clause 3 of the will. We have already expressed the view that the bene-

ficiaries are entitled to enter into possession of their respective interests upon the death of Katie. Upon the occurrence of that event each brother will be entitled to enter into possession of his interest in one-ninth of the residue. All but Raghunandan will then be vested in possession absolutely of all that they are entitled to. Raghunandan will at the same time be entitled to enter into possession of his interest in one-ninth an interest which will terminate at his death. There being no gift over it appears to us that there will be an intestacy as to this one-ninth of the estate and the interest of his brothers therein will fall to be determined by the laws of intestate succession.

In the result the appeal will be dismissed but the order of the learned Judge will be varied by deleting from his declaration the words "and that subject to the said life interest of the "plaintiff Raghunandan his eight brothers (named in clause 3 "of the will) are entitled to the residue under clause 3 of the "said will."

The costs of all parties to the appeal will be paid out of the estate of the deceased Hunooman.

Appeal dismissed; order varied.

Solicitors: *Carlos Gomes,* for the appellants;
J. Edward de Freitas, for the respondents.

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of British Guiana.

OVID ALOYSIUS FERNANDES,
Appellant (Plaintiff),

v.

AURELIA ST. CLAIR GUMBS and CHARLES RODRIGUES NASCIMENTO
Respondents (Defendants).

[1944. No. 2.—BRITISH GUIANA.]

BEFORE BLACKALL, C.J., Trinidad and Tobago, (President); VERITY, C.J., British Guiana; and MALONE, C.J., Windward Islands and Leeward Islands.

1944. OCTOBER 3, 4, 5, 10.

Appeal—West Indian Court of Appeal—Notice of appeal—To expire not less than 28 *days from date of filing—Where notice of appeal does not so expire—Amendment made—West Indian Court of Appeal Rules* 1920 *and* 1930.

Appeal—West Indian Court of Appeal—Service of—Where served after 4 *p.m. on last day—Service not deemed to be effected on following day—Order* 45, *rule* 6 *of Rules of Court,* 1900*—Does not apply—Notice of appeal may be served up to midnight on last day—West Indian Court of Appeal Rules,* 1930 *rule* 25.

Sale of land—Contract of—Intention of purchaser not to perform—Vendor entitled to treat contract as at an end—Absolved from further performance

O. A. FERNANDES *v.* A. ST. CLAIR GUMBS & ANR.

Sale of land—Contract of—Part of purchase price paid—At time of contract of sale—Claim for its return—Contract repudiated by purchaser —Implied term in contract—Money paid to remain property of vendor.

Costs—Money deposited in Court by plaintiff—To abide further order of the Court—Action unsuccessful—Order of trial judge—Money to be applied towards payment of defendant's costs in resisting impudent claim of plaintiff—Affirmed by West Indian Court of Appeal.

The effect of the West Indian Court of Appeal Rules, 1920 and 1930, is that notice of appeal must be served on the parties before the expiration of six weeks from the date of the judgment, to expire not less than 28 days from the date of filing.

That part of Order 45, rule 6 of the Rules of Court, 1900 (which provides that service effected after four in the afternoon on any week-day except Saturday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day) does not apply in respect of appeals to the West Indian Court of Appeal. In such appeals, anything to be done therein may, according to the judgment in Jugmohan Singh v. Bhola (1940) L.R.B.G., be done up to midnight on the last day. Rule 25 of the West Indian Court of Appeal Rules, 1920, does not therefore operate to make the above quoted provision effective in respect of appeals to the West Indian Court of Appeal.

Where a notice of appeal to the West Indian Court of Appeal was not a 28 days' notice, and the respondents were not prejudiced thereby, the Court ordered that it be amended.

That part of Order 45, rule 6 of the Rules of Court, 1900, (which provides that service effected after four in the afternoon on any weekday except Saturday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day) does not apply in respect of appeals to the West Indian Court of Appeal. In such appeals, anything to be done therein may, according to the judgment in *Jugmohan Singh* v. Bhola (1940) L.R.B.G., be done up to midnight on the last day. Rule 25 of the West Indian Court of Appeal Rules, 1920 does not therefore operate to make the above quoted provision effective in respect of appeals to the West Indian Court of Appeal.

Where a notice of appeal to the West Indian Court of Appeal was not a 28-days' notice, and the respondents were not prejudiced thereby, the Court ordered that it be amended.

The appellant on the 19th May, 1942, entered into an agreement to purchase lot 198 Queenstown from the respondent for the sum of $3,000, and paid to the respondent at the time of the agreement the sum of $75 on account of the purchase price. It was a term of the agreement that transport be completed in 3 months. About the middle of July the appellant informed the respondent's agent that he was not in a position to complete, and at no time up to the expiration of the time limit or within a reasonable time thereafter did he make any attempt to do so. On the contrary, he repeated on several occasions between then and the 2nd December, 1942, that he was unable to complete. On that date, the respondent, treating the contract as at an end, sold the property to a third party.

Held (1) that the respondent was entitled to do this, for the appellant had made it plain that he did not intend to perform the contract of the 19th May and the respondent was therefore absolved from further performance on her part;

(2) that, although there was no express stipulation in the agreement as to the disposal of the $75 in the event of repudiation of the agreement by the appellant, it is well established that the term most naturally to be implied in the case of money paid on the signing a con-

tract, is that in the event of non-performance, it shall remain the property of the payee.

Nadim Antar v. *Valverde* (1942) L.R.B.G. 442, applied.

A consent order of the Court provided that the plaintiff should deposit the sum of $1300 to abide further order of the Court in the action. The action was dismissed, and the trial judge ordered that the sum so deposited should be applied in payment of the taxed costs of the defendants. It was contended on behalf of the plaintiff that the sum of $1300 was deposited for the specific purpose of covering the claim and costs of the secondnamed respondent in certain foreclosure proceedings against the property of the first named respondent, and could not be utilised for any other purpose.

Held that whatever may have been the original intention of the plaintiff, the consent order contained no such qualification, and the trial judge properly ordered that the sum of $1300 should be applied towards payment of the taxed costs of both defendants in resisting the plaintiff's claim (described by the Court of Appeal as being an impudent claim).

APPEAL by the plaintiff Ovid Aloysius Fernandes from a judgment of Duke, J. (Acting) ordering that judgment be entered for the defendants Aurelia St. Clair Gumbs and Charles Rodrigues Nascimento with costs on the plaintiff's claim, and for the defendant Gumbs with costs on her counterclaim. The judgment is reported at (1943) L.R.B.G. 303. On the appeal coming on for hearing, counsel for the respondents took two preliminary objections. The arguments thereon are fully set out in the judgment hereunder.

S. L. van Batenburg Stafford, K.C., for the respondents, in support of the preliminary objection.

S. I. Cyrus, for the appellant.

Cur. adv. vult.

The judgment of the Court on the preliminary objection was delivered on the 4th October, 1944, by the President, as follows:

A preliminary objection was taken to the Notice of Appeal on the ground that it contains no time limit. Rule 6 (1) of the West Indian Court of Appeal Rules provides that no appeal shall be brought after the expiration of six weeks and by sub-Rule (2) an appeal is deemed to be brought when the notice is filed with the Registrar. Under Rule 7, Notice of Appeal shall be served on all parties affected and by sub-Rule (6) (3) this Notice shall be a 28 days notice. The effect of these Rules is that Notice must be served on the parties before the expiration of six weeks from the date of the judgment, to expire not less than 28 days from the date of filing.

In the present case, the Notice was filed before 4 p.m. on the last available day and, by the Rules of the Supreme Court of British Guiana, service after 4 p.m. *on* any week day except Saturday, is deemed to be affected on the following day.

It was argued by Mr. Stafford that this Rule is applicable by reason of Rule 25 of the West Indian Court of Appeal Rules which provides that in any matter or proceeding in respect of which no provision is made by these Rules, the practice or procedure governing appeals in each Colony shall apply.

Now the West Indian Court of Appeal Rules allow six weeks which, according to the judgment in *Jugmohan Singh v, Bhola*,

means that anything to be done therein may be done up to midnight on the last day. If, however, we were to apply the local Rule in its entirety, this would abridge the time given by the West Indian Court of Appeal Rules. In our view, Rule 25 was not intended to do this. It was merely intended for the purpose of filling up a gap, where such existed. We think, therefore, that where the local Rule conflicts with the West Indian Court of Appeal Rules the last must prevail and the former must be read with such modifications as to avoid conflict.

We are of the opinion, therefore, that the Notice was served in time, nevertheless although the respondents had eight months' notice, the form of Notice was not a 28-day Notice. This is not, however, a fatal defect and it can be cured by amendment.

We think that as the other parties were not in fact prejudiced, this is a case in which we should exercise our power to amend and it is ordered that the Notice be amended by inserting immediately after the word "moved" the words "on the first day of March, 1944, or" and inserting immediately after the word "day" in the first line the word "thereafter".

As Mr. Stafford has informed the Court that if the decision went against him he was prepared to proceed with the case, we will now proceed with it.

The Court then proceeded to hear the appeal.

S. *I. Cyrus,* for the appellant.

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

Cur. adv. vult.

The judgment of the Court was delivered by the President on the 10th October, 1944, as follows:

The facts of this case have been exhaustively dealt with in the judgment of the Court below and as we accept the facts as stated therein, it is unnecessary to recapitulate them at any length.

The appellant on 19th May 1942 entered into an agreement to purchase lot 198 Queenstown, Georgetown, from the respondent Gumbs for $3,000. It was a term of the agreement that transport be completed in three months.

About the middle of July the appellant informed Miss Gumbs' agent that he was not in a position to complete and at no time up to the expiration of the time limit or within a reasonable time thereafter did he make any attempt to do so. On the contrary he repeated on several occasions between then and 2nd December 1942 that he was unable to complete. On that date the respondent Gumbs, treating the contract as at an end, sold the property to a third party. We agree with the learned trial Judge that she was entitled to do this for the appellant had made it plain that he did not intend to perform the contract of 19th May and the respondent was therefore absolved from further performance on her part.

Mr. Cyrus has contended that even if it should be held that there has been a repudiation of the contract by the appellant he is nevertheless entitled to repayment of the sum of $75 paid on account of the purchase money. We are unable to accept this contention, There was, it is true, no express stipulation in the agree-

ment as to the disposal of this sum in such event, but it is well established that the term most naturally to be implied in the case of money paid on the signing of a contract, is that in the event of non-performance by the payer it shall remain the property of the payee (*Nadim Antar* v. *Valverde,* 1942, L.R.B.G. 442).

The appellant has also appealed against the Judge's order that the sum of $1,300 deposited by the plaintiff under an order of the Court made on 12th July 1943 should be applied in payment of the defendants' taxed costs. It was contended on his behalf that this sum was deposited for the specific purpose of covering the claim and costs of the respondent Nascimento in certain foreclosure proceedings, and could not be utilised for any other purpose. But whatever may have been the original intention of the appellant the order (which was made by consent) contained no such qualification. It simply ordered that the plaintiff should deposit $1,300 to abide further order of the Court in this action. We are of opinion that the learned Judge properly ordered that this amount should be applied towards payment of the taxed costs of both respondents in resisting the appellant's impudent claim.

There are several other grounds of appeal but as they are all without substance they need not be discussed. It will suffice to say that in our opinion the appeal is entirely devoid of merit and is dismissed with costs.

Appeal dismissed.

Solicitors: *H. A. Burton,* for the appellant; *M. S. Fitzpatrick* for respondent Gumbs; *H. V. van B. Gunning,* for respondent Nascimento

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of British Guiana.

ENA FRANCIS SPRATT, Appellant (Petitioner).

v.

WILLIAM RICHARD SPRATT, Respondent (Respondent.)

[1944. No. 3.—BRITISH GUIANA].

BEFORE BLACKALL, C.J., Trinidad and Tobago, (President); VERITY, C.J., British Guiana; and MALONE, C.J., Windward Islands and Leeward Islands.

1944. OCTOBER 3, 11.

Husband and wife—Dissolution of marriage—Domicil of husband—Originally American—Whether domicil acquired in Colony—What must be established—Animus manendi, accompanied by acts showing more than a passing intention.

In order to prove that a person has acquired a domicil in this Colony, it must be established that he had an *animus manendi* accompanied by acts showing more than a passing intention.

Boldrini v. Boldrini and *Martini* (1932) Probate 9, C. A., applied.

Appeal by the petitioner Ena Spratt from a judgment of Fretz, J. (reported in (1943) L.R.B.G. 280) dismissing an un-

defended petition for dissolution of marriage on the ground that it had not been established that the domicil of the husband William Richard Spratt was in British Guiana.

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

Cur. adv. vult.

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

On the 20th December, 1942, the appellant was married to the respondent, a citizen of the United States of America, at Providence Congregational Church, Georgetown, in this Colony. After their marriage the parties lived together at 113, George Street, in the city of Georgetown until the 11th February, 1943, when the respondent left the matrimonial home without cause and returned to the United States. Although the appellant wrote him on several occasions she has had no reply, and he has made no provision for her support. On the 15th May 1943 the appellant filed a petition praying for the dissolution of the marriage on the ground that she had been maliciously deserted by the respondent. The respondent did not enter an appearance.

On the hearing of this petition the Court raised the question whether it had jurisdiction to pronounce a decree dissolving the marriage and the hearing was adjourned to enable the petitioner to establish this. After hearing evidence the learned trial Judge came to the conclusion that the respondent had not an *animus manendi* and dismissed the petition.

Jurisdiction in divorce depends on domicil, the domicil of the wife being that of her husband. Jurisdiction in the present case depends upon whether the respondent is domiciled in British Guiana and the burden of establishing this rests upon the petitioner. The respondent is admittedly an American citizen and it was not suggested that he was domiciled in this Colony prior to his arrival in 1940. In order to prove that he has since acquired such a domicil it must therefore be established that he had an *animus manendi* accompanied by acts showing more than a passing intention (*Boldrini* v. *Boldrini* and *Martini,* 1932 P. (C.A.) 9).

Now the evidence in the present case, putting it at its highest, does not, in our opinion, establish anything more than a passing intention on the part of the respondent to make British Guiana his home. We are therefore in agreement with the decision of the Court below. The appeal is dismissed.

Appeal dismissed.

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

A. R. GOMES & ANR. *v.* J. E. TOBIAS.

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of British Guiana.

ANTHONY RICHARD GOMES and WILLIAM CADOGAN,
Appellants (Plaintiffs),

v.

JAMES EMANUEL TOBIAS, Respondent (Defendant).

[1943. No. 2.—BRITISH GUIANA]

BEFORE BLACKALL, C.J., Trinidad and Tobago, (President); MALONE, C.J., Windward Islands and Leeward Islands; and DEAR, C.J., (Acting), Barbados.

1944. OCTOBER 10, 11, 12, 16

Appeal—Findings of fact and inferences drawn by trial judge— Appeal from—Burden on appellant—To satisfy Court of Appeal—That findings and inferences could not have been reasonably drawn—Not merely that other inferences might conceivably have been drawn.

On an appeal from the findings of fact of a trial judge and from the inferences which he drew from the evidence, the appellant, in order to succeed, must satisfy the Court of Appeal that those findings of fact and inferences could not have been reasonably drawn from the evidence: it is not sufficient for the appellant to show that other inferences might conceivably have been drawn.

Appeal by the plaintiffs from a judgment of Verity, C.J., dismissing a claim against the defendant for a declaration of partnership.

J. A. Luckhoo, K.C., (J. *A. Luckhoo,* junior, with him), for appellants.

S. L. van B. Stafford, K.C., *(E. A. Heyliger* with him), for respondent.

Cur. adv. vult.

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

This is an appeal from a judgment of the Chief Justice of British Guiana dated the 19th April 1943 whereby judgment was entered for the defendant.

In the action the plaintiffs (appellants) claimed a declaration that a partnership existed between them and the defendant (respondent) in respect of certain gold claims located in this Colony, and that such partnership has existed since the month of June, 1934.

The learned Chief Justice found 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". Against this judgment the plaintiffs have appealed.

No specific question of law was argued on behalf of the appellants, but it was contended that the learned Chief Justice had drawn an unreasonable and incorrect conclusion having regard to the undisputed oral evidence, certain letters which had been written by the respondent and the conduct of the parties up to the departure of the respondent from Georgetown for the Siparuni mining district, on the 16th June, 1934.

In commenting upon the oral evidence given at the trial of this action the learned Chief Justice made these observations "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 (four and a half) 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 "statement from the midst of which I must attempt to retrieve such grains "of truth as I may find." We think these observations aptly describe the position.

This Court was urged to construe the letters of the 8th and 10th June 1934, written by the respondent to one Ferdinand Harry, as a clear indication that a concluded partnership agreement had been entered into between the appellants and the respondent. But it would, in our opinion, be stretching the imagination to construe this correspondence in the manner contended for.

We do not consider it necessary to deal with the evidence in detail, but viewing all of it — oral and documentary — as a whole, and bearing in mind the conduct of the parties, and the various inconsistent versions of the transaction given by the appellants at different times this Court has come to the conclusion that the findings of the learned Chief Justice were not only reasonable, but it is difficult to see how he could have come to any other.

In order to succeed in their appeal the appellants must satisfy this Court that the findings of fact and inferences which the learned Chief Justice drew from the evidence could not have been reasonably drawn therefrom. It is not sufficient for the appellants to show that other inferences might conceivably have been drawn. The appellants have not discharged this onus and the appeal is therefore dismissed with costs.

Appeal dismissed.

Solicitors: *M. S. Fitzpatrick; R. G. Sharples.*

M. DIN *v.* BOODHOO & ANR.

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of British Guiana.

MAHAMED DIN, Appellant (Plaintiff),

v.

BOODHOO and TETRY, Respondents (Defendants).

[1943. No. 5.—BRITISH GUIANA.]

BEFORE BLACKALL, C.J., Trinidad and Tobago, (President); MALONE, C.J., Windward Islands and Leeward Islands; and DEAR, C.J., (Acting), Barbados.

1944. OCTOBER 17, 18, 19, 27.

Immovable property—Roman Dutch law as to—Ceased to be law of Colony—From and after January 1, 1917*—Except specially retained by statute.*

Limitation of actions—Immovable property—-Action to recover— Roman Dutch law rule as to 33 1/3 *years—Cesser of—Period of limitation Twelve years—Civil Law of British Guiana Ordinance, cap.* 7, s. 4 (2); *Limitation Ordinance, cap.* 184, s. 14.

Construction—Statute—Particular enactment—General enactment— If taken in most comprehensive form, would override particular enactment—Particular enactment operative—General enactment operative subject thereto—Limitation Ordinance, cap. 184, ss. 14, 15.

Construction—Statute—Manner of construction—To advance and not to defeat intention of Legislature.

Civil Law Ordinance—Saving of existing rights—Acquired before January 1, 1917 *by any person—Person not to be deprived of those rights —Meaning of person—Cap.* 7, s. 2 (3).

From and after January 1, 1917, the law governing immovable property in this Colony ceased to be Roman Dutch law, except in so far as it has been expressly retained by statute.

The rule of Roman Dutch law whereunder the period of limitation allowed to a person within which he might bring an action to recover immovable property is 33 1/3 years, has ceased to be part of the law of the Colony.

Section 4 (2) of the Civil Law of British Guiana Ordinance, cap. 7, and section 14 of the Limitation Ordinance, cap. 184 apply to immovable property in this Colony.

The provisions of section 15 of the Limitation Ordinance, cap. 184, must be read subject to those of section 14, and in so far as they conflict, the provisions of section 14 must prevail.

Pretty v. *Solly* (1859) 26 Beav. 606, and *de.Winton* v. *Brecon* (1859) 28 J.J. Ch. 604, applied.

Where a statute contains a particular enactment and a general enactment, and the general enactment, taken in its most comprehensive form, would override the particular enactment, the rule is that the particular enactment must be operative, and the general enactment must be taken to affect only the other part's of the statute to which it may properly apply.

It is the duty of the Courts to construe a statute in such a manner as will advance, and not defeat the object of the Legislature.

Barlow v. *Ross,* 24 Q.B.D. 389, applied.

A person who seeks to avail himself of the exemption given by section 2 (3) of the Civil Law of British Guiana Ordinance, cap. 7, must show that the right he claims was acquired before the prescribed date by himself and not by any other person,

Appeal by the plaintiff Mahamed Din from a judgment of Verity, C.J., reported at (1944) L.R.B.G., dismissing his action against the defendants Boodhoo and Tetry.

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

C. Shankland, for the respondent Boodhoo.

L. M. F. Cabral, for the respondent Tetry.

Cur. adv. vult.

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

The plaintiff-appellant in this action claimed a declaration that he is entitled to the use of a certain road or dam giving access to a plot of land (Lot 25 A on the Plantation Windsor Forest) owned by him. He also claimed an injunction restraining the defendants-respondents from obstructing this right of way. The defendants denied the plaintiff's claim and counter-claimed for rectification of the description in their transport of Lot 24, owned by them, with a view to including in it the area of land over which the right of way is claimed. The learned Chief Justice of British Guiana dismissed the counter-claim and there has been no appeal against the decision.

He also dismissed the plaintiff's claim. He found that the original owner of Plantation Windsor Forest reserved a dam or road as means of access to Lot 25 A, this dam being located on the southern boundary of Lot 24, but not forming part of that lot. During the years 1909 to 1911 it was used by persons going to and from Lot 25 A, but from 1911 or 1912 it had not been so used, and from 1919 it had been occupied by the defendants without disturbance. The learned Chief Justice also found that the defendants at no time held any legal title to this dam, (such title being in the owners of the plantation) and that any right of action to dispossess the defendants had accrued not less than 20 years before the date of the issue of the writ. He held that by reason of section 4 (2) of the Civil Law of British Guiana Ordinance (Ch. 7) the owners of the plantation cannot now make any entry or bring any action to recover this area from the defendants nor can the plaintiff, whose right of action cannot rest on any higher ground than the right of the owners of the plantation. If it were otherwise the effect, if the plaintiff were to succeed, would be to dispossess the defendants and restore to the owners of the plantation that which they could not themselves recover: He therefore declined to make the declaration sought or to order the injunction claimed by the plaintiff. From this decision the plaintiff has appealed.

On the hearing of the appeal the findings of fact in the Court below were not disputed. It was however submitted on behalf of the appellant that when he obtained transport of Lot 25 A he acquired a right of way, which under Roman-Dutch law, had been enjoyed by his predecessors in title. It was contended that Roman-Dutch law was applicable in this case and consequently the period of limitation allowed to the plaintiff within which he might bring action to recover his right was 331/3 years,

and not 12 years as prescribed by Chapter 7, section 4 and by the Limitation Ordinance (Chapter 184), section 14. It was argued that the Ordinances referred to have no application to the right of way claimed by the plaintiff, that such a right is immovable property which (with a few exceptions not material to the present issue) is governed by Roman-Dutch law. In support of his argument that Chapters 7 and 184 have no application in the present case, counsel referred the Court to paragraph (C) of Chapter 7 section 3 (which provides that the English Common Law of real property shall not apply to immovable property in this Colony) and contended that the periods of limitation and prescription in Chapters 7 and 184 do not apply to this right of way which is immovable property. This argument is not impressive, for the Statutes of Limitation are not part of the English Common Law of real property, and even if they were the paragraph in question must be read subject to the opening words of section 3 which make it quite clear that the Legislature of this Colony is free to do what it has in fact done, namely to enact that some of the provisions of the English Statutes of Limitation shall form part of the law of this Colony and apply to immovable property. Nor can we accept Counsel's contention that if the English Common Law of real property is inapplicable, the Roman-Dutch law of immovable property is still in force, for by section 3 of the Ordinance and from and after 1st January, 1917, the law governing immovable property in this colony ceased to be Roman-Dutch law, the English Common Law of real property being at the same time declared inapplicable. *(Lalbahadur Singh* v. *McPherson,* 1939, B.G.L.R. at p. 92).

We consider next the appellant's submission that Chapter 184 section 15 renders nugatory the provisions of Chapter 7 section 4 (2) and Chapter 184 section 14. The words of section 15 admittedly conflict with the other provisions mentioned, and the duplication effected in the Revised Edition of the Laws, 1930, was not happy. This is not however the first time that a statute has contained a particular enactment and general enactment, and in which the latter, taken in its most comprehensive form, would over-ride the former. The rule in such cases is that the particular enactment must be operative and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply: (*Pretty v. Solly* (1859) 26 Beav. 606). "For instance" said Romilly, M.R. in *De Winton v. Brecon* (1859), 28 L.J. Ch. 604) "if there is an authority in an Act of Parliament to a corporation to sell a particular piece of land, and there is also a general clause in the Act to the effect that nothing in the Act contained shall authorise the corporation to sell any land at all, the general clause could not control the particular enactment, and the particular enactment would take effect, notwithstanding the prior exception was not clearly expressed in the general clause. If the Court finds a positive inconsistency and repugnancy, it may be difficult to deal with it, but, so far as it can, it must give effect to the whole of the Act of Parliament." Applying this rule to the present case the provisions of Chapter 184 Section 15 in our judgment must be read subject to those of section 14 and in so far as they conflict, the latter must prevail,

With regard to Chapter 7 section 4 (2) (of which Chapter 184 section 14 is substantially a re-enactment) that provision was enacted subsequent to the Prescription Ordinance, 1856 (later re-named "the Limitation Ordinance"). Now the manifest intention of Chapter 7 section 4 (2) was to provide a term of limitation in respect of actions relating to immovable property, ,and the reference to the Limitation Ordinance clearly implies that the latter is to be construed in such a manner as to give effect to the new provisions. But to construe section 15 of Chapter 184 in the sense contended for by the appellant would render the provisions of Chapter 7 section 4 (2) entirely nugatory. A construction which would have such a result is to be avoided if possible, for it is the duty of the Courts to construe a statute in such a manner as will advance and not defeat the object of the Legislature. (*Barlow v. Ross,* 24 Q.B.D. 389).

In accordance with the foregoing rules of interpretation we hold that the provisions of Chapter 184 section 15 do not override the provisions of section 14 of that Ordinance or of Chapter 7 section 4, which must be given full force and effect.

In the course of his judgment the learned Chief Justice said "He (the plaintiff) does not and could not on the evidence claim a right of way over the defendants' land. On the evidence in this case there can be no question of dominant and servient tenements or any relationship between the two lots (24 and 25 A) 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 issues between the present parties."

With these remarks this Court is in complete agreement. Counsel for the appellant, however, having in mind no doubt the learned Chief Justice also found "there is no doubt that during the first two years after purchase this dam was used by persons who wished to reach lot 25A", contended that the appellant's predecessors in title acquired a right of user over the lands described as "Dam" on the south of Lot 24 and, having regard to the provisions of Chapter 7 section 2 (3), the appellant was now entitled to this right. The material part of that sub-section is as follows: —

> "Nothing in this Ordinance contained shall be held to deprive any person of any right of ownership, or other right, title or interest in any property, movable or immovable, or of any other right acquired before the date aforesaid", (i.e. 1st January, 1917).

In support of his argument that the appellant is entitled to the full benefit of every right acquired by any of his predecessors in title, Mr. Woolford submitted that when the appellant's predecessor in title became the owner of Lot 25A in 1909 he *ipso facto* acquired the right to use the dam on the south side of Lot 24 for the purpose of ingress and egress to and from Lot 25A, and since this right was acquired before 1st January, 1917 the provisions of Ch. 7 sec. 2 (3) are applicable thereto. From this he argued that when the appellant obtained title to Lot

25A he became entitled, not only to the right of way, but also to the benefit of Ch. 7, sec. 2 (3).

We are unable to assent to this contention. In our view a person who seeks to avail himself of the exemption given by that sub-section must show that the right he claims was acquired before the prescribed date by himself and not by any other person. The interpretation sought to put on the sub-section would make the exemption so wide as to defeat the main object of the Ordinance *viz:* the abrogation of Roman-Dutch law and, as already mentioned a construction which would lead to this, is, if possible, to be avoided. It is significant, in this connection, that in section 4 (2) of the Ordinance the words "has accrued to him or to some person through whom he claims" were used in order to effect the inclusion of predecessors in title. Had the Legislature intended the amplification contended for by the appellant they would expect to find a similar expression in sec. 2 (3), but it contains nothing of the kind.

The appeal is dismissed with costs.

Solicitors: *N. C. Janki,* for appellant; *Carlos Gomes* for respondent.

OVID ALOYSIUS FERNANDES, Plaintiff,

v.

AURELIA GUMBS and CHARLES RODRIGUES NASCIMENTO (No. 2) Defendants.

[1943. No. 153.—DEMERARA.]

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

1944. FEBRUARY 14.

Appeal—From interlocutory order ex parte—Whether appeal lies therefrom at instance of party affected thereby.

Appeal—Leave to—From interlocutory order made ex parte—Application for—Made by person affected by the order—Applicant not remediless if application refused—Leave to appeal refused.

Practice and procedure—Order made ex parte—Application to set aside or discharge—May be made by party affected thereby.

Quaere: whether an *ex parte* order granting an application for an interlocutory order is appealable by any person affected thereby.

Where an application for an interlocutory order is granted ex *parte* any person affected thereby may apply to set aside or discharge the order.

O. A. FERNANDES *v.* A, GUMBS & C. R. NASCIMENTO

An application by a person affected by an interlocutory order made ex parte for leave to- appeal therefrom, was refused as the applicant was not remediless inasmuch as he could, apply to set aside or discharge the order.

Ex parte summons by the plaintiff for an order granting him leave to appeal from an interlocutory order made ex parte on the application of the first-named defendant.

S. I. Cyrus, for the applicant (plaintiff).

Duke, J. (Acting): This is an ex parte summons taken out by the plaintiff Ovid Aloysius Fernandes on the 9th February, 1944, for an order granting him leave to appeal from an order made on the 7th February, 1944 on the ex parte application of the defendant Aurelia Gumbs. This order directed that a Writ of delivery may issue, in accordance with rule 90 of Order 36 of the Rules of Court, 1900, requiring the plaintiff to deliver up to the defendant Aurelia Gumbs her grosse transport for lot 198, Queenstown, Georgetown. On the 11th February, 1944, the defendant Gumbs filed a request with the Registrar of the Supreme Court for the sealing of a writ of delivery, and, leave having already been given for its issue, the writ was issued by the Registrar.

An order has been made on the ex parte application of the defendant Gumbs. This order affects the plaintiff who now wishes to have that order set aside. If he is advised that there are good grounds for the setting aside of the order, he can take out a summons (which must be served upon the defendant Gumbs), to have the order set aside or discharged. The plaintiff has, however, not done that. The ex parte order is an interlocutory order, and cannot be appealed against, except with the leave of the Court. The plaintiff now seeks such leave.

If the plaintiff is correct in his contention that the order of the 7th February, 1944 would not have been made if he had been able, before the order was made, to place before the Court his case, then he can obtain all the relief to which he is entitled by merely taking out, and serving, a summons to set aside or discharge the ex parte order. On the hearing of that summons, the plaintiff would be able to place before the Court all the facts and arguments which he hopes will convince the Court that the order of the 7th February, 1944, was not properly made, and should therefore be set aside and discharged. Even if I were to assume that an ex parte order granting an application were appealable at the instance of a party affected by the order, the plaintiff would not be remediless if leave to appeal were refused. Such leave is unnecessary as there is open to the plaintiff a less expensive and more expeditious remedy than that by way of appeal. The question of appeal would only arise if a summons by the plaintiff to set aside or discharge the ex parte order is dismissed.

Leave to appeal is therefore refused

Application dismissed.

Solicitor for applicant*; H. A. Bruton.*

IN THE WEST INDIAN COURT OF APPEAL

ON APPEAL from the Supreme Court of British Guiana.

JOEL GOMBERG, Appellant (Plaintiff),

v.

G. BETTENCOURT & CO, LTD, Respondents (Defendants).

[1944. No. 5. BRITISH GUIANA.]

BEFORE BLACKALL, C.J, Trinidad and Tobago, (President); MALONE, C.J, Windward Islands and Leeward Islands; DEAR, C.J, (Acting), Barbados.

1944. October 23, 24, 25; November 9.

Sale of goods—F.o.b. contract for—Goods sent by route involving sea transit—Sale of Goods Ordinance, cap. 65, s. 34 (3)*—Applies to.*

Precedents—Courts of co-ordinate jurisdiction—Decisions of —Followed—On ground of judicial comity.

Sale of goods—Contract for—Goods sent by route involving sea transit—Sale of Goods Ordinance, cap. 65, s. 34 (3)*—"Insure"—Meaning of—Relates to war risk, as well as to marine, insurance.*

Construction—Statute—Species of a genus mentioned in statute—Species not known or contemplated when statute passed—Statute extended to.

Sale of goods—Contract for—Goods sent by route involving sea transit—Purchaser able to effect general covering policy on—Seller not relieved—Of obligation under Sale of Goods Ordinance, cap. 65, s. 34 (3).

Section 34 (3) of the Sale of Goods Ordinance, cap. 65, applies to f.o.b. contracts.

Wimble v. *Rosenberg* (1913) 3 K.B. 743, applied.

A Court of law, on the ground of judicial comity, abides by the decision of another Court of co-ordinate jurisdiction.

A decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts, will generally be followed even by Courts of higher authority than the Court establishing the rule, and even though the Court before whom the matter arises afterwards might not have given the same decision, had the question come before it originally.

Where a decision has been standing for more than 31 years it would be a strange thing for it to be overruled.

Dunlop y. *Balfour, Williamson* & *Co.* (1892) 1 Q.B. 521, applied.

Section 34 (3) of the Sale of Goods Ordinance, cap. 65, relates to war risk, as well as to marine, insurance.

The language of a statute is generally extended to new things which were not known and could not have been contemplated when it was passed, and particularly when the Act deals with a *genus,* and the thing which afterwards comes into existence is a species of it.

A.G. v. *Edison Telephone Co.,* 6 Q.B.D. 244, applied.

The fact that the purchaser might have been able to effect a general covering policy is not enough to relieve the seller of goods from the obligation thrown upon him by section 34 (3) of the Sale of Goods Ordinance, cap. 65.

Wimble v. *Rosenberg* (1913) 3 K.B. 743, applied.

Appeal by the plaintiff Joel Gomberg from a judgment of Verity, C.J., dismissing with costs an action brought against G. Bettencourt & Co., Ltd., for goods sold and delivered.

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

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

Cur. adv. vult.

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

In this case the respondents (defendants) ordered a quantity of hats from the appellant (plaintiff). The goods were lost in transit through enemy action and the respondents refused to pay for them. The appellant sued for the price of the goods but the claim was dismissed.

The facts, which are not in dispute, are briefly these. The goods were ordered on August 20 and September 25, 1941, through the local agent of the appellant and were despatched by parcel post from Montreal on February 14, 1942. They were insured by the appellant against marine but not against war risk. The invoices were posted on the same day, the contract being f.o.b. Montreal.

The first point to be determined is whether section 34 (3) of the Sale of Goods Ordinance, Chapter 65, applies to f.o.b. contracts. It was held in *Wimble v. Rosenberg* (1913, 3 K.B. 743) that section 32 (3) of the Sale of Goods Act, 1893 (which is identical with section 34 (3) of Chapter 65) does so apply, but counsel for the appellant has invited us to disregard that decision as unsound. In support of this he cited the dissenting judgment of Hamilton, L.J. and certain observations of Lord Reading, C.J., in the subsequent case of *Northern Steel and Hardware Co., Ltd., v. John Batt & Co., Ltd.,* (33 T.L.R. p. 517) which indicated that he was disposed to share the views of Hamilton, L.J.

Now although there is no statute or common law by which a Court is bound to abide by the decision of another Court of co-ordinate jurisdiction, yet a Court of law does so on the ground of judicial comity. And apart from any question as to the Courts being of co-ordinate jurisdiction, a decision which has been followed for a long period of time and has been acted upon by persons in the formation of contracts will generally be followed even by Courts of higher authority than the Court establishing the rule, and even though the Court before whom the matter arises afterwards might not have given the same decision had the question come before it originally. (19 Halsbury, 2nd Edition, pp. 256-7). To paraphrase then the language of Lopes, L.J. in *Dunlop* & *Sons Balfour, Williamson & Co.,* (1892, 1 Q.B.D. at p. 521) it would be a strange thing where a decision has been standing for more than 31 years, for this Court to over-rule it. We are not prepared to take this course.

It was next submitted by the appellant that as the Sale of Goods Act, 1893 was enacted at a time when war risk insurance was unknown, Chapter 65, section 34 (3) must be construed as relating only to marine risk. But the language of a statute is generally extended to new things which were not known and could not have been contemplated when it was passed, and particularly, when the Act deals with a *genus* and the thing which afterwards comes into existence is a species of it. Thus the telephone has been held to be a "telegraph", within the meaning of the Telegraph Acts, 1863 and 1869, though not invented or contemplated in 1869 (*A.G. v. Edison Telephone Co.*, 6 Q.B.D. 244). Even therefore if war risk insurance did not come into existence prior to the war of 1914-18 this contention fails.

The next point to be considered is whether the goods were sent "in circumstances in which it is usual to insure." While it is true that, the submarine menace was not as acute in February, 1942 as it afterwards became, it cannot be said that no risk of loss by enemy action existed at that date and the local agent of the appellant stated in evidence that "it is trade usage when a war is in operation for a seller to insure against war risk without instructions from buyer." We accept this and are of opinion that the circumstances were such that it would be usual for a prudent person to insure against war risk. That the appellant realised that he was imprudent in not so insuring is indicated by the fact that upon hearing of the loss of another shipment about the same time, he informed his agent in Georgetown that all future shipments would have to be insured always "since it would be very foolish to take the risk of sending it the regular way".

The next question is whether the appellant gave such notice to the respondents as would enable them to insure against war risk or alternatively whether the respondents had in their possession all the information necessary to enable them to insure. It is not disputed that the appellant did not give any notice but it is contended on his behalf that the particulars contained in the orders (Exhibits B1 and B2) afforded the requisite information. The orders did indeed contain particulars of the goods ordered and the ports of shipment and discharge, but

they also contained the condition that all orders were subject to acceptance by the principals (i.e. the appellant). We agree with Mr. Humphrys that shipment of the goods constituted acceptance by the appellant, but until the respondents were made aware of this the need for insuring did not arise. The placing of an order, especially in war time, is no guarantee that it will be filled and it is to be observed in the present instance that although the orders were given in August and September, 1941, the goods were not shipped until February, 1942. It is contended that despite their lack of information on this point the respondents could have protected themselves by open or floating cover and much stress was placed on the admission of Mr. E. C. Fernandes (the Secretary of respondent Company) that "if we had wanted to give the goods general cover as soon as when shipped we could do so through a bank."

In the words of Buckley, L.J., in *Wimble* v. *Rosenberg* "this would be equivalent to saying that in every case without the knowledge of particulars he (the buyer) is already in possession of all the information which enables him to insure. The result is that the sub-section is reduced to silence." We are in agreement therefore with the learned trial judge that the fact that the respondents might have been able to effect a general covering policy is not enough to relieve the appellant from the obligation thrown upon him by section 34 (3).

This brings us to the appellant's final contention namely that from the course of business between the parties an agreement could be implied which would take the matter out of the subsection. The evidence, in our view, does not support this contention and as the learned Chief Justice dealt fully with this aspect of the case in his judgment; it will suffice to say that we agree with his conclusions on this point.

The appeal is dismissed with costs.

Solicitors: *J. Edward de Freitas; V.C. Dias.*

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of British Guiana.

FRANCISCO VIEIRA, Appellant (Plaintiff),

v.

WALTER ROBERTS, Respondent (Defendant).

[1944. No. 3.—BRITISH GUIANA.]

BEFORE BLACKALL, C.J., Trinidad and Tobago, (President) ; Malone, C.J., Windward Islands and Leeward Islands; and DEAR, C.J. (Acting), Barbados.

1944. OCTOBER 13, 16; NOVEMBER 9.

Negligence—Of defendant—Contributory negligence—Of plaintiff—Accident could have been avoided—By exercise of reasonable care on part of defendant—Defendant liable.

Negligence—Of defendant—Contributory negligence—Of plaintiff— Efforts of defendant to avoid accident—Inefficacious—By reason of self-

created incapacity of defendant—Negligence of defendant—Efficient, proximate and decisive cause of injury—Defendant liable.

If, although the plaintiff was negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due, and the plaintiff is entitled to recover.

Swadling v. Cooper (1931) A.C. 8, applied.

If, notwithstanding the difficulties of the situation, efforts to avoid the injury duly made would have been successful but for some self-created incapacity which rendered such efforts inefficacious, the negligence that provided such a state of disability is not merely part of the inducing cause or a remote cause or a cause merely *sine qua non*, it is in very truth the efficient, the proximate, the decisive cause of the incapacity and therefore of the mischief. Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable, notwithstanding a finding of contributory negligence of the plaintiff.

British Columbia Electric Railway v. Loach (1916) 1 A.C. 726, per Lord Sumner, applied.

APPEAL by the plaintiff Francisco Vieira from a judgment of Verity, C.J., dismissing with costs an action against Walter Roberts for damages arising from the negligent driving of the defendant's motor car.

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

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

Cur. adv. vult.

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

This is an appeal against a decision by Verity, C.J., dismissing a claim in respect of personal injuries to the appellant and damage to his bicycle occasioned by his being run down by the respondent's motor car while being driven by the latter's servant on July 29, 1941.

It is a judicial commonplace to say that the law in collision cases has long been well settled, but that its application not infrequently presents difficulties. The present is such a case. It has been ably argued by counsel on both sides and they have referred the Court to numerous authorities bearing on the points at issue.

As to the facts, it would appear that on the date mentioned the plaintiff emerged from a side road to the main Vlissengen Road riding a bicycle, and having crossed to his wrong side proceeded in a southerly direction. The defendant's car was being driven in the same direction and the driver, observing the plaintiff, sounded his horn when about 20 rods (240 feet) from him. It is not clear whether the plaintiff heard it or not but at any rate he paid no attention. The driver blew again when he was 2 or 3 rods (24-36 feet) away. The horn was a loud one and the plaintiff on hearing it seems to have lost his head for he very ill-advisedly swerved across the road in a vain attempt to get over to his correct side. The driver at once applied his

brakes and drew further to the left but did not succeed in avoiding a collision, with the result that the plaintiff sustained injuries which necessitated his remaining in hospital for some weeks.

The learned trial Judge drew from the evidence the inference that it was entirely beyond the power of the driver to anticipate or avoid the collision and that it was the plaintiff's negligence which was the effective cause of the accident. Upon these grounds he dismissed the action. Now it cannot be denied that the plaintiff was negligent in riding on the wrong side of the road, and even more so in attempting to cross it at a moment when a car driven at considerable speed was about to overtake him, and it is clear that had he not done this, the accident would not have occurred. If then there was no negligence on the part of the driver, or although there was negligence on his part, the acts of negligence were synchronous, or so nearly so that neither party had time to escape from the position of danger created by the other's negligence, the plaintiff's action would fail.

On the other hand:

> "if although the plaintiff was negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due and the plaintiff is entitled to recover."

(*Swadling* v. *Cooper,* 1931, A.C. at p. 8.)

Under which category then does the present case fall? We are satisfied that from the moment the plaintiff started to move towards the left side, the driver did all in his power to avert a collision. A further point however arises: whether his inability at that stage to avoid the accident was due to any previous negligence on his part, for if so, his previous negligence is considered as crystallising into an ultimate act when it produces its natural consequences, and he is liable. In *British Columbia Electric Railway* v. *Loach* (1916, 1 A.C. at p. 726) Lord Sumner stated the law thus:

> "if, notwithstanding the difficulties of the situation, efforts to avoid the injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that provided such a state of disability is not merely part of the inducing cause or a remote cause or a cause merely *sine qua non*—it is in very truth the efficient, the proximate, the decisive cause of the incapacity and therefore of the mischief..... Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may, in some cases, though anterior in point of time to the plaintiff's negligence constitute 'ultimate' negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff."

In the *Loach* case the defendant had very negligently driven a cart on to a level crossing. A train was approaching and the driver saw the cart when about 400 feet off. He immediately applied the brakes and had they been in proper working order the train could have been stopped in time to avoid the accident, but as they were not, a collision occurred, and the railway company was held liable.

In the present case the brakes of the car were in perfect order but it was submitted on behalf of the plaintiff that the driver

could have pulled up in time had he not been travelling so fast. Now the principle enunciated by Lord Sumner applies whenever there is a self-created incapacity on the part Of the defendant, be the cause what it may and it is necessary therefore to consider the evidence as to the speed at which the car was travelling.

The driver stated that he was driving at about 18-20 miles per hour, that he was two or three rods (24-36 feet) from the plaintiff when the latter started to swerve across the road and that he (the driver) could and did stop the car within 10 or 12 feet. It was however testified by the witness Gordyck, a motor mechanic of experience, that a 22 H.P. Ford V-8 motor car (the type that was driven by the defendant's servant) if travelling at 20 m.p.h. could be stopped within 8 to 12 feet. The driver's evidence was therefore self-contradictory for even if he were only 24 feet from the plaintiff when the latter started to swerve and he stopped the car within 12 feet (as he said he did) the accident would not have occurred. It is clear, therefore, that the car was travelling at a speed considerably in excess to 20 m.p.h. As to what his speed actually was, a police constable who arrived on the scene shortly after the accident, stated that he found marks on the road surface consistent with the scraping of a cycle along the road as also marks of blood at about 11 feet from the grass verge on the left hand side of the road, which is about 20 feet wide at that point. The statement as to the blood marks is corroborated by the evidence of an eye witness called by the plaintiff, who swore that there was blood on the spot where the car hit the plaintiff, while the medical evidence disclosed that the plaintiff received two lacerated wounds on his head. The police constable also found skid marks which he measured. They commenced at a point 55 feet north of the spot where blood was found and continued for a distance of 21 feet to a point on the left side of the road where they stopped. North of the blood the skid marks showed no sign of a swerve but south of it they swerved and showed the marks of four wheels. Commenting upon this evidence the witness Gordyck stated that if the skid marks extended for a distance of 76 feet the car would have been travelling at about 55-60 m.p.h.

This Court regards the evidence of the police constable and Gordyck (both of whom are entirely disinterested parties) as of considerable weight. In our view that evidence clearly establishes that the driver was travelling at an excessive speed. In our opinion it was because of this that he was unable to stop in time. This is not one of those cases in which a driver was faced with a sudden emergency and has to act, as it is said, in the agony of the collision. When he first noticed that the plaintiff was on the wrong side he was still 240 feet away and he admitted he suspected that the plaintiff might dash across the road. It was therefore the driver's duty to keep a proper look-out and to drive at such a speed as would enable him either to bring the vehicle to a stand still within a short distance or by a slight deviation to avoid a collision. Instead of doing either of these he continued on his way without altering his course and at a high rate of speed which he made no attempt to reduce until it was too late. He seems in fact to be one of those motorists who are under the impression that provided a driver blows his horn

he is relieved of all responsibility and that any person who gets in his way or does not get out of it does so at his peril. But as Lord Wright expressed it in McLean v. Bell (48 T.L.R.., at p. 469):

> "In these days of rapidly moving traffic it is true that a foot passenger should be circumspect in crossing a road, but it is equally true that the driver of a motor car should be alert in seeing danger and in controlling his speed and course accordingly, and may be in a much better position to avoid a collision than the pedestrian. It must always be a question of fact and degree."

In the present case while we agree with the finding of the Court below to the extent that the driver could not have avoided the collision in the circumstances in which he found himself at the moment, it appears to us, with due deference to the learned Chief Justice, that he failed to appreciate that those circumstances had been brought about by the self-created incapacity of the driver, and that the speed at which the car was being driven at the time was a determining factor in deciding upon the defendant's legal liability. We have come to the conclusion therefore that the appeal should be allowed and that judgment should be entered for the plaintiff with costs both here and in the Court below. We assess the damages at $360 inclusive of special damages.

Appeal allowed.

Solicitors: *F. Dias,* O.B.E.; *J. Edward de Freitas.*

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of British Guiana.

CECIL BISHUN DYAL, Appellant (Defendant),

v.

JOSEPH SALAMALAY, Respondent (Plaintiff).

[1944. No. 1—BRITISH GUIANA.]

BEFORE BLACKALL, C.J., Trinidad and Tobago, (President); MALONE, C.J., Windward Islands and Leeward Islands; and DEAR, C.J., (Acting), Barbados.

1944. NOVEMBER 2, 3, 4, 10.

Principal and agent—Authority to sell whole estate—Commission payable—On selling price of whole estate—Sale by principal of part of estate—Claim by agent on a quantum meruit—Not maintainable—Claim by agent for damages—Where principal sells part with the object of preventing agent from earning his commission.

The appellant and the respondent entered into an agreement whereby the respondent would be entitled to a commission of $2,000 if he sold the whole of the Aruka estates for $40,000 on or before the 30th November 1942, or to 5 per centum on the sale price if the appellant sold the whole of the estates oh or before the 30th November 1942.

The appellant sold a part of the estates on the 30th October 1942 for $15,000.

Held that this was an eventuality against which the respondent had not protected himself, and that as the respondent on the express terms

of his contract was only to be paid in the event of the sale of the whole of the Aruka estates, he was not entitled to a *quantum meruit* on the sale of a part.

Luxor (Eastbourne) Ltd. v. Cooper (1941) 1 A.E.R. 40, 41. *per* Viscount Simon, L.C., and *Lott v. Outhwaite* (1893) 10 T.L.R. 76, *per* Lindley, L.J., applied.

Semble, that if the sale of a part of the Aruka estates had been made by the appellant with the object of preventing the respondent from earning his commission, the respondent might have brought an action for damages against the appellant.

APPEAL by the defendant Cecil Bishun Dyal from a judgment of Verity, C.J., ordering judgment to be entered for the plaintiff Joseph Salamalay for the sum of $750 and costs.

L. M. F. Cabral, for appellant.

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

The judgment of the Court was delivered by Malone, C.J., Windward Islands and Leeward Islands, as follows: —

The question in this case is whether the respondent is entitled to recover from the appellant the sum of $750 which he claims as money due to him under a commission agreement. The action was founded on an agreement dated August 18, 1942, and signed by both parties, the terms of which were reduced to writing and are as follows: —

> "I the undersigned C. B. Dyal of Aruka estates, N.W.D. do hereby authorise Mr. Joseph Salamalay of 9, Regent Street, Georgetown, to sell on my behalf the Aruka estates situate at N.W.D. and 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 sawmill business carried on by me (thereon).
>
> Price asked for the said estate is $40,000 U.S. currency remuneration to be given for such sale is $2,000 any sum over and above $40,000 goes to the seller, time allowed for such sale is up to and inclusive of the 30th September 1942, in the event of a sale being transacted by me prior to 30.9.42 then I will still remunerate Mr. Salamalay 5 per cent of the sale."

It is alleged in the Statement of Claim that the respondent negotiated with certain likely purchasers in the United States and elsewhere, and that on October 19, 1942, the appellant with that knowledge orally renewed this agreement and extended its operation to the 30th November, 1942, and promised a further extension to December 31, 1942.

On August 22, 1942, the appellant entered into an agreement with one Dr. Leslie Wong whereby he granted to Dr. Wong, *inter alia,* the exclusive right and licence to extract rubber from any or all the rubber trees on the Aruka estates. The appellant at the same time granted to Dr. Wong the option (exercisable within 3 months from August 22, 1942, of purchasing the said Aruka estates with all the buildings, erections and trees thereon, save and except that portion of land forming part of the said estates known as Plantation 'Wycaribbee' and the sawmill business carried on by the owner together with about 25 square roods of land around the said sawmill business, for the sum of twenty thousand dollars." Plantation "Wycaribbee" has an area of

approximately 725 acres. Dr. Wong exercised his option and on October 30, 1942, purchased from the appellant that part of the Aruka estates mentioned in the agreement of August 22 comprising about 1,000 acres, for the sum of $15,000, a reduction of $5,000 being made because of a deficiency in the number of rubber trees on the area bought. The learned trial Judge inferred from the evidence that the appellant concluded a contract of sale with Dr. Wong in the hope that he might thereafter evade payment of remuneration to the respondent. But with great respect to the view expressed by the learned Chief Justice, there is, in our opinion, no evidence in this case from which such an inference can properly be drawn. The appellant in the exercise of his undoubted right of ownership sold approximately one-half of the Aruka estates to Dr. Wong for $15,000 and on this sum the respondent claims to be entitled to 5 per cent commission.

It seems quite clear from the written agreement of August 18, 1942 (omitting for the moment the term relating to a sale made by the appellant) that the respondent would only have earned his commission of $2,000, if he had sold the whole of what is known as the "Aruka estates", approximately 2,000 acres, for $40,000, before October 1, 1942. He was not authorised to sell a part of these estates; his position was that he either became entitled to $2,000 or to nothing. It is obvious that the respondent was fully alive to the position for he stated in his evidence "I never attempted to sell a portion of it. The agreement was to sell the estate"……."I was trying for $40,000, wherever I could get it."

Under the last term in that agreement the respondent would be entitled to 5 per cent of the sale price "in the event of a sale being transacted by the appellant prior to the 30th September, 1942." Now "a sale" must in our view, refer to the property the subject matter of the agreement, namely, the whole of the Aruka estates, and not to a sale of a part. If it was the intention of the parties that the respondent should be remunerated whether the appellant sold one acre, a thousand acres or two thousand acres, they ought to have said so in clear and unambiguous language. Although this agreement is not one which the law requires to be in writing, its terms were in fact reduced to writing, and the rights of the parties under that agreement must be found in the document referred to. It may very well be that while the appellant would have been willing to pay a commission of 5 per cent if the whole of the estates were sold at one time, he might not have been willing to pay the same commission if small portions were sold from time to time.

Up to and including September 30, 1942, neither the appellant nor the respondent had effected a sale of the Aruka estates under the agreement of August 18, 1942, and, the time having elapsed, that agreement was totally at an end. It is alleged, however, that the appellant orally renewed this agreement and extended its operation to the 30th November, 1942. But we are clearly of the opinion that whatever language may have been used, the legal effect of the conversations which took place on October 19, 1942, between the appellant, the respondent and the witness Foster was that a new agreement, embodying substantially the

terms of the old one was entered into between the appellant and the respondent.

It was strenuously argued on behalf of the respondent that if the legal effect of the findings of the Court below was that on October 19, 1942, a new agreement had been entered into between the parties and that the terms of this new agreement (except for extending the time limit to November 30) were similar to those contained in the original agreement, then the question of the new agreement was an issue raised upon the pleadings. In support of this counsel referred to paragraph 3 of the Statement of Claim. We are, however, unable to agree that the issue of a new agreement has been raised upon the pleadings. The respondent's whole case rests upon the agreement of August 18, 1942, which, it was alleged, was renewed orally on October 19, 1942. It was claimed that the operation of the agreement was then extended to November 30, 1942. But even if we were satisfied that this issue had been properly raised upon the pleadings, or that the original agreement had been renewed and the time for its performance extended, we should nevertheless feel bound to hold that the respondent on a proper interpretation of these agreements, was not entitled to the commission which he claims, inasmuch as no sale of the whole of the Aruka estates had been effected.

"There is, I think," said Lord Simon, L.C. in *Luxor (Eastbourne) Ltd. and others* v. *Cooper* (1941) 1 A.E.R. at p. 40:

> "considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern, and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication, of other terms,"

and at p. 41:

> "There is a third class of case, where, by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between the offeror and his principal. . . The agent is promised his reward in return for an event, and the event has not happened. He runs the risk of disappointment, but if he is willing to run the risk, he should introduce into the express terms of the contract the clause which protects him."

In the present case, as we have already stated, the respondent would have been entitled to his commission on the happening of a certain event, that event being the sale of the whole of the Aruka estates whether that sale had been brought about by his own endeavours or by those of the appellant. The conditions of this contract are not in our view satisfied by the sale of a part of the Aruka estates. Nor in a case like this can the respondent claim on a "quantum meruit". This is a well established rule supported by a substantial body of authoritative decision. The matter was tersely put by Lindley, L.J. in *Lott* v. *Outhwaite* (1893) 10 T.L.R. 76, thus:

> "It was said that there was an implied contract to pay the agent a "quantum meruit" for his services. The answer was that there could be no implied contract where there was an express contract."

The learned trial Judge found that the appellant had mis-

described the extent of the property and the number of rubber trees mentioned in the agreement of August 18, 1942, and that although he would appear to have contemplated the inclusion of Plantation "Wycaribee" in the sale, the appellant had at the date of the renewal already determined to exclude it and did in fact exclude it from the particulars he then gave. He further found that during the continuance of the respondent's agency as extended on October 19 the appellant transacted a sale of the property which he had authorised the respondent to sell. With great respect to the learned Chief Justice we find ourselves unable to draw this inference from the evidence. Even if the contract under which the respondent claims remuneration was in the terms found by the learned Chief Justice, it would nevertheless be impossible for the respondent to succeed, as this contract differs from that alleged in the Statement of Claim and is not the contract upon which the plaintiff has founded his claim. Counsel for the respondent indeed made it perfectly clear in the course of his argument that he did not rely on the contract as found by the" Court below. It is also of some significance that the agreement as found by the learned Chief Justice contains no reference to the price to be paid. It is hardly conceivable that the respondent would have undertaken the impossible task of selling one-half of the Aruka estates for the same price at which he agreed to sell the whole. But if he was not to sell it at that price at what price was he authorised to do so? Was he to be entitled to sell half the property at any figure he liked, although he could not sell the whole for less than $40,000?

The position after the discussions on October 19, 1942 as we see it, may be summarised thus: The appellant and the respondent had entered into an agreement whereby the latter would be entitled to a commission of $2,000 if he sold the whole of the Aruka estates for $40,000 on or before November 30, 1942, or to 5 per cent, on the sale price if the appellant sold the whole of the estates on or before November 30. In fact the appellant sold a part on October 30, 1942. This was an eventuality against which the respondent had not protected himself, and as the respondent on the express terms of this contract was only to be paid in the event of a sale of the whole of the estates he was not entitled to a quantum meruit on the sale of a part. Had the sale of a part of the estates been made by the appellant with the object of preventing the respondent from earning his commission the respondent might have brought an action for damages against the appellant. But we have already held that the sale was not made with such an object.

In the result the appeal must be allowed with costs here and below.

Appeal allowed.

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

P. BACCHUS *v.* C. HOOKUMCHAND
IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of British Guiana.

PEER BACCHUS, Appellant (Plaintiff),

v.

CHRISTMAS HOOKUMCHAND, Respondent (Defendant).

[1944. No. 6.—BRITISH GUIANA.]

BEFORE BLACKALL C.J., Trinidad and Tobago; (President); MALONE, C.J., Windward Islands and Leeward Islands; and DEAR, C.J., (Acting), Barbados.

1944. OCTOBER 26, 27, 30, 31; NOVEMRER 1, 2, 11.

Servitude — Servient tenement — Acquisition of — By owner of servitude— Merger.

Evidence—Regularity of proceedings—By Registrar of Deeds— Presumption in favour of—Dereliction of duty—Presumption against.

Words—"Front lands"—Meaning of—Lands in front of the back lands.

Appeal—Question of fact—Judgment of trial judge—How to be regarded by Court of Appeal—Duty of Court—Not to shrink from overruling judgment appealed from—If it is wrong.

Servitude — Right of grazing — Use of servient tenement for agricultural purposes—If sufficient grazing ground left for owner of dominant tenement.

Servitude—Right of grazing—Abandonment of—Mere non-user— Extinguishment not affected thereby—Suspension of exercise of a right — Not sufficient to prove an intention to abandon it — Other circumstances to be proved.

Plantation Hope, and the extra depth thereof, were subject to a right of grazing in favour of the proprietors of Plantations Washington and Rising Sun.

Plantation Hope consisted of three distinguishable areas as follows: (1) a parcel of land situate between the public road and the sea, lying north of the public road and having an area of about 150 acres, (2) a parcel of land about 200 acres in extent, lying south of the public road and situate between the public road and a wire fence, and (3) a parcel of land having an area of about 163 acres, lying south of the wire fence, situate between Plantation Hope and the extra depth thereof, and known as the southern or back portion of the Plantation. The extra depth which has an area of about 414 acres lies to the south of the southern or back portion of Plantation Hope.

Plantations Washington and Rising Sun were subject to a right of grazing in favour of the proprietor of Plantation Hope.

In June 1932 the proprietor of Plantation Hope transported to the proprietors of Plantations Washington and Rising Sun the "southern or back portion" of Plantation Hope and also "the extra depth of the said plantation" together with the rights of grazing of the proprietor of Plantation Hope on Plantations Washington and Rising Sun.

In 1935 the executor of the proprietor of Plantation Hope transported to the heirs of that proprietor, Plantation Hope save and except the southern or back portion, subject to the right of the proprietors of Plantations Washington and Rising Sun of grazing cattle and other stock over the "front lands" of Plantation Hope.

In 1938 the portion of Plantation Hope owned by those heirs was sold at execution sale to the defendant, subject to the right of the proprietors of Plantations Washington and Rising Sun of grazing cattle and other stock over the "front lands" of Plantation Hope.

Held (1) that the grazing rights of the proprietors of Plantations Washington and Rising Sun in relation to the lands (specified in the transport of 1932) at Plantation Hope and the extra depth thereto, situate south of the wire fence, had been extinguished by merger by virtue of the transport of 1932;

(2) that there was nothing on the registered title, at the time of the 1938 execution sale, to show that the proprietor of Plantations Washington and Rising Sun had lost his right of grazing over that part of Plantation Hope situate north of the wire fence; and

(3) that the words "front lands" in the 1935 transport mean, and can only refer to, the lands in front of the back lands of Plantation Hope which then belonged to the proprietor of Plantations Washington and Rising Sun, that to construe the words otherwise would impute to the Registrar of Deeds a dereliction of duty, and that a transport which purported to destroy or diminish the registered grazing rights of the proprietor of Plantations Washington and Rising Sun in respect of the lands at Plantation Hope north of the wire fence would not have been passed by the Registrar of Deeds.

An Appeal Court pays great deference to the opinion of the trial judge especially as to the reliance to be placed on the evidence of witnesses, yet it must re-consider the materials which were before the Judge. The Court must then make up its mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from overruling it, if on full consideration it comes to the conclusion that it is wrong.

Coghlan v. *Cumberland* (1898) 1 Ch. 704, applied.

The existence of a servitude of grazing in no way prevents the owner of the servient tenement from utilising his own land for agricultural purposes provided he leaves enough grazing ground for the owner of the dominant tenement.

Mere non-user of a right of grazing cannot alone cause extinguishment thereof, for the suspension of the exercise of a right is not sufficient to prove an intention to abandon it. There must be other circumstances in the case to raise a presumption of such intention.

Appeal by the plaintiff Peer Bacchus from a judgment of Verity, C.J., dismissing with costs his claim against the defendant Christmas Hookumchand and ordering that judgment be entered for the defendant with costs on his counterclaim.

H. C. Humphrys, 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:—

In this action the plaintiff claimed (1) a declaration that he is entitled to certain rights of grazing on the property of the defendant, (2) an injunction preserving those rights, and (3) damages. The plaintiff also claimed a right of drainage but as this has not been contested no further reference need be made to it. The defendant counter-claimed for (1) an injunction restraining the plaintiff from grazing cattle and stock on his property, (2) a declaration that the plaintiff is not entitled to the right of grazing, and (3) damages. The Chief Justice of British Guiana

dismissed the plaintiff's claim, granted the defendants an injunction and assessed the damages at $50. Against this decision the plaintiff has appealed.

In 1910 Joshua Ramphul bought the plantations Washington and Hope on behalf of John Isaacs, and Plantation Rising Sun for Richard Birtie Butts. Isaacs shortly afterwards agreed to exchange Hope for the Rising Sun on condition that Butts gave him the right of grazing over Hope. That arrangement was put into effect by transports, each owner being given grazing rights over the other's land.

In February 1920 the plaintiff as executor of John Isaacs transported to himself as devisee 14/16ths of Washington and Rising Sun with the right to the owner of Hope of grazing of all stock on both plantations. Subsequently, Thomas Isaacs and Mathurbally, the other co-owners, transported their respective shares in the properties to the plaintiff who thus became the sole owner of both plantations subject to the grazing rights of the owner of Hope.

Plantation Hope is bounded on the east by Plantation Washington and for the purpose of this decision may be described as consisting of four distinguishable areas. In the extreme south there is an area of about 414 acres which did not form part of the original plantation and which is known as the "extra depth." North of the extra depth lies an area of about 163 acres extending as far as the wire fence shown on plan Exhibit H, and known as the southern or back portion of the plantation. North of the wire fence there is an area between that fence and the public road about 200 acres in extent, and north of the public road lies an area between the road and the sea of about 150 acres.

The extra depth accrued to R. B. Butts by prescription and the Court granted him a prescriptive title thereto on 6th March, 1923, subject to the right of grazing by the owner of plantations Washington and Rising Sun.

In June, 1932 R. B. Butts transported to the plaintiff the "southern or back portion" of Hope and also the "extra depth of the said plantation" together with his (Butts') rights of grazing on Washington and Rising Sun.

In 1935 Butts' executor transported to his heirs plantation Hope, save and except the southern or back portion, subject to the right of the proprietor of plantations Washington and Rising Sun of grazing cattle and other stock over the front lands of Hope.

The position then from 1935 onwards was that while the plaintiff's right of grazing on the front lands of Hope was preserved, Butts' right of grazing on Washington and "Rising Sun had been acquired by the plaintiff.

In 1938 the portion of Hope owned by Butts' heirs was sold at an execution sale to the defendant, the advertisement describing the property as being subject to the right of the proprietor of Washington and Rising Sun of grazing cattle and other stock over the front lands of Hope. The transport was passed as advertised. The plaintiff maintains that although when he bought the southern or back portion of Hope his right of grazing over that portion was extinguished by merger, yet he still

retained his right over the remainder, from which it follows that when the transport of 1935 reserved to him the right of grazing over the front lands, the words "front lands" mean and can only refer to the lands in front of the back lands which then belonged to him.

We think this contention is well founded. The plaintiff by virtue of ownership of Washington and Rising Sun was entitled to grazing rights over the whole of Hope. So far as those rights related to the lands south of the wire fence, they had been extinguished by merger when the plaintiff purchased those lands but there was nothing on the registered title at the time of the execution sale to show that the plaintiff had lost his grazing rights over that part of Hope north of the wire fence. A transport which purported to destroy or diminish those rights would not have been passed by the Registrar. It may be assumed therefore that the Registrar, when checking the transport, satisfied himself that the words used preserved plaintiff's rights as set out in the registered title, and that he understood the words "front lands" to refer to all lands north of the wire fence, that is to say, the remainder of Hope which the registered title showed was still subject to the servitude. We think this is the proper and indeed the only reasonable meaning to be attributed to the words "front lands" in the connection in which they were used. To construe them as Mr. Luckhoo has invited us to do would be contrary to the intention of the Deeds Registry Ordinance, (Ch. 177) and that of the parties (assuming they were honest) and would impute to the Registrar a dereliction of duty.

It is however contended by the defendant that although each party had the right of grazing over the other's lands under the transports of 1910, they mutually agreed in 1911 that each should cultivate part of his lands and that grazing rights should not thenceforth be exercised over the parts to be so cultivated. It is alleged that R. B. Butts under that agreement cultivated that portion of Hope between the public road and the wire fence and enclosed it, and that since then the plaintiff has exercised no grazing rights over the enclosed part. As a variant of this Mr. Luckhoo argued that each owner acquiesced in the use by the other of enclosed lands for purposes of cultivation inconsistent with a servitude of grazing and thereby tacitly released such part from the servitude.

There was no documentary evidence to support either of these allegations and the prolonged correspondence which passed between the parties' solicitors contains no indication that any such claims were being made by the defendant. It is significant too that in a mortgage of Hope made in 1924 by R. B. Butts the right of grazing all stock by the proprietors of Washington and Rising Sun is expressly reserved without any restriction or qualification. Moreover, if there had been an abandonment of his grazing rights by the plaintiff, it is difficult to understand why when the plaintiff effected the extinguishment of Butts' rights over Washington and Rising Sun by transport in 1932 the latter was content to execute that deed without obtaining a like surrender from the plaintiff.

The defendant's case then rests upon the oral evidence of

a number of witnesses. The only ones in a position to give evidence as to the alleged agreement were two sons of R. B. Butts, whose testimony on the point was vague and inconsistent. The learned Chief Justice however came to the conclusion that on balance the weight was in favour of the defendant's witnesses as he regarded the position presented by the plaintiff and his witnesses as an incredible one.

Now an Appeal Court pays great deference to the opinion of the trial Judge especially as to the reliance to be placed on the evidence of witnesses, yet it must be reconsider the materials which were before the Judge. The Court must then make up its mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong (*Coghlan v. Cumberland* 1898, 1 Ch. at p. 704).

In the present case we are bound to say that we do not find anything inherently incredible in the plaintiff's version: on the contrary we regard it as a very reasonable one. According to his evidence about the year 1911, R. B. Butts suggested to him that their properties might with advantage be planted with coconuts and he proposed that the cattle should be kept off the plants for three or four years, after which grazing could be resumed in the areas so planted. He (plaintiff) agreed to this and the arrangement was carried out. He stated that it was further mutually agreed that each of the owners should put a certain area under rice and when the crop was reaped each year the cattle could go back. He also stated that a few farmers were allowed to plant provisions after the first few years.

This arrangement, provided there was goodwill on both sides and a certain amount of give and take, seems to us to have been a sensible one and appears to have worked quite satisfactorily on the whole during the lifetime of R. B. Butts, as both the plaintiff and he were on friendly terms. After careful consideration therefore of all the evidence, oral and documentary bearing on the point we have reached the conclusion that the plaintiff's evidence as to the arrangement come to in 1911 should be accepted.

This arrangement in our view amounted to a suspension, not an abandonment, of the plaintiff's grazing rights. As counsel for the defendant put it in the course of his argument, the existence of a servitude of grazing in no way prevents the owner of the servient tenement from utilising his own land for agricultural purposes provided he leaves enough grazing ground for the owner of the dominant tenement. Quite apart therefore from any mutual agreement the cultivation in question was not inconsistent with the continuance of the servitude.

Further, in no case will mere non-user of a right of grazing alone cause extinguishment for the suspension of the exercise of a right is not sufficient to prove an intention to abandon it. There must be other circumstances in the case to raise a presumption of such intention. In the present case there is evidence of suspension of the plaintiff's grazing rights from time to time but in our view there is no evidence to support a finding that he ever abandoned them.

To sum up: we are of opinion that there are no sufficient grounds for holding that the plaintiff has lost his right to graze animals on that part of the lands of plantation Hope owned by the defendant. From the time the defendant acquired this property he seems to have made up his mind to jockey the plaintiff out of his lawful rights and we are inclined to agree with Mr. Humphrys that the defendant's pleas of abandonment and acquiescence were an afterthought.

The appeal must be allowed. The counterclaim is dismissed. We make the declaration claimed by the plaintiff and grant the injunction for which he asks. The defendant must pay the costs both here and in the Court below.

Appeal allowed.

Solicitors: *J. Edward de Freitas; E. A. Luckhoo.* O.B.E

O. A. FERNANDES *v.* A. GUMBS & C. R. NASCIMENTO

OVID ALOYSIUS FERNANDES, Plaintiff,

v.

AURELIA GUMBS and CHARLES RODRIGUES NASCIMENTO, (No. 3), Defendants.

[1943. No. 153.—DEMERARA.]

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

1944. FEBRUARY 14, 15, 18.

Appeal—Stay of execution—Pending determination of appeal to West Indian Court of Appeal—Jurisdiction under rule 18 (1) (c) *of West Indian Court of Appeal Rules,* 1920 *and* 1930 *to grant—Delegated jurisdiction of powers of Court of Appeal itself—Application for such stay—Cannot be made in original proceedings—Must be made in appeal proceedings.*

Practice and procedure—Stay of execution—Pending determination of appeal to West Indian Court of Appeal—Application for—Procedure.

The jurisdiction exercised by the Supreme Court under rule 18 (1) of the West Indian Court of Appeal Rules, 1920 and 1930 to hear an application for a stay of execution pending the determination of an appeal to the Court of Appeal is exercised by the Supreme Court as a delegate of the West Indian Court of Appeal. The powers so exercised are part of the Jurisdiction of the Court of Appeal itself, and they form no part of the jurisdiction of the Supreme Court.

An application for a stay of execution of a judgment or order appealed from, pending the determination of an appeal to the West Indian Court of Appeal, must be brought in the matter of the appeal. It cannot be properly brought in the matter of the original proceedings inasmuch as the Supreme Court as such has no jurisdiction to entertain it. An application so brought was therefore struck out.

Summons by the plaintiff for an order granting a stay of execution of a judgment of the Supreme Court until the hearing and determination of an appeal already filed to the West Indian Court of Appeal.

S. I. Cyrus for the applicant (plaintiff).

S. *L. vanB. Stafford, K.C.,* for the defendants.

Cur. adv. vult.

DUKE, J. (Acting): This is a summons taken out by the plaintiff on the 9th February, 1944 asking for a stay of execution of a judgment of the Court, dated the 15th December, 1943, and entered the 22nd December, 1943, until the hearing and determination of an appeal to the West Indian Court of Appeal, notice of motion whereof was filed on the 2nd February, 1944.

The summons, although taken out subsequent to the filing of the notice of appeal motion, was not intituled in the matter of the West Indian Court of Appeal on appeal thereto from the Supreme Court of British Guiana; it is intituled:

"In the Supreme Court of British Guiana

Civil Jurisdiction

Between: —

"Ovid Aloysius Fernandes, Plaintiff

and

"Aurelia Gumbs, singlewoman appearing by her attorney Richard Gui Sharples, and Charles Rodrigues Nascimento. Defendants."

Counsel for the defendants submitted that the Supreme Court sitting in its ordinary civil jurisdiction had no jurisdiction to grant a stay of execution of a judgment or order pending the hearing and determination of an appeal therefrom to the West Indian Court of Appeal, that such jurisdiction is delegated by the Court of Appeal to the Supreme Court or a Judge thereof by virtue of Rule 18 (1) (c) of the West Indian Court of Appeal Rules, 1920 and 1830; and, further, that an application for a stay of execution on any judgment or order appealed from, pending the determination of an appeal therefrom to the West Indian Court of Appeal must be made in the appeal proceedings and not in the original action. On the other hand, counsel for the plaintiff urged that the Supreme Court, as such, had inherent jurisdiction, as well as jurisdiction under Rule 15 (c) of Order 36 of the Rules of Court, 1900, to hear and determine any such application; and, alternatively, that an application under Rule 18 (1) (c) of the West Indian Court of Appeal Rules, 1920 and 1930, can properly be made in the original proceedings.

Counsel for the plaintiff did not refer me to any authority (and I know of none) for his submission that the Supreme Court, or any judge thereof, has inherent jurisdiction to grant a stay of execution of a judgment or order, until the hearing and determination of an appeal therefrom to the West Indian Court of Appeal.

Rule 15 (c) of Order 36 of the Rules of Court, 1900, (which corresponds with Order 42, rule 17 (b) of the English Rules) is as follows:

> Every person to whom any sum of money or any costs shall be payable under a judgment or order shall be entitled to sue put one or more writs of execution, subject nevertheless as follow…….The Court or a Judge may, at or after the time of giving judgment or of making an order, stay execution until such time as they or he shall think fit.

The English Order 42, rule 17 (b) does not apply to an application for a stay of execution pending the determination of an appeal, and Rule 15 (c) of Order 36 of the Rules of Court, 1900, must be construed accordingly. The same applies to the English Order 42, rule 27 which corresponds with rule 23 of Order 36 of the Rules of Court, 1900.

In England applications for a stay of execution pending the determination of an appeal are dealt with under Order 58, rule 16, which is as follows:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from or any judge thereof, or the Court of Appeal may order

The original Order 43, rule 22 of the Rules of Court, 1900, contained similar provisions.

When the original Order 43 of the Rules of Court, 1900 was enacted, the Court of Appeal in British Guiana was in respect of all appeals from a single judge, the Full Court. The West Indian Court of Appeal was constituted by the West Indian Court of Appeal Act, 1919 (9 & 10 Geo. 5, c. 47). By section 5 (1) (c) of that Act, it was provided that, subject to the provisions of the Act, the judges of the Court, or a majority of them, of whom the president shall be one, may make rules of Court for regulating generally, the practice and procedure of the Court of Appeal or any matters relating thereto. In pursuance thereof, the West Indian Court of Appeal Rules, 1920, were made. Rule 16 was as follows:

> 16. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Supreme Court appealed from, or any judge thereof may order.

The Full Court (referred to as the Appeal Court in the original Order 43 of the Rules of Court, 1900) was abolished by the West Indian Court of Appeal Ordinance, 1921, (No. 2) under which all appeals from a single judge lay to the West Indian Court of Appeal. The Full Court was, however, re-established by the Appeals Regulation Ordinance 1922 (No. 33) for the purpose of hearing the appeals specified therein.

Subject to the provisions of Rule 25 of the West Indian Court of Appeal Rules, the original Order 43 of the Rules of Court, 1900 was repealed, and replaced, by the Rules of the Supreme Court (Appeals), 1924. In those Rules there are no provisions as to applications for a' stay of execution pending the determination of an appeal to the West Indian Court of Appeal: however, with respect to appeals to the Full Court, Rule 19 makes provision as to a stay of execution pending the determination of an appeal to the Full Court, and this rule is in similar terms to those of the English Order 58, rule 16. The Full Court is part of the Supreme Court.

In 1930 the West Indian Court of Appeal amended the Rules of 1920 and the following sub-rule was enacted as Rule 18 (1):

> Subject to any provisions which may be made by the Legislature of any colony, the following applications and matters may be dealt with by a Supreme Court or a Judge thereof in the Colony where the appeal arises:
>
> (a) Applications for giving security for costs to be occasioned by any appeal;
>
> (b) Applications for leave to appeal in *forma pauperis;*
>
> (c) Applications for a stay of execution on any judgment or order appealed from pending the determination of such appeal;
>
> (d) Applications for extension of time.

In England the Court of Appeal and the High Court of Justice are both parts of one Court, namely, the Supreme Court of Judicature, and the rule-making authority in respect of the Court of Appeal is the same as the rule-making authority in respect of the High Court of Justice. Prior to the coming into force of the West

Indian Court of Appeal Act, 1919, the Appeal Court (under the original Order 43 of the Rules of Court, 1900) was part of the Supreme Court, and the rule-making authority for the Appeal Court was the same as the rule-making authority for the Supreme Court sitting in its original jurisdiction.

The West Indian Court of Appeal is an entirely different court from the Supreme Court of British Guiana, and the rule making authority of the West Indian Court of Appeal is not the same as the rule-making authority of the Supreme Court.

An application for a stay of execution pending the determination of an appeal is a proceeding in the appeal (see In re *BRITISH INVESTORS CORPORATION* (1897) W.N. 36, C.A.) and there is no jursidiction, under the Supreme Court of Judicature Ordinance, cap. 10 or under any local rule, in the Supreme Court or in any judge thereof to hear and determine an application for a stay of execution of a judgment or order appealed from, pending the determination of an appeal to the West Indian Court of Appeal. Such jurisdiction is part of the powers of the Court of Appeal itself.

In *BOODHOO* & *TETRY v. MAHAMAD DIN* (1942) L.R.B.G. 74, 75, the Full Court held that an order of a judge of the Supreme Court made under rule 18 (1) (d) of the West Indian Court of Appeal Rules, 1920 and 1930, was not made in the exercise of the civil jurisdiction of the Supreme Court, but was made in the exercise of the jurisdiction of the West Indian Court of Appeal, The judgment of the Court was delivered by VERITY, C.J., and in the course of the judgment, he stated:

> It (that is to say,, the application under rule 18 (1) (d) of the Rules of 1920 and 1930) came before a judge of this Court (that is to say, the Supreme Court), in so far as it came properly before him at all, not by virtue of the jurisdiction conferred upon him by the Supreme Court Ordinance, but by virtue of the rules of the West Indian Court of Appeal 1920, as amended by the Rules of 1930…….The powers, whatever their nature, are conferred by the Court of Appeal upon the Supreme Court or a Judge, but are nevertheless the powers of the Court of Appeal itself, which is authorised by Act of Parliament to make rules "regulating the practice or procedure of the Court of Appeal or any matters relating thereto."

The jurisdiction exercised under Rule 18 (1) of the West Indian Court of Appeal Rules 1920 and 1930 by the Supreme Court or a Judge thereof is exercised as a delegate of the West Indian Court of Appeal. The powers so exercised are part of the jurisdiction of the Court of Appeal itself, and they form no part of the jurisdiction of the Supreme Court in its civil jurisdiction.

An application, therefore, for a stay of execution of a judgment or order appealed from, pending the determination of an appeal to the West Indian Court of Appeal, must be brought in the matter of the appeal. It cannot be properly brought in the matter of the original proceedings inasmuch as the Supreme Court, as such, or a Judge thereof, as such, has no jurisdiction to entertain it.

The application herein is intituled, not in the matter of the appeal which was filed 7 days before the summons herein was filed, but in the matter of the original action.

The summons herein is therefore struck out with costs, and I certify for counsel.

Application struck out.

Solicitors: H. A. Bruton, for plaintiff; *M. S. Fitzpatrick,* for defendant Gumbs*; H. V. vanB. Gunning,* for defendant Nascimento.

THOMAS HOUSTON, Plaintiff,

v.

VlRGIL deFREITAS, Defendant.

[1943. No. 117.—DEMERARA.]

BEFORE DUKE, J., (Acting).

1944. FEBRUARY 21, 22, 23, 24.

Statute of Frauds—Sale of land—Contract of—Unenforceable—Unless signed by person lawfully authorised by party to be charged—Act of agent in signing contract, subsequently ratified—Agent lawfully authorised—Civil Law of British Guiana Ordinance, cap. 7, *section* 3 (D) *proviso* (d).

Principal and agent—Contract signed on behalf of principal— Approved by principal—Ratification.

Sale of land—Contract for—Specific performance—Vendor's suit for—Purchaser financially unable to pay purchase price—Specific performance not decreed.

Damages—Contract for sale of land—Breach by purchaser— Purchase price greater than value of land—Difference—Measure of damages.

Principal and agent—Authority to agent to purchase immovable property—Whether implied power to sign power to sign on behalf of principal memorandum of purchase.

Principal and agent—Power to sign on behalf of principal memorandum of contract of purchase—Power to enter into agreement containing usual terms—Whether included in authority to purchase immovable property.

A person who signs a memorandum of sale "For undisclosed purchaser" is a person "lawfully authorised" under proviso (d) to section 3 (d) of the Civil Law of British Guiana Ordinance, Cap. 7, if his act is subsequently ratified by the person on whose behalf he signed.

McLean v. Dunn (1828) 4 Bingham 728, 729; 130 E.R. 947, 949, per Best, C.J.

The Court will not make a decree of specific performance in favour a vendor where the purchaser is financially unable to pay the purchase price.

Where in a vendor's suit against the purchaser for breach of contract for the sale of immovable property the purchase price exceeded the value of the property, the Court awarded as damages the amount of the excess.

Quaere: Whether an agent who is authorised by his principal to purchase immovable property is authorised to sign, on behalf of his principal, a memorandum of the contract of the purchase.

Thirkell v. Cambi (1919) 2K.B. 590, 595, *North v. Loomes* (1919) 1 Ch. 378, and *Rosenbaum* v. *Bilson* (1900) 2 Ch. 267, 269, 270, considered.

Quaere: Whether an agent who is authorised by his principal to sign a contract, on behalf of his principal, for the purchase of immovable property is authorised to sign a contract containing terms which are usually and properly inserted in such a contract.

Action by the plaintiff Thomas Houston against the defendant Virgil deFreitas for specific performance and damages. The facts and arguments sufficiently appear from the judgment.

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

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

Cur. adv. vult.

DUKE, J. (Acting): The plaintiff Thomas Houston is, and was at all material times, the owner of lots 19 and 20, Queens-town, Georgetown. These lots of land are situate at the corner of Lamaha and Peter Rose Streets, and are on the cool side of those streets. The defendant Virgil de Freitas lives with his parents, his three brothers and his sister, in his mother's house which is situate at the northeastern corner of Middle and Waterloo Streets, Georgetown; this house is on the hot side of those streets. The defendant, who is a grown-up man, preferred to live in a house which was on the cool side of a road. In the month of October, 1942, he approached James Alexander Charles, who is a licensed house or commission agent for the sale of immovable property (described in the evidence as a real estate agent), and asked him to purchase, on behalf of the defendant, lots 19 and 20 Queenstown from the plaintiff. Charles asked the defendant what sum he was prepared to pay, and the defendant replied that Charles must get the plaintiff's price. The defendant told Charles that he must not disclose to the plaintiff that the person on whose behalf he was seeking to purchase the property, was the defendant.

The agent Charles tried on many occasions during October, November and December, 1942 to induce the plaintiff to sell lots 19 and 20 Queenstown, but without success, and Charles so informed the defendant. The plaintiff became ill and he was in hospital in January, 1943. While he was in hospital, the defendant asked his agent Charles to try and induce the plaintiff, while lying there ill, to sell his' property, but Charles refused to comply with this request. After the plaintiff came out of hospital, Charles again approached him. Eventually the agent Charles was informed by the plaintiff that he had decided to sell lots 19 and 20 Queenstown, and that the selling price was $15,000. This information was communicated by Charles to the defendant who said that $15,000 was too high, and instructed Charles to offer $12,000. This offer was not accepted by the plaintiff, and the defendant subsequently instructed his agent Charles to purchase from the plaintiff, on behalf of the defendant, lots 19 and 20 Queenstown, Georgetown, for the sum of $13,000. The defendant handed the sum of $100 to be paid to the plaintiff to bind the bargain, and he told his agent Charles that when he Charles got the plaintiff to sell the property for $13,000 he must pay the plaintiff the sum of $100 as agent for an undisclosed purchaser, and then arrange to pay the plaintiff the sum of $900 on the following day upon

which day his agent Charles would then disclose that the undisclosed purchaser was the defendant Virgil deFreitas.

The plaintiff refused to sell for $13,000. Charles enquired of the defendant whether he would increase his offer to $14,000, thus splitting the difference between $13,000 and $15,000. The defendant refused to vary the instructions which he had given to his agent Charles to purchase lots 19 and 20 Queenstown from the plaintiff for $13,000. The plaintiff told Charles that if he was instrumental in selling a property of his (the plaintiff's) wife at a certain price, he would sell lots 19 and 20 Queenstown to him (Charles) as agent for an undisclosed purchaser, for the sum of $13,000. The substance of the conditional offer by the plaintiff to sell for the sum of $13,000 lots 19 and 20 Queenstown to Charles as agent for an undisclosed purchaser was communicated by Charles to the defendant who requested his agent to do his best to fulfil the condition. Charles did in fact succeed in effecting a sale on the 25th March, 1943, of the property of the plaintiff's wife for the price required by the plaintiff. Thereupon the plaintiff at the same time and on the same day, agreed to sell lots 19 and 20 Queenstown, Georgetown, to Charles as agent for an undisclosed purchaser, for the sum of $13,000 and Charles as agent for an undisclosed purchaser agreed to purchase lots 19 and 20 Queenstown, Georgetown, from the plaintiff for the sum of $13,000. The agent Charles did not disclose to the plaintiff the identity of his principal.

In accordance with the mandate which he had received from the defendant, the agent Charles paid to the plaintiff the sum of $100, and promised to pay a further sum of $900 on the following day, that is to say, on the 26th March, 1943.

During the trial of this action it has been suggested that the mother of the defendant was the undisclosed principal, but, after considering all the evidence, I am satisfied that the defendant was the undisclosed principal of the agent Charles, and further, that when Charles accepted the offer of the plaintiff to sell lots 19 and 20, Queenstown, for $13,000, he did so as agent for the defendant Virgil deFreitas and not as agent for any principal whom the defendant may have had.

Counsel for the defendant has urged that there is implicit in the evidence the inference that the agent Charles was not authorised to purchase lots 19 and 20, Queenstown, from the plaintiff, but that he was only authorised to obtain, on payment of the consideration of $100, an option to purchase the plaintiff's property situate at lots 19 and 20, Queenstown. I am, however, satisfied that the word "option" was never used by the agent Charles to the defendant, and that it was not used by the defendant to his agent Charles until after the defendant's mother and sister had expressed, subsequent to the 25th March, 1943, their unwillingness to live in the house situated on lots 19 and 20, Queenstown. I am further satisfied that the defendant Virgil deFreitas did in fact authorise his agent Charles to purchase lots 19 and 20, Queenstown, Georgetown, from the plaintiff for the sum of $13,000.

On the 25th March, 1943, a memorandum of agreement for the sale by the plaintiff for the sum of $13,000 to James Alexander Charles as agent for an undisclosed purchaser, of lots 19 and 20, Queenstown, Georgetown, was signed by the agent Charles as such, and by the plaintiff. The memorandum was as follows:

> Georgetown, Demerara,
> 25th March, 1943.
>
> $100.00
>
> Received from JAMES ALEXANDER CHARLES as agent for an undisclosed purchaser the sum of one hundred dollars ($100.00) oh account of the sum of thirteen thousand dollars ($13,000.00) the purchase price of "lots numbers 19 and 20 (nineteen and twenty), Lamaha Street, Queenstown, in the city of Georgetown, with all the buildings and erections thereon." The Purchaser agrees to pay to the Vendor a further sum of nine hundred dollars ($900.00) on the 26th day of March, 1943. The balance of the purchase money to be paid on the passing of the transport. All expenses of and incidental to the passing of the transport to be equally divided between the Vendor and the Purchaser. Possession on the passing of the transport. The Vendor to pay the whole of the accumulated Arrears or Funded debt (if any) up to the date of passing of transport. The Vendor to also pay all unpaid taxes and rates on the property hereby sold up to the time of passing transport. The Vendor to receive all the rents of the property sold up to the date of passing of transport. Transport to be advertised forthwith and to be accepted by the Purchaser within one month from this date.
>
> (Sgd.) THOS. HOUSTON,
> I agree to the above
> (Sgd.) J. A. CHARLES,
> For Undisclosed Purchaser.
> 24 cents Stamp cancelled.
>
> Witnesses:
> 1. W. YENKANA
> 2. ADA HOUSTON.

Counsel for the defendant has urged that all terms in the memorandum subsequent to the term that the balance of the purchase money was to be paid on the passing of the transport were inserted without the express authority of the defendant. While this is true, it is also true that all the terms objected to are terms that are usually and properly inserted in a well-drawn memorandum for the sale of immovable property in the city of Georgetown. Further, it is difficult to appreciate why the defendant should object to terms which were inserted in the interest of the defendant, and which transferred to the plaintiff obligations which would otherwise devolve on the defendant. The only terms which were inserted for the protection of the vendor plaintiff were:

(1) The Vendor to receive all the rents of the property hereby sold up to the date of passing of transport:
(2) Possession on the passing of the transport and
(3) Transport to be advertised forthwith and to be accepted

by the purchaser within one month from the 25th March, 1943.

It is, however, unnecessary for me to express an opinion as to whether the agent Charles had implied authority (as submitted by counsel for the plaintiff) to include in the memorandum the terms to which objection has been taken by counsel by the defendant, as there is a perfectly good memorandum even if all those terms are excised from the memorandum.

As soon as the memorandum had been executed by Charles acting as agent for an undisclosed purchaser (the defendant) and by the plaintiff, the agent Charles repaired to the business place of the defendant and he showed him the memorandum duly signed. The defendant did not in any way object to, or express disapproval of, the words "I agree to the above……For undisclosed purchaser" appearing in the memorandum, or of his agent Charles signing the memorandum as such. On the other hand, he was pleased with what had been done, he expressed his approval and he told his agent Charles "To-morrow, you will put the receipt in my name," at the same time handing back the memorandum to his agent Charles to keep.

The sum of $900 was to be paid to the plaintiff on the 26th March, 1943. On that day the agent Charles went to the defendant for the money, and the defendant told him that he was getting the money by borrowing on his life insurance policy with the Barbados Mutual Life Assurance Society. In his evidence Charles stated that such a loan could be obtained within 24 hours, from the Society's representative in this Colony. The defendant did not pay the $900 to the agent Charles on the day after the agreement. The plaintiff spoke to Charles who promised to take it to him. The defendant told his agent Charles that he had applied to the Hand-in-Hand Fire Insurance Co., Ltd., for a mortgage on lots 19 and 20, Queenstown: the evidence, however, showed that the application was made in the name of the defendant's mother and was withdrawn and handed back to the person who had presented it, within 24 hours after it had reached the office of the insurance company.

The 26th March, 1943, was the day which had been appointed by the defendant when his agent Charles would reveal to the plaintiff that the undisclosed purchaser for whom Charles had been acting was the defendant. On the following day the agent Charles did not obtain from the defendant the sum of $900 to pay the plaintiff, and as the plaintiff was enquiring about the non-payment, Charles revealed to the plaintiff that the undisclosed principal for whom he had been acting, was the defendant. He did so, primarily to satisfy the plaintiff that he need not be afraid that the money would not be paid.

The defendant did not pay to the plaintiff, directly or indirectly, the sum of $900. He was unable to persuade his mother and sister that the plaintiff's house on lots 19 and 20, Queenstown, was large enough to accommodate the plaintiff's parents, his three grown-up brothers, his grown-up sister and himself. The defendant did not, and does not, propose to live in the house unless the other members of his family also reside in it, and he pur-

chased it for the purpose of residing in it. On the 9th April, 1943, the solicitor for the plaintiff wrote the defendant a letter calling upon him to pay the said sum of $900, and to take steps to have transport of lots 19 and 20 Queenstown advertised by the plaintiff in his favour forthwith. The defendant says that he may have thrown the letter in his waste paper basket. The Writ in this action was filed on the 22nd April, 1943.

The plaintiff claims the following relief from the defendant:

(1) specific performance of the agreement made on the 25th March, 1943, for the sale by the plaintiff to the defendant of lots 19 and 20, Lamaha Street, Queenstown, with all the buildings and erections thereon:
(2) alternatively, the sum of $5,000 as damages for breach of the said agreement:
(3) such other relief as seems just: and
(4) costs.

In paragraph 4 of his defence the defendant has pleaded that the provisions of section 3 proviso (d) of the Civil Law of British Guiana Ordinance, Chapter 7, have not been complied with and the plaintiff is thereby not entitled to maintain this action against him. The proviso referred to, so far as is material to this case, is as follows:

> No action shall be brought whereby to charge anyone upon any contract or agreement for 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 agent Charles signed the memorandum as agent for an undisclosed principal. In *HALL v. FORDE et al* (1927) L.R.B.G. 80, 81, DOUGLASS, J. held that an unnamed principal cannot be sued on a contract to which the provisions of that proviso apply where he is not sufficiently described in the memorandum, except in a case where by the memorandum the agent is himself liable on the contract, that is to say, by virtue of being agent of an undisclosed principal. Consequently, the undisclosed principal, in this case the defendant Virgil de Freitas would be liable on the contract if his agent Charles was lawfully authorised by him to sign the memorandum.

In *MacLEAN v. DUNN* (1828) 4 Bingham 722, 729: 130 E.R. 947, 949, BEST, C.J. said:

> The subsequent sanction of a contract signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given before hand.

In the acts and conduct of the defendant on the 25th March, 1943, when the agent Charles took to him the memorandum of the 25th March, 1943 signed by Charles as agent for an undisclosed purchaser and by the plaintiff, there is evidence upon which a jury may properly find that the terms of the memorandum were then approved by the defendant, and that the act of the agent Charles in signing the memorandum on behalf of the defendant was ratified and confirmed by the defendant; and, sitting as a jury, I find that the terms of the memorandum were ratified and confirmed by the defendant, and that he ratified and

confirmed the act of the agent Charles in signing the same on his behalf.

Counsel for the defendant referred to *THIRKELL v. CAMBI* (1919) 2 K.B., 590, 595, and to *NORTH v. LOOMES* (1919) 1 Ch. 378, and submitted that the defendant's authority to Charles to purchase from the plaintiff lots 19 and 20 Queenstown on his behalf for the sum of $13,000 did not include an authority to sign on behalf of the defendant a memorandum of the contract of purchase. In reply, thereto,, Counsel for the plaintiff cited *ROSENBAUM v. BELSON* (1900) 2. Ch. 267, 269, 270 in which BUCKLEY, J. held that "a sale prima *facie* means a sale effectual in point of law, including the execution of a contract where the law requires a contract in writing," and that an authority to sell must be construed accordingly. Counsel for the plaintiff submitted that "a purchase *prima facie* means a purchase effectual in point of law, including the execution of a contract where the law requires a contract in writing," and that an authority to purchase must be construed accordingly. In view, however, of my finding as to ratification, it is not necessary for me to express any opinion as to which submission is correct.

The plaintiff treated the contract of the 25th May, 1943, as subsisting and claimed a decree of specific performance. He is entitled to the decree, but as counsel for the defendant has informed the Court that his client is financially unable to pay $13,000 for the purchase from the plaintiff of lots 19 and 20 Queenstown, it would be useless for the Court to make such a decree.

The contract has been broken by the defendant, and the plaintiff is entitled to recover damages therefor from the defendant. Charles, who has had experience of immovable property in the city of Georgetown, has deposed that the present market-able value of lots 19 and 20 Queenstown is $10,000 or $10,500. There has been a considerable amount of speculation in immovable property in the city of Georgetown during the past 3 or 4 years, resulting in an inflation of values. Mr. James Slater, the Secretary of the Hand-in-Hand Fire Insurance Co., Ltd., pays no regard to the excess in values caused by inflation, and he deposed that in his opinion lots 19 and 20 Queenstown are of the value of $7,000 to $8,000. The defendant deposed that in March, 1943, lots 19 and 20 Queenstown, as an investment, were not worth more than $7,000 to $8,000; that he only agreed to pay $13,000 as he had intended to reside in the house; and that the property was not worth more than $8,000 to $10,000 to-day. Upon this evidence I find that the present value (whether speculative or otherwise) of lots 19 and 20 Queenstown, does not exceed the sum of $10,500. The defendant had agreed to purchase the property from the plaintiff for $13,000. By reason of the defendant's breach of contract in failing to complete his purchase, the plaintiff is left with the property which is now valued at least $2,500 less than the price which the defendant had agreed to pay for it.

There will therefore be judgment for the plaintiff against the defendant for the sum of $2,500 and costs.

Judgment for plaintiff.

Solicitors: *V. C. Dias; J. Edward de Freitas.*

ATTORNEY GENERAL *v.* s.s. "J L. RICHARDS" (No. 1)

ATTORNEY-GENERAL, Plaintiff,

v.

STEAMSHIP "JAMES L. RICHARDS" (No. 1), Defendant

[1942. No. 401A.—DEMERARA.]

BEFORE DUKE, J., (Acting).

1944. JANUARY 3, 17; FEBRUARY 7, 14, 21, 28, 29.

Admiralty—Action—Joinder of parties—Procedure as to—That of Admiralty Division of High Court of Justice—Same as in ordinary civil jurisdiction of Supreme Court—Rules of Court, 1900, *Order* 14, *rule* 13*—Vice-Admiralty Courts Rules,* 1883, *rule* 207.

Admiralty—Action—Collision by one ship with a wharf—Two ships at fault—Right of owner of wharf—To proceed against both ships or either ship—Both ships proceeded against—Damages not apportionable—Right of owner of wharf—To recover damages against either ship.

The plaintiff claimed damages from ship A for a collision by ship A with a stationary wharf owned by the plaintiff. Ship A made an application for an order that ship B do come in as a defendant to the action. Ship B was not within the jurisdiction of the Court when the motion was made or heard. The plaintiff claimed no relief against ship B, he only claimed relief against ship A, and he objected to being compelled to add as defendant a ship against which he was making no claim. Ship A alleged that ship B did not allow sufficient room to ship A to pass between the plaintiff's wharf and ship B, and that in order to avoid running into ship B which was full of explosives, ship A ran into the plaintiff's wharf.

Held that an order would not be made under rule 24 of the Vice-Admiralty Courts Rules, 1883 or under rule 13 of Order 14 of the Rules of Court, 1900, against the wishes of the plaintiff.

Hood-Barrs v. *Frampton* & *Co.* (1924) W.N. 287, *MacArthur v. Hood* & *Miller* (1885) 1 Cababe & Ellis 551, and *Chalmers* v. *Guthrie* (1923) 156 Law Times Journal 382, applied.

per curiam: If the steamship "City of St. Louis" was a defendant to this action, neither steamship (if both ships were at fault) would be entitled to claim, as against the plaintiff, that the damage suffered by him should be apportioned between the two ships and should be recovered against them accordingly; it would be open to the plaintiff, in his discretion, to recover the whole of the damages from the steamship "City of St. Louis" or from the steamship "James L. Richards".

Motion by the defendant for an order that the steamship "City of St. Louis" do come in as defendant in the action. The motion was made under rules 24, 25, 26 and 207 of the Vice-Admiralty Courts Rules, 1883 and rule 13 of Order 14 of the Rules of Court, 1900.

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

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

DUKE, J. (Acting): This is a motion in Court by the *defen-*

Cur, adv. vult.

dant the Steamship "James L. Richards" for an order that the Steamship "City of St. Louis" do come in as defendant in the action brought by His Majesty Attorney-General for the Colony of British Guiana claiming the sum of $6,000 as damages against — the Steamship "James L. Richards" for damage occasioned by the said steamship colliding on the 8th December, 1942, in the port of Georgetown with a wharf the property of the inhabitants of the Colony of British Guiana.

It appears from the affidavit filed in support of the notice ' of motion that the defendant alleges that the collision the subject matter of this action was caused by the improper lighting and navigation of the Steamship "City of St. Louis"; that the Steamship "City of Louis" sailed from the Colony shortly after the collision and her present whereabouts are unknown; and that WATERMAN STEAMSHIP AGENCY LIMITED of 19, Rector Street, New York, United States of America are the general agents of the Steamship "City of St. Louis" and that SPROSTONS LIMITED acted as local agents of that ship.

The motion is made under rule 24 of the Vice-Admiraltv Courts Rules, 1883. Rules 24, 25, 26 and 207 are as follows:

> 24. The judge may order any person who is interested in the action, though not named in the Writ of Summons, to come in either as plaintiff or as defendant.
>
> 25. For the purposes of the last preceding rule an underwriter or insurer shall be deemed to be a person interested in the action.
>
> 26. The judge may order upon what terms any person shall come in, and what notices and documents, if any, shall be given to and served upon him, and may give such further directions in the matter as to him shall seem fit.
>
> 207. In all cases not provided for by these Rules the practice of the Admiralty Division of the High Court of Justice of England shall be followed.

The practice of the Admiralty Division of the High Court of Justice with respect to applications for the joinder of parties is the same as the practice of the Supreme Court, sitting in the exercise of its ordinary civil jurisdiction, in relation to similar applications.. The defendant's application can therefore be treated as having been made, not only under rule 24 of the Vice-Admiralty Courts Rules, 1883, but also under rule 13 of Order 14 of the Rules of Court, 1900, which rule corresponds with Order 16 rule 11 of the English Rules of the Supreme Court.

Counsel for the defendant has informed the Court that the defendant ship was going out of port, that the steamship "City of St. Louis" was coming into port, that the latter ship did not allow the defendant ship sufficient room to pass between the "City of St. Louis" and the plaintiff's wharf, that the latter ship was full of explosives, and that, in order to avoid running into that ship, the defendant ship ran into the wharf. He stated that the defendant ship would be entitled to bring an action against the steamship "City of St. Louis" to recover damages, if any, awarded in this action against the defendant, that the object of this application was to avoid multiplicity of suits, and that in the general interest of all parties opportunity should be taken to

have all persons who may possibly be liable to the plaintiff, before the Court. Counsel suggested that if service could not be affected upon the steamship "City of St. Louis" within three of four months, the action should then proceed to hearing in its present form. He explained that the delay in making the application was due to war conditions, both ships being in the service of the Allied Nations.

Counsel for the plaintiff did not consent to the application, he objected to the joinder, and he submitted, firstly, that such an order should not be made against the will of the plaintiff who was claiming no relief against the steamship "City of St. Louis"; secondly, that to compel the plaintiff to join the steamship "City of St. Louis" as a defendant would cause great inconvenience to the plaintiff; thirdly, that if the defendant ship and the steamship "City of St. Louis" were both guilty ships with respect to the damage to the wharf, it was open to the plaintiff, in his discretion, to sue one or other of the guilty ships; and fourthly, that service could not be effected upon the steamship "City of St. Louis".

In reply, counsel for the defendant stated that the plaintiff would find himself in a dilemma if the Court were to find the defendant ship not liable, and if the steamship "City of St. Louis" were not a defendant to this action. He admitted that the question of service, upon the steamship "City of St. Louis" would be a difficult one as that ship might never return to the Colony, but he submitted that if such service can possibly be effected within a reasonable time, the Writ of Summons should be served upon the steamship "City of St. Louis".

The steamship "City of St. Louis" is not within the jurisdiction of this Court, and it can only be served with the Writ if and while it is within the jurisdiction. The plaintiff is the owner of a stationary wharf which has been damaged by reason of a collision between the wharf and the moving steamship "James L. Richards", and he has sued that ship, and he claims no relief against the steamship "City of St. Louis", he is prepared to stand or fall according as to whether he satisfies or does not satisfy the Court that that ship is liable in law for the damage done to the wharf. If, at the trial of this action, the Court is not satisfied that liability in the defendant ship "James L. Richards,, has been established, the Court will give judgment for the defendant. The plaintiff's action is not based on a joint contract, it is founded upon tort. If the steamship "City of St. Louis,, was a defendant to this action, neither steamship (if both ships were at fault) would be entitled to claim, as against the plaintiff, that the damage suffered by him should be apportioned between the two ships and should be recovered against them accordingly; it would be open to the plaintiff, in his discretion, to recover the whole of the damages from the steamship "City of St. Louis", or from the steamship "James L. Richards": see *SALMOND,* Law of Torts, 8th Edition, page 491.

In *HOOD-BARRS v. FRAMPTON & CO.,* (1924) W.N. 287, the Court refused to make an order adding, against the wishes of the plaintiff, as a defendant a person against whom the plain-

tiff was seeking no relief. It is not the policy of the English Law, for the Courts to compel a plaintiff to add as a defendant a person who was out of the jurisdiction: see *MAC ARTHUR v. HOOD* & *MILLER* (1885) 1 Cababe & Ellis 551. In *CHALMERS v. GUTHRIE* (1923) 156 Law Times Journal 382, it was held that where the liability is a joint and several one, the plaintiff will not be compelled to add defendants, but the defendant will be left to his remedy (if any) under the third party procedure.

In this case, the plaintiff claims no relief against the steamship "City of St. Louis." That ship is not within the jurisdiction of this Court. If the defendant ship and the steamship "City of St. Louis" are both at fault, it is open to the plaintiff, in his discretion, to sue either, or both, of the two ships. It is suggested by counsel for the defendant' ship that that ship will be able to recover from the steamship "City of St. Louis" any damages which the plaintiff may recover against the defendant ship: if this is so, the plaintiff is not in any way concerned with that issue.

In these circumstances the defendant's motion must be refused with costs.

Motion refused

Solicitors: *J. Edward de Freitas*, for applicant; V. C. *Dias*,

Acting Crown Solicitor, for respondent (plaintiff).

RAMSAYWACK, Appellant (Defendant),

v.

PRUDENCE MURRAY, Respondent (Plaintiff).

[1944. No. 1—DEMERARA.]

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

1944. MARCH 3.

Detinue—Delivery of goods or their value—Judgment for—Where goods pledged by plaintiff with defendant—Provision to be included in judgment—That on payment of amount of pledge delivery of goods or their value to be made.

Where judgment is given for the plaintiff in an action for detinue of goods pledged with the defendant, the order should contain a provision that delivery of the goods or payment of their value is to be made upon payment of the amount of the pledge.

Appeal by the defendant from a decision of the Magistrate of the Essequibo Judicial District in an action for detinue.

A. J. Parkes, for appellant.

C. L. Luckhoo, of respondent.

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

RAMSAWACK *v.* P. MURRAY

This is an appeal from a judgment of the Magistrate of the Essequibo Judicial District by which he ordered delivery to the respondent of certain articles wrongfully detained by the appellant.

It appears from the findings of the learned Magistrate that the respondent's husband pledged with the appellant certain jewellery in security for a loan of $20, that the respondent tendered that sum and asked for the return of the jewellery but that the appellant stated that it had been stolen and asked for time. The learned Magistrate further found that if stolen the loss was occasioned by the negligence of, the appellant and that he was liable. Holding also that the respondent had made tender of the amount loaned he ordered delivery of the jewellery or payment of the value thereof which he assessed at $88.

We are satisfied that the evidence supports the findings of the learned Magistrate as to both negligence and tender and that he was right in his conclusion that the order for delivery or payment should be made, but in the particular circumstances of this case we are of the opinion that repayment to the appellant of the sum loaned should be made by the respondent who has continuously averred her willingness so to do.

The appeal is dismissed with costs but the order will be varied by the addition thereto of the words "upon payment to the "defendant by the plaintiff of the sum of Twenty dollars the "amount of the loan in respect of which the said articles were "held in pledge."

Appeal dismissed; order varied.

GHANSIAN, Appellant (Defendant),

v.

JOSEPH LAWRENCE, P.C. No. 4050, Respondent (Complainant).

[1944. No. 3—DEMERARA.]

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

1944. FEBRUARY 25; MARCH 3.

Chose in action—Huckster's licence—Nature of—Not a chose in action—Hucksters Licensing and Control Ordinance, 1936 *(No.* 28), s.3 *(a).*

Criminal law and procedure—Larceny at common law—Subject of—Huckster's licence—Chattel—Hucksters licensing and Control Ordinance, 1936 (*No.* 28), s.3 (a).

Criminal law and procedure—Larceny—Intent to deprive owner permanently of his property—Evidence.

Appeal—Question of fact—Conclusion of magistrate—Based partly upon evidence not given—No certainty that magistrate would have arrived at the same conclusion if he had not believed that the evidence was in fact given—Decision of magistrate set *aside.*

A huckster's licence issued under section 3 (a) of the Hucksters Licensing and Control Ordinance, 1936 (No. 28) is not a chose in action:

it confers no right in respect of, or to take possession of, movable or immovable property.

A huckster's licence is a chattel and is the subject of larceny at common law.

R. v. Boulton (1849) 1 Den.C.C.508, and *R.* v. *Chapman* (1910) 4 Cr.App. R.276,280 applied.

On a charge of larceny, it must be proved that the defendant had the intention permanently to deprive the owner of the article alleged to be stolen.

R. v. GUERNSEY (1858) 1 F.&F.394, applied.

Where a conclusion of a magistrate was based partly upon evidence which was not given, and there was no certainty that he would have arrived at the same conclusion if he had not believed that such evidence was in fact given, the decision of the magistrate was set aside.

Appeal by defendant from a decision of the Magistrate of the Berbice Judicial District.

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

A. C. Brazao, Crown Counsel, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Duke, J. (Acting) as follows: —

This is an appeal by GHANSIAN from a decision of the Magistrate of the Berbice Judicial District convicting him of stealing one huckster's licence No. 769 value $4, the property of SAHADEO PERSAUD, contrary to section 70 of the Summary Jurisdiction (Offences) Ordinance, cap. 13. The licence was issued to SAHADEO PERSAUD on the 30th June, 1943, under the Huckster's Ordinance, 1936. It granted permission to him, until the 31st December, 1943, to act as a huckster under section 3 (a) of the Ordinance, and it acknowledged that the sum of $4 was paid for the Licence. This licence was the property of SAHADEO PERSAUD, and it was in his possession up to the 27th November, 1943.

Counsel for the appellant submitted that the document in question was not the subject of larceny at common law because, *firstly*, it is not a chattel, and so does not come within the meaning of personal goods which are the only articles which are capable of being the subject of larceny at common law, and *secondly*, the document came within the class of documents like bills and notes which are chosen in action, and, as such, are excluded from the definition of personal goods.

A huckster's licence is not a chose in action: it confers no right in respect of, or to recover possession of, or to take possession of, movable or immovable property. In *R.* v. *CHAPMAN* (1910) 4 Cr. App. R. 276, 280, the Court of Criminal Appeal, following an earlier decision of the Court for Crown Cases' Reserved in *R.* v. *BOULTON* (1849) I Den. C.C. 508, held that a railway ticket, which is evidence of a contract that some one should be allowed to travel, is a chattel, and therefore the subject of larceny at

common law. On the authority of this case, we hold that a huckster's licence which merely acknowledges payment of the revenue fee prescribed therefor, and grants permission to the licensee to act as a huckster until the end of the year in which the licence is issued, is a chattel, and the subject of larceny at common law.

Counsel for the appellant has further submitted that there was an absence of any *animus furandi* in the acts and conduct of the appellant in his dealings with the licence. In *R.* v. GUERNSEY (1858) 1 F. & F. 394, the accused, in the temporary absence of the Librarian of the Colonial Office from the library, abstracted one of a number of copies of a secret and confidential despatch which were under a book on the librarian's table. The accused sent the copy to a newspaper which published it. He was charged with larceny of the copy of the despatch. In the course of his summing-up, MARTIN, B. directed the jury that they would have to determine whether the accused at the time he took the document away from the Colonial Office intended to deprive the Colonial Office of all property in the despatch, and to convert it to his own use; and the accused was acquitted.

The learned magistrate found that on the 27th November, 1943, SAHADEO PERSAUD had his huckster's licence with him; that the appellant went to the house of SAHADEO PERSAUD on that day, and that they together consumed some alcohol; that SAHADEO PERSAUD became intoxicated, and that when he recovered, his licence was gone; and that on the 5th December, 1943, the licence was found in the possession of the appellant. The appellant's explanation of his possession of the licence was that on the 27th October, 1943, SAHADEO PERSAUD sold two pieces of cloth to him; handed him his huckster's licence, and told him to use it; that on the 4th December, 1943, he was held up by the Police for selling cloth on which the price was not marked; and that he produced to the Police the huckster's licence which had been handed to him by SAHADEO PERSAUD. The learned magistrate did not accept the appellant's explanation. In his reasons for decision, he said: "The appellant admitted that he was a huckster." The record of appeal (and we are bound by the record) does not disclose that there was any such admission. We accept the magistrate's finding of fact that the licence was removed from the possession of SAHADEO PERSAUD without his knowledge or authority, but the appellant would, nevertheless, not be guilty of larceny unless he had the intention permanently to deprive SAHADEO PERSAUD of the licence. The learned Magistrate convicted the appellant, but, in doing so, he was influenced by the belief that the appellant had admitted that he was a huckster. We are unable to say that the magistrate must necessarily have arrived at the same decision, if he had not believed that the appellant had made the admission that he was a huckster, and inferred therefrom that he intended to carry on business as such indefinitely. He may very well have taken the view that the appellant did not intend to deprive SAHADEO PERSAUD permanently of the licence.

In these circumstances, the appeal must be allowed with costs, and the conviction and sentence set aside.

Appeal allowed.

ALBERT FERNANDES, Plaintiff,

v.

DE FREITAS, Ltd., Defendants.

[1943. No. 23.—DEMERARA.]

BEFORE DUKE, J, (Acting).

1944. JANUARY 10, 17.

Practice and procedure—Interrogatories—Affidavit in answer-Objected to as insufficient—Rules of Court, 1900, *Order* 27, *rules* 11 *and* 12*—To be read together—Orders which be made on' application under rule* 11*—Specified in rule* 12.

Practice and procedure—Interrogatories—Person interrogated omits to answers or answers insufficiently—Application by person interrogating—For an order requiring him to answer or to answer further—When to be made—Within four days of the filing of the affidavit in answer-Rules of the Court, 1900, *Order* 27, *rules* 11 *and* 12.

Rules 10 and. 11 of Order 27 of the Rules Court, 1900, must be read together as one rule. Rule 10 provides that the method of objecting to the sufficiency of an affidavit in answer to interrogatories shall not be by way of exception, but must be by way of summons in the

action: and rule 11 specifies the orders which may be made on the hearing of the application.

An application under rule 11 of Order 27 of the Rules of Court, 1900, must be filed within four days after the filing of the affidavit in answer to interrogatories.

PRELIMINARY OBJECTION to summons by the plaintiff that defendants file a further affidavit fully and sufficiently answering certain interrogatories.

J. A. Luckhoo, K.C., for plaintiff (applicant).

H. C. Humphrys, K.C., for defendants, in support of the preliminary objection.

Cur. adv. vult.

DUKE, J. (Acting): On the 6th September, 1943, the plaintiff obtained an order, *ex parte,* from a judge in Chambers giving him leave to deliver to the defendants certain interrogatories for answer within 21 days after delivery or within such further time as may be agreed upon between the parties to this action. The interrogatories were delivered to the defendants on the 15th September, 1943, and the defendants filed their answer thereto on the 6th October, 1943, that is to say, within 21 days after delivery of the interrogatories.

On the 19th November, 1943, the plaintiff filed an application, by way of summons, for an order that the defendants do within 10 days make and file a further affidavit fully and sufficiently answering certain of the interrogatories which were delivered to them.

Rules 10 and 11 of Order 27 of the Rules of Court, 1900, are as follows:—

> 10. No exception shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or Judge, on an application made for that purpose, within four days after the filing of the affidavit.
>
> 11. If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer further, either by affidavit or by *viva voce* examination, as the Court or Judge may direct.

Since the coming into force of the Rules of Court, 1932, the application referred to in rules 10 and 11 is made by way of summons: see rule 1 (12) or Order XL (C).

Counsel for the defendants has submitted that the application herein should be struck out, because it was not made within four days after the defendant's answer was filed: while Counsel for the plaintiff has submitted that rule 11 of Order 27 imposes no time limit on the bringing of applications thereunder, and that the plaintiff's application is brought under that rule, and not under the rule 10 which imposes a time limit.

Under the old Chancery practice the method of objecting to the sufficiency of an affidavit in answer to interrogatories was

by way of exceptions: see Kerr, Law of Discovery, 1870, pages 49, 50 and Sichel & Chance, Law of Discovery, 1883, page 121.

Rules 10 and 11 of Order 27 of the Rules of Court 1900 correspond with rules 9 and 10 of Order 31 in the first Schedule to the Judicature Act 1875 (38 & 39 Vict. c. 77). They also correspond with rules 10 and 11 of Order 31 of the English Rules of the Supreme Court, 1883. The only material difference is that in the English rules there is no time limit for the making of an application under one or other of the respective Rules.

Rule 9 of Order 31 in the Schedule to the Judicature Act, 1875, abolished the procedure by way of exceptions and substituted therefor a new procedure whereby the sufficiency or otherwise of an affidavit in answer to interrogatories was determined on motion or summons. Rule 10 provided that if any person interrogated omits to answer, or answers insufficiently,the party interrogating may apply to the Court or Judge for an order requiring him to answer, or to answer further, as the case may be; and an order may be made requiring him to answer or answer further either by affidavit or by *viva voce* examination, as the judge may direct. The party interrogated may omit to answer and yet his answer may be sufficient, as he may be justified in declining or refusing to answer. Where the party interrogating objects to the affidavit in answer as being insufficient, he can allege either that the party interrogated has omitted to answer, or has answered insufficiently. Rules 9 and 10 deal with the same subject matter. Rule 9 prescribes the new form of procedure, and rule 10 enacts what orders may be made on the hearing of the application.

Similarly, rule 10 of Order 27 of the Rules of Court, 1900, as amended by the Rules of Court, 1932, prescribes that the method of objecting to the sufficiency of an affidavit in answer to interrogatories shall not be by way of exception, but must be by way of summons in the action: and rule 11 enacts what orders may be made on the hearing of the application made my way of summons.

Rule 10 of Order 31 of the present English Rules has been repealed by the Rules of the Supreme Court (Revision) 1917; see Weekly Notes, 1917, pages 99, 183. It was no longer necessary. The procedure for making an application is sufficiently provided for by other rules, and the subject matter of rule 10 is the same as the subject matter of rule 11. The procedure by way of exception was abolished 42 years before 1917, by the Judicature Act, 1875, and it was not necessary therefore, in 1917, to keep rule 10 alive merely to provide that "No exception shall be taken to any affidavit in answer."

Rules 10 and 11 of Order 27 of the Rules of Court, 1900, must be read together as one rule. The application referred to in rule 10, which must be made within four days after the filing of the affidavit in answer, is one and the same as the application which is more particularly described in rule 11. It therefore follows that an application under rule 11 must be filed within four days after the filing of the affidavit in answer.

This application was filed 44 days after the filing of that affidavit. The preliminary objection therefore, succeeds, and the plaintiff's application filed herein on the 19th November, 1943, must therefore be struck out with costs and I certify for counsel!

Under the authority of rule 4 of Order 45 of the Rules of Court, 1900, 1 enlarge the time appointed by rule 10 of Order 27 of those Rules for making an application under rule 11 of Order 27, to fourteen days from the date of this order.

Preliminary objection allowed.

Solicitors. Carlos Gomes, for the applicant.

J. Edward de Freitas, for the respondent.

P. L. PESTANO *v.* C. A. PESTANO

PATRICIA LUCILLE PESTANO, Petitioner,

v.

CARL ANDREWS PESTANO, Respondent.

[1943. No. 29.—DEMERARA.]

BEFORE DUKE, J. (Acting).

1943. DECEMBER 20; 1944. JANUARY 10, 17; FEBRUARY 7, 14, 29; MARCH 6.

Husband and wife—Dissolution of marriage—Permanent maintenance of wife—Application for—Leave of Court not required—Where application made after decree nisi and before decree absolute—Matrimonial Causes Ordinance, cap. 143, s.14; *Rules of Court (Matrimonial Causes),* 1921, *rule* 43 (1), (2).

Husband and wife—Permanent maintenance of wife—Application therefor under Matrimonial Causes Ordinance, cap. 143, s.14 (1)*—Benefit taken by wife—For her life (not merely joint lives)—Free from fluctuation of husband's income—Order under subsection—For security only—Where husband possesses no property which can be separated from his other property and be specifically charged with payment of maintenance —No order can be made.*

Husband and wife—Permanent maintenance—Application therefor—For payment of monthly or weekly sum—Financial position of wife—-Not worse than her pre-marital financial position—Husband and wife only lived together for 61/2 months—Wife entirely self-supporting— Earnings of *wife greater than those* of *husband—No order made—Matrimonial Causes Ordinance, cap* 143, s.14 (2).

Infants—Maintenance and education of—Dissolution of marriage— Interim orders—Provision in final decree—Matrimonial Causes Ordinance, cap. 143,s.19.

Infants—Custody of—Dissolution of marriage—Matrimonial Causes Ordinance, cap. 143, s. 19.

Infants—Custody of—Children in custody of mother—Not being maintained by father—Not a ground for his being given custody of them.

The leave of the Court is not necessary where a petition for permanent maintenance is filed before the decree *nisi* is made absolute.

Luke v. *Luke* (1942) L.R.B.G.198, applied.

A wife applied under section 14 (1) of the Matrimonial Causes Ordinance, cap. 143, for maintenance. The income of the husband was not derived from investments but from his own labour and exertions as a salesman.

Held (1) that the only order which could be made under section 14 (1) was one for security *simpliciter,*

Shearn v. *Shearn* (1931) Probate 1, applied;

(2) that an order under section 14 (2) the wife takes the benefit for her life (and not merely joint lives) free from fluctuation of the husband's income;

(3) that the husband did not possess any free capital, nor any property which could be separated from his other property and could be specifically charged with the payment of maintenance; (4) that the wife's application must be refused.

P. L. PESTANO *v.* C. A. PESTANO

A wife applied under section 14 (2) of the Matrimonial Causes Ordinance, cap. 143 for an order that her husband pay to her a monthly or a weekly sum for her maintenance. The financial position of the wife was not worse than her pre-marital position. The parties only lived together as husband and wife for 61/2 months. The wife was entirely self-supporting, and her earnings were greater than those of her husband.

Held that no order would be made.

Interim order made under section 19 of the Matrimonial Causes Ordinance, cap. 143 for the maintenance of children of a marriage.

Directions given as to order for the maintenance of children to be inserted in final decree for dissolution of marriage.

A wife obtained a decree *nisi* of dissolution of marriage on the ground of malicious desertion. There were two children of the marriage. Husband and wife only lived together for a total period of 61/2 months. The final separation took place 6 months after the birth of the first child and 6 months before the birth of the second child. Both children were girls. The husband ceased, after the decree *nisi*, to support his children. The wife left the Colony to work abroad, and committed the care of the children to her parents. In the decree nisi it was directed that the children were to remain in the custody of their mother. The husband applied for the custody of the children.

Held (1) that the circumstance that he had ceased to contribute towards the maintenance of the children could not be relied upon by him as evidence in support of an application by him for their custody;

(2) that his application must be refused.

Petition by Patricia Lucille Pestano for maintenance under subsections (1) and (2) of section 14 of the Matrimonial Causes Ordinance, cap. 143 and for maintenance of the children of the marriage between her husband Carl Andrews Pestano and herself. The facts and arguments sufficiently appear from the judgment.

H. B. S. Bollers and *Lionel A. Luckhoo,* for petitioner.

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

Cur. adv. vult.

DUKE, J. (Acting): This is a petition by PATRICIA LUCILLE PESTANO for an order:

(a) that the respondent CARL ANDREWS PESTANO do to the satisfaction of this Court secure to the petitioner such gross or annual sum of money for her life, by way of maintenance for herself and the two children of the petitioner and of the respondent, as to the Court shall seem just;

(b) that the respondent do pay to the petitioner during the joint lives of herself and the respondent such monthly or weekly sums of money for her maintenance and the maintenance and education of the two children of the marriage, as may be reasonable; and

(c) such further and other relief as may be just.

The petition deals not only with permanent maintenance of the wife, but also with the maintenance and education of the children of the petitioner and of the respondent. In so far as the petition relates to permanent maintenance, it is made under sub-sections (1) and (2) of section 14 of the Matrimonial Causes Ordinance, cap. 143, and rule 43 of the Rules of Court (Matrimonial Causes), 1921. The petitioner and the respondent were married on the 26th April, 1941. There are two children of the marriage, PATRICIA CAMILLE born on the 23rd August, 1941 and MAUREEN ANN born on the 13th August, 1942. On the 11th May, 1943, a decree *nisi* of dissolution of marriage was granted to the petitioner on the ground of malicious desertion; and it was ordered that the children of the marriage were to remain in the custody of the petitioner, and that the respondent was to be at liberty to have reasonable access to them. The petition herein was filed on the 19th June, 1943.

Counsel for the respondent has submitted that as the petition for permanent maintenance was not filed within a month after the decree *nisi*, the leave of the Court to file it was required under Rule 43 (1) of the Rules of Court (Matrimonial Causes), 1921, and that as the petition was filed without such leave, it was a nullity and should be struck out. In *LUKE* v. *LUKE* (1942) L.R. B.G. 198, the petition for permanent maintenance was filed on the day after the decree nisi was made absolute, and it was held that no leave of the Court was necessary as the petition was filed within one month after the decree *nisi* was made absolute. In the present case the decree *nisi* has not yet been made absolute, and for the reasons which I have already fully stated in *LUKE* v. *LUKE, supra,* I hold that the leave of the Court is not necessary where a petition for permanent maintenance is filed before the decree *nisi* is made absolute. The submission of counsel therefore fails.

The only order which can be made under subsection (1) of section 14 of the Matrimonial Causes Ordinance, cap. 143 is one for security *simpliciter:* see *SHEARN* v. *SHEARN* (1931) Probate 1. In an order under this subsection the wife takes the benefit for her life (and not merely joint lives) free from fluctuation of the husband's income. In this case the respondent's income is not derived from investments, it is derived from his own labour and exertions as a salesman; he is not possessed of any free capital, and he possesses no property which can be separated from his other property and be specifically charged with the payment of maintenance. Paragraph (a) of the relief claimed is for an order for security, and the respondent has no property in respect whereof such an order can be made whether in favour of the wife in respect of permanent maintenance, or in favour of the children in respect of their maintenance. The application, therefore, in so far as it asks for an order for security, must be refused.

Prior to her marriage the petitioner was a competent stenographer. It does not appear that the petitioner had any private means at the time of the marriage, or, if she had

had any, that the property which she had at the time of the marriage was in any way used by the respondent either for his own benefit or for the purposes of the marriage. The respondent is a saleman presently working for $15 a week; he receives a bonus of $200 a year, so that his gross emoluments are $81.67 a month. The petitioner is now residing at ARUBA, Netherlands West Indies, where she is employed as a stenographer at a salary of U.S. $97 a month. Out of this salary, she has to repay to her employers in monthly instalments of $10, certain moneys advanced to her by her employers. It was alleged by the petitioner (before she left the colony) that her board and lodging in ARUBA, will amount to U.S. $60 a month. But, even if this is taken to be accurate, the petitioner is entirely self-supporting, and she will be in a better position when the advances have been repaid. Paragraph (b) of the relief asked for, in so far as it relates to permanent maintenance of the wife, is founded upon section 14 (2) of the Matrimonial Causes Ordinance, cap. 143. That sub-section is as follows: —

The Court, if it thinks fit, may make an order on the husband for payment to the wife during their joint lives of any monthly or weekly sum for her maintenance and support the Court thinks reasonable.

The present financial position of the petitioner is not worse than her pre-marital financial position. The marriage was of short duration — the parties only lived together for an aggregate period of 61/2 months. The emoluments of the respondent are less than those of the petitioner, and the salary of the petitioner would exceed the sum of U.S. $97 a month, if she has to do overtime work. In these circumstances I must refuse to make any order on the respondent for payment to the petitioner during their joint lives of a monthly or weekly sum for her maintenance.

The petition, therefore, in so far as it seeks permanent maintenance for the petitioner is dismissed.

There now remains for consideration the question as to whether the Court should make an order on the respondent for payment to the petitioner of a monthly or weekly sum for the maintenance and education of the two children of the marriage, PATRICIA CAMILLE born on the 23rd August, 1941, and MAUREEN ANN born on the 13th August, 1942. By section 19 of the Matrimonial Causes Ordinance, cap. 143, in any suit for a decree of dissolution of marriage the Court may from time to time, before making final decree, make such interim orders, and may make such provision in the final decree, as it deems just and proper with respect to the custody, maintenance and education of the children of the marriage of whose parents is the subject of the suit, and may give any further or other directions it deems advisable as guardian paramount of all infants. This section is similar to section 35 of the Matrimonial Causes Act, 1857, (20 & 21 Vict. C. 85), and to section 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. The respondent, up to the time of the making of the decree *nisi*, had been paying to the petitioner the sum of $4 a week for the maintenance of his wife and their two children. Since the decree *nisi* was made, the respondent had contributed nothing towards the maintenance of

his children. The children are with the petitioner's father who is a pensioner. The petitioner left this Colony for ARUBA on the 12th July, 1943. Since then, she has become self-supporting and is able, in some measure, to assist in maintaining her children. The respondent says that he wants the custody of his children who have been committed by the petitioner to the care of her parents, but it does not appear to the Court that the circumstance that he has ceased since the 11th May, 1943, to contribute anything towards their maintenance can be relied upon by him as evidence in support of an application by him for their custody. The petitioner and the respondent finally separated, from each other six months before the birth of MAUREEN ANN on the 13th August, 1942, and six months after the birth of PATRICIA CAMILLE on the 23rd August, 1941. The petitioner, along with the children of the marriage, lived with her parents during the difficult period between February, 1942, when the respondent deserted her without cause, and the 12th July, 1943, when she left this Colony to take up employment in ARUBA. It is clear to my mind that the children know their maternal grandparents, but they do not know their father. The Court could not possibly take away the children, who are girls of the ages of 21/2 years and 11/2 years, from the petitioner's parents, and hand them over to the respondent, merely because the petitioner, instead of idling in the Colony, has gone abroad to work for herself and the children. The Court has made an order that the children are to remain in the custody of the petitioner, and that the respondent is to have liberty of access to them. The respondent is not entitled to adopt the attitude that he will not maintain his children so long as they reside with the petitioner's parents. They are the agents of the petitioner. Having considered all the circumstances of this case, including the fact that the petitioner is working for a gross salary of at least U.S. $97 a month in ARUBA, I order that the respondent do pay to the petitioner the sum of $2 a week for the maintenance of the child PATRICIA CAMILLE as from the 19th June, 1943, the date of the filing of the petition herein, until the date of the final decree or until further order; and I make a similar order with respect of the child MAUREEN ANN. I further order that in the final decree there be included the following provision with respect to the maintenance and education of the child PATRICIA CAMILLE, namely, an order that the respondent shall pay to the petitioner, during the joint lives of the respondent and of PATRICIA CAMILLE, the sum of $2 a week for the maintenance and education of the child PATRICIA CAMILLE until she attains the age of 16 years or until further order; a similar provision will be included in the final decree with respect to the child MAUREEN ANN.

The parties will bear their own costs in so far as they relate to the application for permanent maintenance. The petitioner's costs, in so far as they relate to the application for maintenance and education of the children of the marriage, are fixed in the sum of $25, and will be recovered by the petitioner from the respondent.

Solicitors: *R. S. Persaud,* for petitioner; *R. G. Sharples,* for respondent.

O. A. FERNANDES *v.* A. GUMBS & C. R. NASCIMENTO

OVID ALOYSIUS FERNANDES, Plaintiff,

v.

AURELIA GUMBS and CHARLES RODRIGUES NASCIMENTO (No. 4), Defendants.

[1943. No. 153—DEMERARA.]

BEFORE DUKE, J. (Acting) IN CHAMBERS.

1944. FEBRUARY 7, 14, 15, 21, 28; MARCH 6, 8.

Practice and procedure—Order—Requiring person to do an act thereby ordered—Time not fixed in order—Order not thereby rendered ineffectual—Supplemental order fixing time may be made.

Practice and procedure—Judgment or order—Requiring act to be done forthwith—Whether "forthwith" sufficient expression of time— Rules of Court, 1900 *and* 1932, *Order* 35, *rule* 4.

Where an order requires a person to do an act thereby ordered, and no time is fixed therein within which the act is to be done, the order is not thereby rendered ineffectual, but the Court will make a supplemental order fixing the time.

Quaere : whether an order requiring a person to do an act "forthwith" sufficiently fixes the time within which the act is to be done.

Thomas v. *Nokes* (1868) L.R. 6 Eq. 521, *per* Lord Romilly, M.R. and *Gilbert* v. *Endean* (1878) L.R. 39 Ch.D. 263, C.A., *per* Jessel, M.R. considered.

Summons filed by the defendant Aurelia Gumbs for a supplemental order fixing the time for certain acts to be done under a judgment of the Court.

S. L. van B. Stafford, K.C., for the applicant, the defendant Gumbs.

S. I. Cyrus and *H. B. S. Bollers,* for the respondent, the plaintiff.

Cur. adv. vult.

DUKE, J. (Acting): This is a summons taken out on the 2nd February, 1944, by the defendant AURELIA GUMBS that the plaintiff OVID ALOYSIUS FERNANDES may be ordered:

(1) on or before the 9th February, 1944, or subsequently within four days after service of the order to be made hereon to deliver to the defendant AURELIA GUMBS her grosse transport in respect of lot 198 Queenstown :

(2) On or before the 21st February, 1944, or subsequently within four days after the service of the order to be made hereon to render a just and true account of the rents received by him in respect of lot 198 Queenstown. Georgetown, on behalf of the defendant AURELIA GUMBS together with a just and true account of his dealings and intromissions herewith; and

(3) that the costs of this application be costs in the action.

By order of Court dated 15th December, 1943 and entered on the 22nd December, 1943, it was adjudged:

(1) that the plaintiff do render a just and true account of the rents received by him in respect of lot 198 Queenstown on behalf of the defendant GUMBS, to the said defendant together with a just and true account of the dealings and intromissions of the plaintiff therewith ;

(2) that the plaintiff do pay the defendant GUMBS the sum found due to her on such account;

(3) that the plaintiff do deliver to the defendant GUMBS her grosse transport in respect of lot 198 Queenstown, forthwith.

On the 30th December, 1943, the defendant GUMBS served upon the plaintiff a sealed and certified copy of the order of Court of the 15th December, 1943. On that sealed and certified copy there was endorsed, at the time of service, a memorandum as follows:

> If you the within named OVID ALOYSIUS FERNANDES neglect to obey this order by the time limited you will be liable to process of execution for the purpose of compelling you to obey the said order.

The plaintiff has failed to comply with the order of Court of the 15th December, 1943, in respect of the rendering of the account to the defendant GUMBS, as well as in respect of the delivery to her of the gross transport.

Rule 4 of Order 35 of the Rules of Court, 1900 and 1932 is as follows:—

> Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be endorsed a memorandum in the words or to the effect following, viz :
>
> If you the within named A. B. neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order).

This rule corresponds with the English Order 41, rule 5. In the notes to that rule in the ANNUAL PRACTICE, 1943, at page 740, it is stated that "when the order omits to fix a time, it is not thereby rendered ineffectual, but the court will make a supplemental order fixing the time". The order of Court of the 15th December, 1943, did not state the time or the time after service of the order within which the plaintiff was to render the account set forth in the order, but with respect to the grosse transport it provided that it should be delivered to the defendant GUMBS forthwith. With respect to the portion of the order relating to the rendering of the account it is clear that it cannot be enforced until the Court by a supplemental order, fixes the time within which it should be rendered, and the object of paragraph 2 of the summons is to obtain such an order. It is the long established practice of Courts of Equity in England to make such a supplemental order, and a supplemental order, will accordingly be made fixing the time within which the plaintiff is to render the account as on or before the 14th March, 1944. There is, however, some difference of opinion as to whether an order requiring a person to do an act forthwith is a sufficient compliance with the provisions of the English Order 41, rule 5, and as to whether a supplemental order is necessary in such a case. In *THOMAS v.*

NOKES (1868) L.R. 6 Eq. 521, Lord ROMILLY, M.R. held that an order of the Court for the delivering up of a deed "forthwith" is a sufficient expression of time within the meaning of the then Order 23 rule 10" which required that every decree or order in a suit requiring any person to do an act thereby ordered shall state the time within which the act is to be done. In *GILBERT v.* ENDEAN (1878) L.R. 9 Ch. D. 266, C.A., JESSEL, M.R. said: "Now it happens accidentally, for I have no doubt it is an accident that the judgment required a further motion to enforce it, because it fixed no date for the acts to be done. The one act is directed to be done "forthwith", and the other act is simply directed to be done without any reference to time. Therefore, technically, no doubt a motion for fixing a day was required, and until a day was fixed the order could not be enforced". In view of the conflict of opinion between two distinguished Masters of the Rolls, the defendant GUMBS acted quite properly in coming to the Court for a supplemental order fixing the time within which the grosse transport is to be delivered. She had to come to the Court for a supplemental order fixing the time within which the defendant GUMBS was to render an account, and she acted prudently in including in the summons herein an application for an order fixing the time within which the grosse transport was to be delivered. Assuming, but not deciding, that the opinion of JESSEL, M.R. is to be followed in preference to that of LORD ROMILLY, I fix the time within which the plaintiff is to deliver to the defendant GUMBS, as required by order of Court dated the 15th December, 1943, her grosse transport for lot 198, Queenstown, Georgetown, as on or before the 14th March, 1944. However, I should point out that if the word "forthwith" in the order of the 15th December, 1943, is to be construed as in *THOMAS* v. *NOKES* then this supplementary order with respect to the time within which the grosse transport is to be delivered up, will have been made without jurisdiction and will be of no effect.

The costs of and incidental to this application will be costs in the action and will be taxed and recovered accordingly, and I certify for counsel.

Application granted.

Solicitors: *M. S.Fitzpatrick,* for applicant, the defendant Gumbs;
H. A. Bruton, for respondent, the plaintiff.

O. A. FERNANDES *v.* A. GUMBS & C. R. NASCIMENTO

OVID ALOYSIUS FERNANDES, Plaintiff,

v.

AURELIA GUMBS and CHARLES RODRIGUES NASCIMENTO (No. 5), Defendants.

WEST INDIAN COURT OF APPEAL

[1944. No. 2.—BRITISH GUIANA.]

BEFORE DUKE, J. (Acting).

1944. FEBRUARY 28; MARCH 6, 9.

Appeal—Stay of execution—Pending appeal—Of taking of account—Will not be ordered—Unless irreparable injury would be done to appellant.

Appeal—Stay of execution—Pending appeal—Of order as to costs—When granted—If no reasonable probability of getting them back in the event of the appeal being successful.

Appeal—Stay of execution—Action dismissed—Injunction to restrain defendant from disposing of subject matter of action, pending appeal—Not a stay of execution.

Appeal—Court of Appeal—Inherent original jurisdiction of—Where action dismissed—To grant injunction restraining defendant from disposing of subject matter of action, pending appeal.

Appeal—West Indian Court of Appeal—Delegated jurisdiction of Supreme Court or a Judge thereof—To deal with applications for stay of execution of any judgment or order appealed from, pending the determination of an appeal—No jurisdiction, where action dismissed, to grant an injunction restraining defendant from disposing of subject matter of action, pending appeal—Such jurisdiction not delegated by West Indian Court of Appeal—West Indian Court of Appeal Rules. 1920 & 1930, *rule* 18 (1) (c).

Appeal—Court of Appeal—Action dismissed—No jurisdiction to grant injunction restraining defendant, pending appeal, from disposing of subject matter of action—Judgment on counterclaim for delivery of grosse transport in respect of the land the subject matter of action— Subject matter of action cannot be disposed of, unless grosse transport produced to Registrar of Deeds—Stay of execution of order for delivery—Would have same effect as if an injunction were granted restraining defendant, pending appeal, from disposing of subject matter of action—No jurisdiction to grant such injunction—Stay of execution refused—West Indian Court of Appeal Rules, 1920 & 1930, *rule* 18 (1) (c).

It is the general rule that an order will not be made staying the taking of an account, pending the determination of an appeal, and such an order will not be made unless irreparable injury will be done to the appellant by the taking of the account.

Nerot v. Burnand (1828) 2 Russell 56, 58, per Lord Eldon, L.C., *Hyam v. Terry* (1880) 29 W.R.32, per Fry, J., *Shaw* v. *Holland* (1900) 2 Ch. 313, C. A., *per* Lord Alverstone, M.R., and *Coleman* & *Co., Ltd, v. Stephen Smith* & *Co., Ltd.* (1911) 2 Ch.572, 580, *per* Fry, J., applied.

The ordinary rule is that execution for costs will not be stayed pending an appeal unless evidence be adduced to show that the respondent will be able to repay the amount levied by the execution if the appellant be successful on the appeal.

Barker v. Lavery (1885) 14 Q.B.D.789, C. A., and *Atkins v. G. W. Ry. Co.* (1896) 2 Times L.R. 400, *per* Lord Esher, M.R., applied

O. A. FERNANDES *v.* A. GUMBS & C. R. NASCIMENTO

An application for a stay of execution, pending an appeal, does not include an application, where an action has been dismissed, for an injunction restraining the successful defendant from disposing or parting with the possession of the subject matter of the action, pending the determination of an appeal,

Wilson v. Church. (No.l), (1879) 11 Ch.D.576 and 48 L.J.Ch.S90, C.A., applied.

Where a plaintiff appeals for an order dismissing an action, the Court of Appeal has an inherent original jurisdiction to grant an injunction restraining the successful defendant from disposing, or parting with the possession, of the subject matter of the action, pending the determination of the appeal.

Wilson v. *Church* (No. 1), (1879) 11 Ch.D.576 and 48 L.J. Ch.690.

Such jurisdiction has not been delegated to the Supreme Court by the West Indian Court of Appeal Rules, 1920 & 1930, rule 18 (1) (c).

The plaintiff claimed specific performance of a contract for the sale of certain land, and the defendant counter claimed for the delivery of the grosse transport of the defendant relating thereto which the plaintiff had in his possession. Judgment was given for the defendant both on the claim and the counterclaim. The plaintiff appealed, and applied for a stay of execution of the order on the counterclaim for the delivery of the grosse.

Held (1) that such stay would have the effect of restraining the defendant from selling the land, pending the appeal;

(2) that there was no jurisdiction in the Supreme Court, under the West Indian Court of Appeal Rules, 1920 & 1930, rule 18 (1) (c) to grant such an injunction to the plaintiff; and

(3) that the application for the stay must therefore be refused.

Application by the appellant Ovid Aloysius Fernandes, the plaintiff in the supreme Court, by way of summons, for a stay of execution.

S. I. Cyrus for appellant,

S. L. van B. Stafford, K.C., and *Lionel A. Luckhoo,* for respondents Gumbs and Nascimento.

Cur. adv. vult.

DUKE, J. (Acting): This is an application made by the appellant OVID ALOYSIUS FERNANDES under Rule 18 (1) (c) of the West Indian Court of Appeal Rules, 1920 and 1930, for a stay of execution on the judgment or order appealed from, pending the determination of his appeal to the West Indian Court of Appeal. The judgment was delivered on the 15th December, 1943, and the formal order was entered on the 22nd December, 1943. The appellant filed his notice of appeal motion on the 2nd February, 1944, and this application which was made by way of summons on the 24th February, 1944, was fixed for hearing on the 28th February 1944. On the return day of the summons, I directed that the application be adjourned into Court for hearing, and, to meet the convenience of counsel for the appellant, the hearing was fixed, not for Tuesday the 29th February 1944 as I had originally intended, but for the 6th March 1944

When the application was called for hearing in Court, counsel for the appellant intimated that he relied on the affidavit of the appellant's solicitor filed in support of the application, and that he did not propose to address the Court but that he wanted to

hear what counsel for the respondents would say in answer to the application. Thereupon, junior counsel for the respondent stated that, as counsel for the appellant had not addressed the Court, he would not address the Court, but would leave the matter in the hands of the Court. Counsel for the appellant then claimed the right of reply, but I declined to hear him, as counsel for the respondents had said nothing which could be the subject of a reply. On the 11th February, 1944, the appellant filed a summons in the ordinary civil jurisdiction of the Supreme Court of British Guiana asking for a stay of execution of the judgment or order of the 15th December, 1943. Senior Counsel for the respondents took the preliminary objection that the Supreme Court of British Guiana sitting in its ordinary civil jurisdiction had no jurisdiction to hear the summons. I heard a full argument from counsel for the appellant and from senior counsel for the respondents, not only on the preliminary objection, but also upon the merits. The argument extended over the 14th and 15th February, 1944. On the 18th February, 1944, I delivered my decision upholding the preliminary objection, and, in those circumstances it was not necessary for me to consider the merits or otherwise of the summons. I have made reference to the notes of the arguments adduced in Chambers by counsel for the appellant and by senior counsel for the respondents, and I have made some research of my own. I have no doubt that if counsel for the appellant had any additional arguments to those which he addressed to me in Chambers on the 14th and 15th February, 1944, he would not have taken the unusual course on the 6th March, 1944, of electing not to address the court.

The appellant, who was plaintiff in the Supreme Court, had brought an action against the respondents AURELIA GUMBS and CHARLES RODRIGUES NASCIMENTO claiming specific performance of an agreement dated the 19th May, 1942, for the sale of lot 198 Queenstown, Georgetown by the respondent GUMBS to him for the sum of $3,000 of which purchase price only the sum of $75 had been paid; a declaration that the respondents acted in collusion in the acquisition by the respondent NASCIMENTO of the rights of the mortgagee of the said property, and in the taking by the respondent NASCIMENTO of proceedings to bring the mortgaged property to sale at execution, and that the respondent NASCIMENTO thereby acquired, subsequent to the 19th May, 1942, a fraudulent preference; and an injunction restraining the respondent NASCIMENTO from selling at execution, in pursuance of a judgment obtained by him as mortgagee in a foreclosure action against the proprietors of lot 198 Queenstown, the said lot. The appellant's claim was dismissed with costs. The respondent GUMBS had filed a counterclaim against the appellant, and judgment thereon was given with costs in her favour for an account, and for delivery to her of her grosse transport for lot 198 Queenstown. The respondent GUMBS left this Colony for the United States of America in September, 1940, and, shortly before doing so, she handed her grosse transport to the appellant for the purpose of safe keeping.

In *NEROT* v. *BURNAND* (1826) 2 Russell 56, 58, LORD ELDON, L.C. stated that, generally speaking, the Court never stays the taking of an account, pending an appeal, and in that case he held that there was no ground for the application for a stay of the account. In *HYAM* v. *TERRY* (1880) 29 W.R. 32, FRY, J. said: "It is against the ordinary course of the Court to stay accounts or inquiries pending an appeal unless it can be shown that irreparable injury will otherwise be caused". In *SHAW* v. *HOLLAND,* (1900) 2 Ch. 313, C.A., Lord ALVERSTONE, M.R. said: "The general rule, I think should be that the proceedings under a judgment should not be stayed pending an appeal unless on special grounds. Of course, there are many cases in which the expense involved in inquiries might be so great, and the uncertainty as to the necessity of prosecuting them so great, that it would be desirable to stay the prosecution of the inquiries pending an appeal. But I think that in every case some special ground should be shown upon any application to the Court for a stay. I am not satisfied that if they are rightly undertaken, these inquiries as to the market value of the shares need be of any great length, and under these circumstances I do not think that any sufficient ground has been shown for a stay of proceedings." RIGBY, L.J., said: "I think that a stay of inquiries is very rarely needed, and should be granted only under very special circumstances pending an appeal." In *COLEMAN & CO., LTD.* v. *STEPHEN SMITH* & *CO. LTD.* (1911) 2 Ch. 572, 580, an account of profits was ordered in a passing-off action, whereupon the unsuccessful party applied for a stay pending an appeal and SWINFEN EADY, J. said: "It is not the practice of the Court to stay such an account, unless irreparable injury would otherwise be" caused: NEROT v. BURNAND; HYAM v. *TERRY.* The plaintiffs will proceed with the account at their own risks as to costs. It would unduly protract litigation if an account could not be proceeded with until after the decision of the ultimate appeal in the case." The only ground alleged by the appellant in support of his application for a stay of execution of the order for an account is contained in paragraph 5 of the affidavit of his solicitor dated the 24th February, 1944. Therein the appellant states that the respondent GUMBS has claimed the rent of lot 198, Queenstown for the months of July and August, 1943; that the said rent has been deposited in the Magistrate's Court on a distress warrant pending decision of the Court of Appeal; and that the respondent GUMBS has since the month of September 1943 regularly collected and received the rents thereof up to the present time. Even if this is so, this is no ground why a stay should be granted. It is obvious that the appellant cannot account for rent which he has not received. The account required is a simple one, and no irreparable injury would be caused to the appellant by reason of a "refusal of the order. It would unduly protract the litigation herein if the account could not be proceeded with until after the decision of the Court of Appeal. It is the general rule that an order will not be made staying the taking of an account, pending the determination of an appeal, and in this case there are no special cir-

cumstances which would justify the Court in making such an order. The application, therefore, for a stay of execution of the order requiring the plaintiff to render an account of the rents received by him on behalf of the respondent GUMBS in respect of lot 198 Queenstown must be refused.

In *BARKER* v. *LAVERY* (1885) 14 Q.B.D. 769, C.A., it was held by the EARL OF SELBORNE, L.C. that the ordinary rule is that execution for costs will not be stayed pending an appeal unless evidence be adduced to show that the respondent will be unable to repay the amount levied by the execution if the appellant be successful on the appeal. And in *ATKINS* v. G. *W. Ry. CO.* (1896) 2 Times L.R. 400, LORD ESHER, M.R. said: "As a general rule the only ground for a stay of execution (of an order for costs) is an affidavit showing that if the costs were paid there is no reasonable probability of getting them back if the appeal succeeds." The costs of the respondent GUMBS were taxed at $1,194.13; and the costs of the respondent Nascimento were taxed at $575.66. The sum of $1,300, the property of the appellant, had been deposited in the Registry of Court on the 16th July 1943 to abide the further order of the Court in the action. It was part of the judgment of the Court in the action and on the counterclaim that out of the sum of $1,300 the Registrar of the Supreme Court was directed to pay to the solicitors for the respondents the taxed costs of the respondents, and to pay the balance if any to the appellant or to his special order, but it was provided that no such payment was to be made within six weeks from the date of the order. That temporary stay expired on the 26th January 1944. The notice of appeal motion was filed on the 2nd February 1944, and the application herein was filed on the 24th February 1944, four weeks after the expiration of the temporary stay. The special circumstances which are alleged by the appellant (in paragraph 7 of his solicitor's affidavit) to constitute grounds for granting a stay of execution are that the respondent GUMBS is a naturalised American citizen domiciled in the United States of America, that she possesses no property in this Colony save and except the property the subject matter of this action, and that in the event of the appellant being successful the respondent GUMBS will be "unable to be able" to pay all her indebtedness on the said property and all the taxed costs that may be ordered to be paid by her and or to repay to the appellant "the taxed costs ordered to be paid by him. It will be observed that it is not in any way whatever suggested by the appellant that the respondent NASCIMENTO will be unable to repay the amount of his taxed bill of costs in the action, if the appellant is successful on the appeal. In the action, the appellant claimed that he was entitled to specific performance of a contract dated 19th May, 1942, for the sale by the respondent GUMBS to him of lot 198 Queenstown for the sum of $3,000. At the time of the contract the appellant paid the respondent GUMBS, the sum of $75. There is a mortgage of $1,200 on lot 198 Queenstown. So that if the appellant succeeds on his appeal, he will have to pay the respondent GUMBS the sum of $1,725. This sum exceeds the sum

of $1,194.13, the taxed costs of the respondent GUMBS in the action and on the counterclaim, and so there is not a tittle of evidence that if the sum of $1,194.13 were paid out to the solicitor for the respondent GUMBS out of the moneys standing to the credit of the appellant in the Registry of Court, the respondent GUMBS would be unable to repay the said sum of $1,194.13 to the appellant. The application by the appellant for a stay of execution of the orders for costs in favour of the respondent NASCIMENTO and in favour of the respondent GUMBS must therefore be refused.

From paragraph 7 of the affidavit of the appellant's solicitor filed in support of the application herein, it would appear that the appellant thinks that when a person is appealing, the persons who were successful in the Court below must give security for the payment of whatever judgment may be awarded by the Court of Appeal, in the event of his being successful on the appeal. That is a new, but not true, view of the practice of the Courts. No warrant or support for any such idea can be found in the decided cases: although, of course, an appellant may, if the circumstances of the case so require, be ordered to give security for the costs of appeal of those persons who were successful in the Court below.

Rule 18 (1) (c) of the West Indian Court of Appeal Rules, 1920 and 1930, confers a delegated jurisdiction upon the Supreme Court or a judge thereof to deal with "application for a stay of execution on any judgment or order appealed from, pending the determination" of an appeal to the West Indian Court of Appeal. This delegated jurisdiction cannot be exceeded.

In paragraph 4 of the affidavit of the appellant's solicitor filed in support of the application it is stated that the respondents are at law entitled to proceed to execution of the judgment in the action, and accordingly the respondent GUMBS has caused to be advertised in the *Gazette* of the 8th, 15th and 22nd day of January 1944, notice of her intention to pass transport of lot198, Queenstown, Georgetown to and in favour of the respondent NASCIMENTO. The appellant further alleged that the right to the said property is a substantive issue to be determined by the West Indian Court of Appeal. Apparently, the appellant means that the respondent GUMBS should be restrained, pending the determination of the appeal, from disposing of lot 198 Queenstown.

When a plaintiff appeals from an order dismissing an action, the Court of Appeal has an inherent original jurisdiction to grant an injunction restraining the successful defendant from disposing, or parting with the possession, of the subject matter of the action, pending the determination of the appeal: *WILSON* v *CHURCH* (No. 1), (1879) 11 Ch. D. 576. and 48 L.J. Ch. 690,' C.A. That jurisdiction has, however, not been delegated to the Supreme Court or a judge thereof by Rule 18 (1) of the West Indian Court of Appeal Rules 1920 and 1930. An application for a stay of execution pending an appeal does not include an application, where an action has been dismissed, for an injunction restraining the successful defendant from disposing, or part-

ing with the possession, of the subject matter of the action, pending the determination of an appeal. In *WILSON* v. *CHURCH, supra,* an appellant, who had immediately appealed from a judgment dismissing his claim for a declaration that a large sum of money in the hands of trustees should be returned to the bondholders and should not be applied in the works of a railway, applied to the Court of Appeal for an injunction to restrain the trustees from parting with any part of the trust funds in their hands until the hearing of the appeal. Counsel for the respondents submitted that the application was one for a stay of proceedings, but JESSEL, M.R. said: "No one can say that this is an application to stay proceedings in the action. The action was dismissed. The action having been absolutely dismissed by Mr. Justice Fry, he had no jurisdiction to stay the proceedings pending the appeal, and this application was properly made to the Court of Appeal as an original motion."

"An application therefore for an injunction to restrain, pending the determination of the appeal to the West Indian Court of Appeal, the respondent Nascimento from causing lot 198 Queens-town to be sold at execution in pursuance of the judgment obtained by him in the action to "foreclose" the mortgage, cannot be dealt with by the Supreme Court or a judge thereof in pursuance of Rule 18 (1) (c) of the West Indian Court of Appeal Rules, 1920 and 1930. Such an application is not an application for a stay of execution as the action has been dismissed. The same applies to an application for an injunction to restrain, pending the determination of the appeal to the West Indian Court of Appeal, the respondent GUMBS from passing transport of lot 198 Queenstown. Any such application must be dealt with by the Court of Appeal itself.

The transport of lot 198 Queenstown cannot be passed by the respondent GUMBS in favour of the respondent NASCIMENTO unless she produces to the Registrar of Deeds her grosse transport. The appellant has been ordered to deliver this grosse transport to her. He has refused to do so. The grant of a stay of execution of the order for delivery of the grosse transport by the appellant to the respondent GUMBS would have the same effect as if an injunction were granted restraining the respondent GUMBS from passing transport in favour of the respondent NASCIMENTO, pending the determination of the appeal. The Court of Appeal has reserved this jurisdiction to itself, and has not delegated it. The appellant has refused to deliver the grosse transport because he wants to prevent the respondent GUMBS from passing transport. Consequently I must refuse the application for a stay of execution of the order for delivery of the grosse transport for lot 198 Queenstown.

The Court of Appeal recently held a sitting in the Colony, commencing on the 11th February and ending on the 24th February, 1944. The notice of appeal motion herein was filed *on* the 2nd February, 1944, and the appellant, if he so desired, had ample time and opportunity to make an application to the Court of Appeal itself. No such application was however made.

The application of the appellant for a stay of execution is dismissed with costs and I certify for counsel.

Application dismissed.

Solicitors: *H. A. Bruton*, for appellant Fernandes; *M. S. Fitzpatrick*, for respondent Gumbs; *H. V. vanB. Gunning*, for respondent Nascimento.

SAMUEL YHAP, Appellant (Defendant),

v.

VINCENT ROSS, P.C. No. 4414, Respondent (Complainant).

[1943, No. 460. DEMERARA.]

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

1944. MARCH 10.

Appeal—From decision of magistrate—Decision not supported by magistrate's reasons of decision—Decision supported by evidence—Upheld by Full Court.

Defence Regulations—Selling price-controlled article at price exceeding that fixed by competent authority—Identity of purchaser—Not an ingredient of offence.

A conviction is right where it is supported by the evidence even though not by the magistrate's reasons of decision.

The identity of the purchaser is not an ingredient of the offence of selling a price-controlled article at a price exceeding that fixed by order made by a competent authority under the Defence Regulations, 1939.

Appeal by defendant from a conviction made by the Magistrate of the West Demerara Judicial District.

C. Lloyd Luckhoo, for appellant.

A. C. Brazao, acting Assistant Attorney-General, for respondent.

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

This is an appeal from a conviction for selling a price controlled article at a price exceeding that fixed by the Competent Authority by Order No. 479 made under the Defence Regulations, 1939.

The Magistrate found as a fact that the appellant sold by retail one half pint of kerosene oil for the price of five cents. It was submitted that by the Order the retail price of kerosene oil is in drums and that it was not established that this was the kind of oil sold by the appellant.

The learned Magistrate held that "the question as to whether "drum oil was sold or not does not arise as in any event there "was an overcharge." This conclusion appears to have been arrived at as the result of a calculation based upon the wholesale price of oil in cases and is therefore erroneous in that the charge related to a sale by retail.

There is however evidence that the oil in question was oil from a drum and we are of the opinion that had the learned Magistrate applied his mind to this question he could have come to no other reasonable conclusion but that the oil in question fell

within the description of "Kerosene oil (in drums)." In that case the conviction is right for it is supported by the evidence though not by the Magistrate's reasons.

It was further submitted that the conviction is bad in that the name of the person to whom the oil was sold is omitted therefrom. The name of the person to whom the sale is made is not a necessary or even material particular in the description of the offence, which is adequate if, to use the words of the learned author of Paley on Summary Convictions (9th Edn.) p. 485, "it contains in "express terms every ingredient which is required by the statute." In this case the identity of the purchaser is not an ingredient of the offence created by the Order and need not be stated in its description.

The conviction being good both in substance and in form, the appeal is dismissed with costs.

Appeal dismissed.

OVID ALOYSIUS FERNANDES, Plaintiff,

v.

AURELIA GUMBS and CHARLES RODRIGUES NASCIMENTO (No. 6), Defendants,

[1943. No. 153.— DEMERARA.]

BEFORE DUKE, J. (Acting) IN CHAMBERS.

1944. FEBRUARY 28; MARCH 6, 10.

Practice and procedure—Judgments and orders—Time within which act to be done—"Forthwith"—Sufficient expression of time—Rules of Court, 1900 & 1932, *Order* 35, *rule* 4.

Practice and procedure—Application—Summons served upon other side claiming certain relief—Such relief may properly be granted upon an ex parte application—Ex parte application subsequently made — Applicant not estopped from making it.

Practice and procedure—Writ of delivery—Application for leave to issue—May properly be made before Registrar is requested to issue the writ—Rules of Court, 1900, *Order* 36, *rule* 90.

Practice and procedure—Writ of delivery—Order for issue of—Need not be served upon defendant.

Practice and procedure—Writ of delivery—Of grosse transport—Order for issue of—No option therein to retain grosse upon paying value assessed—Registrar authorised to issue writ for delivery of specific property—Rules of Court, 1900, *Order* 36, *rule* 90.

Practice and procedure—Writ of delivery—Of grosse transport —Order for issue of—No provision therein as to what is to happen if property cannot be found—Marshal authorised to levy on all the defendant's lands and chattels till the defendant delivers the grosse transport —Rules of Court, 1900, *Order* 36, *rule* 90.

"Forthwith" is a sufficient expression of time, within the meaning of rule 4 of Order 35 of the Rules of Court, 1900 and 1932, for doing an act directed by order.

Thomas v. *Nokes* (18G8) L.R.6 Eq.251 and *Halford* v. *Hardy* (1900) 81 L.T.721 applied.

A. filed and served upon B. a summons claiming certain relief. The relief could properly be granted upon an *ex parte* application, and subsequent to the date of service, A. filed an *ex parte* summons; claiming the said relief.

Held that A. was not estopped from filing the *ex parte* application.

An application for leave to issue a writ of delivery under rule 90 of Order 36 of the Rules of Court, 1900, and an order of Court thereon, may properly be made before the Registrar is requested to issue the writ.

An order granting leave for the issue of a writ of delivery under rule 90 of Order 36 of the Rules of Court, 1900, is not required to be served upon the defendant.

An order was made under rule 90 of Order 36 of the Rules of Court, 1900 granting leave to issue a writ of delivery for the delivery of a grosse transport. The order contained no provisions as to option of the defendant to retain the grosse transport upon paying the assessed value, or as to the power to levy on the defendant's chattels if the grosse transport is not delivered.

Held that the defendant had no option to retain the groose transport upon paying the value thereof, and that there was power to levy, if the grosse transport could not be found, on the property of the defendant.

Summons by the plaintiff for an order setting aside an order obtained by the defendant Gumbs on an *ex parte* application, and all acts done thereunder.

S. I. Cyrus, for the applicant (plaintiff).

S. L. van B. Stafford, K.C. and *Lionel A. Luckhoo,* for the respondent, the defendant Gumbs.

Cur. adv. vult.

DUKE, J. (Acting): This is a summons taken out on the 25th February, 1944, by the plaintiff OVID ALOYSIUS FERNANDES for an order:

(a) that the order of Court dated and entered the 7th February, 1944, and made on the *ex parte* application of the defendant AURELIA GUMBS, and all proceeding subsequent and incidental to the said order may be wholly set aside for irregularity;

(b) that the Writ of execution to wit, the writ of delivery issued at the instance of the defendant AURELIA GUMBS consequent on the order of the 7th Febuary, 1944, be wholly set aside for irregularity and as having been issued without due authority;

(c) that the levy made on the authority of the writ of delivery be wholly set aside as being irregular and as having been made without authority; and

(d) that the costs of this application be borne by the defendant GUMBS.

By order of the Court dated the 15th December, 1943, the plaintiff was directed, *inter alia,* to deliver to the defendant GUMBS her grosse transport for lot 198 Queenstown forthwith. In the judgment which I delivered on the 8th March, 1944 on the summons by the defendant GUMBS for a supplemental order fixing the time within which the grosse transport was to be delivered, I pointed out that there was some conflict of judicial opinion as to the meaning of the word "forthwith" in an order

directing an act to be done forthwith, I accept the statement in the Notes to the English Order 41, rule 5 in ANNUAL PRACTICE, 1943, at page 741 as being the correct view of the matter. The learned editors there state: *"Forthwith"* has been held to be a sufficient expression of time for doing an act directed by order: *THOMAS* v. *NOKES* (1868) L.R. 6 Eq. 251, *HALFORD* v. HARDY (1900) 81 L.T. 721, notwithstanding the doubt expressed in *GILBERT* v. *ENDEAN* (1878) 9 Ch. D. 266, C.A," The order of the 15th December, 1943 therefore complies with rule 4 of Order 35 of the Rules of Court, 1900 and 1932 in that it states the time within which the act of delivery of the grosse transport is to be done by the plaintiff.

The plaintiff did not deliver up the grosse transport as directed by the order of Court of the 15th December, 1943. On the 5th February, 1944 the defendant GUMBS took out an *ex parte* summons for the issue of a writ of delivery of the grosse transport. This application came before me in Chambers on the 7th February, 1944. I granted the application, and I made the following minute of the order in my Note Book: "Under rule 90 of Order 36 of the Rules of Court 1900 it is ordered that execution shall issue for the delivery of the grosse transport of the defendant GUMBS for lot 198 Queenstown without giving the plaintiff the option of retaining the said grosse transport upon payment of its assessed value, and otherwise ordered under rule 90. Costs to applicant. Fit for counsel". This minute was copied by the Registrar, and it appears on the index of the proceedings which immediately precedes the documents filed in this action; it was also entered by him in the Cause Book in accordance with rule 1 of Order 53 of the Rules of Court, 1900. The order, however, as drawn up did not include all the detail which I had included in my minute, and counsel for the plaintiff has submitted that the formal order did not authorise the issue of a writ of delivery without giving the plaintiff the option of retaining the grosse transport upon paying the assessed value (if any), and further, that the formal order did not authorise the Marshal, if the grosse transport could not be found, to levy on the plaintiff's chattels till the plaintiff delivers the grosse transport.

The operative part of the formal order was as follows:

"IT IS ORDERED that a W r i t of Delivery be forthwith issued against the plaintiff OVID ALOYSIUS FERNANDES for delivery to the first named defendant (AURELIA GUMBS) of the grosse transport of the first named defendant in respect of lot 198 Queenstown, Georgetown, by the judgment in this action dated the 15th December, 1943, ordered to be delivered up to the first named defendant (AURELIA GUMBS) AND that the first named defendant (AURELIA GUMBS) do recover against the plaintiff her costs of this application to be taxed. Fit for counsel. "

Rule 90 of Order 36 of the Rules of Court, 1900, is as follows; Where it is sought to enforce a judgment or order for the recovery of any property other than houses land immovable property or money by writ of delivery, the Court or a Judge may, upon the application of the plaintiff, order that execution shall issue for the delivery of the property without giving the defendant the option of retaining the property upon paying the value assessed (if any), and that if the property cannot be found, and unless the Court or

a Judge shall otherwise order, the Marshal shall levy on all the defendant's lands and chattels till the defendant deliver the property; or at the option of the plaintiff, that the Marshal levy on the defendant's goods for the assessed value (if any) of the property.

It is clear that in the formal order of the 7th February, 1944 no option is given to the plaintiff to retain the grosse transport upon payment of the value assessed, and there was no such option in the formal order of the 15th December, 1943. Further, in the formal order of the 7th February, 1944 the judge in chambers did not order that the Marshal shall not levy on the plaintiff's chattels till the plaintiff delivers the grosse transport. Such being the case, a writ of delivery was properly issued by the Registrar of the Supreme Court under the authority of the formal order of the 7th February, 1944 for the specific delivery of the grosse transport of the defendant GUMBS for lot 198 Queenstown, Georgetown; and, further, the Marshal, when the grosse transport could not be found, was authorised to levy upon the plaintiff's goods till the plaintiff delivers the grosse transport.

Counsel for the plaintiff has submitted that the *ex parte* order of the 7th February, 1944 was irregularly and illegally made, because at the time the order was made, no request had then been made to the Registrar for the issue for a writ of delivery. The Registrar of the Supreme Court cannot issue a writ of delivery under Order 36, rule 90 or the Rules of Court, 1900 unless the Court, prior to its issue, has given leave therefor. An application for leave to issue a writ of delivery under rule 90 of Order 36 of the Rules of Court, 1900, and an order thereon, may therefore properly be made before the Registrar is requested to issue the writ.

Counsel for the plaintiff has pointed out that the plaintiff was not served with a copy of the order of the 7th February 1944, and he has suggested that the non-service constituted a grave irregularity upon the part of the defendant GUMBS. The defendant GUMBS was not required to serve a copy of the order upon the plaintiff. Further, the plaintiff was in no way prejudiced by the non-service upon him of the order; indeed he was aware of it very shortly after it was made, and on the 11th February, 1944, (on which day the defendant requested the Registrar to seal a writ of delivery) the plaintiff took out an *ex parte* summons (which was dismissed on the 14th February, 1944) for leave to appeal from the order of the 7th February, 1944.

Counsel for the plaintiff has further submitted that on the 2nd February, 1944 the defendant GUMBS had filed a summons (which was served upon the plaintiff who had filed an affidavit in protest on the 5th February, 1944 in opposition thereto) asking for the same relief which was sought by the *ex parte* summons filed by her on the 5th February, 1944 for the writ of delivery. On the 7th February, 1944 I held, on the hearing of the *ex parte* summons, that an application under rule 90 of Order 36 of the Rules of Court, 1900 for a writ of delivery is properly made *ex parte.* This ruling is not disputed by counsel for the plaintiff. Even if it were true that in the summons filed on the 2nd February, 1944, (which was an application for a supplementary

order to fix time consequent on rule 4 of Order 35 of the Rules of Court 1900 and 1932 in respect of the order of the 15th December 1943 for an account and for delivery), the defendant GUMBS had asked for the relief for which she asked in her *ex parte* summons of the 5th February, 1944 (which was an application under rule 90 of Order 36 of the Rules of Court 1900 for leave to issue a writ of delivery). I can see no good reason, and none has been suggested to me by counsel for the plaintiff, why the defendant GUMBS should be estopped from filing an *ex parte* summons merely because she had previously filed a summons which she had served upon the plaintiff.

There being no valid objections to the order of the 7th February, 1944, to the writ of delivery issued on the 11th February, 1944 under that order and the order of the 15th February, 1943, or to the proceedings of the Marshal on the 12th February, 1944 under the writ of delivery, the summons herein is dismissed with costs and I certify for counsel.

Application dismissed.

Solicitors: *H. A. Bruton.* for the applicant (plaintiff);
M. S. Fitzpatrick, for the respondent Gumbs, the first named defendant.

HARRY THEOPHILUS POLLYDORE,

Plaintiff,

v.

PUBLIC TRUSTEE OF BRITISH GUIANA as administering the estate of LYDIA ISABELLA ALVES, deceased,

Defendant.

[1943. No. 265. DEMERARA.]

BEFORE DUKE; J. (Acting)

1944. MARCH 7, 8, 14.

Lease—Not good, valid or effectual in law, or pleadable, against bona fide transferee for value—Unless filed as of record in deeds registry —Legal personal representative of—lessor not a bona fide transferee for value—Deeds Registry Ordinance, cap. 177, s. 13 (2).

Part performance—Possession of stranger in land of another, coupled with payment of rent by stranger to owner—Evidence of some agreement of lease between stranger and owner.

Part performance — Possession of stranger in land of another — Evidence of antecedent contract—Sufficient to authorise an enquiry into its terms.

*Part performance—*Acts *relied on as—Must show the existence of some contract in pursuance of which they are done, and the general character of the contract—Cannot in themselves show all the terms of the contract from which they flow—Must be of such a nature that they would of themselves infer the existence of some agreement—Must be unequivocally and, in their nature referable to some such agreement as that alleged—*Must *necessarily relate to and affect the land the subject of the agreement,*

H. T. POLLYDORE *v.* PUBLIC TRUSTEE

Practice and procedure—Pleading—Part performance—When necessary to plead—May be pleaded either in reply or in statement of claim—Immaterial where pleaded.

Statute of Frauds—Immovable property—Oral contract concerning—Plea of proviso (d) *to section* 3 (D) *of the Civil Law of British Guiana Ordinance, cap.* 7*—Acts of part performance proved—Oral evidence admissible—To show what is the nature of the agreement, and what are its terms.*

The legal personal representative of an owner of immovable property is not a *bona fide* tranferee thereof for valuable consideration within the meaning of section 13 (2) of the Deeds Registry Ordinance, cap. 177.

Where part performance is required to be pleaded by a plaintiff, it is immaterial whether the plea appears in the statement of claim or in the reply.

Cumbermac v. *Cyrus* (1931-37) L.R.B.G. 692, 693, W.I.C.A., applied.

The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and is therefore evidence of an antecedent contract and sufficient to authorise an inquiry into its terms. Parol evidence is admissible, in that inquiry, to show what the agreement is. *Morphett* v. *Jones* (1818) 1 Swanston 181, *per* Sir T. Plumer, M.R., *Maddison* v. *Alderson* (1883) 8 Appeal Cases 479,per the Earl of Selbourne, L.C., and *Frame v. Dawson* (1807) 14 Vesey 387, 388 per Sir William Grant, M.R. applied

Where in such a case rent is paid by the stranger to the owner, there is evidence of some agreement of lease between the stranger and the owner.

Cyrus v. *Cumbermac* (1931-37) L.R.B.G. 412, per Verity, J. applied.

The acts relied on as part performance to take a case out of proviso (d) to section 3 (D) of the Civil Law of British Guiana Ordinance, cap. 7, must be of such a nature as, in themselves, would infer the existence of some contract in pursuance of which they are done and the general character of the contract. The acts cannot, unless in some very singular case, be themselves sufficient evidence of the particular contract alleged, because they cannot in themselves show all the terms of the contract from which they flow..

The acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged. They must necessarily relate to and affect the land the subject of the agreement.

Where part performance is established, oral evidence is admissible to show what is the nature of the agreement and what are its terms.

Frame v. Dawson (1807) 14 Vesey 387, 388 *per* Sir William Grant, M.R., *Maddison* v. *Alderson* (1883) 8 Appeal Cases 491 per Lord Fitzgerald, *Brough* v. *Nettleton* (1921) 2 Ch. 25 *per* Lawrence, J., and *Cumbermac v. Cyrus* (1931-37) L.R.B.G. 693, W.I.C.A. *per* Crean, C.J. applied.

Action brought by the plaintiff Harry Theophilus Pollydore against the Public Trustee acting under the provisions of the Public Trustee Ordinance, cap. 245 as administering the estate of Lydia Isabella Alves, deceased, to enforce an opposition entered to the passing of a transport. The facts and arguments sufficiently appear from the judgment.

E. A. Heyliger (for *A. J. Parkes),* for plaintiff.

C. Lloyd Luckhoo, for defendant.

Cur. adv. vult.

DUKE, J. (Acting): This is an action brought by the plaintiff HARRY THEOPHILUS POLLYDORE to enforce an opposi-

tion entered by him on the 31st July, 1943 to the passing of a transport by THE PUBLIC TRUSTEE OF BRITISH GUIANA, acting under the provisions of the Public Trustee Ordinance, Chapter 245, as administering the estate of LYDIA ISABELLA ALVES, deceased, to and in favour of CEPHAS JAMES TURTON. The opposition related to the W1/2 of the W1/2 of lot 79, Agricola, East Bank, Demerara, in respect whereof the plaintiff has alleged that the deceased had made in his favour an oral agreement of lease, specific performance of which is now claimed by the plaintiff.

Upon the action coming on for trial, counsel for the defendant took the preliminary objection that, as the agreement of lease relied upon was oral, it could not be pleaded. In support, he cited section 13 (2) of the Deeds Registry Ordinance, chapter 177, which is as follows:

> No lease of any immovable property ..... shall, as against any bona fide transferee of the property for valuable consideration, be good, valid or effectual in law or pleadable in any court of justice in the colony unless filed as of record in the registry.

The plaintiff's claim rests on an oral lease, but his claim is not against a *bona fide* transferee for value of the property alleged to be subject to the lease. The title to the W1/2 of the W1/2 of lot 79, Agricola is still in LYDIA ISABELLA ALVES, and the defendant is her legal personal representative. The defendant has not passed transport of the said quarter lot, he is seeking to pass transport of it without reference to the plaintiff's claim. Section 13 (2) of the Deeds Registry Ordinance, cap. 177, would have had application if transport had already been passed by the legal personal representative of LYDIA ISABELLA ALVES, deceased, to CEPHAS JAMES TURTON, and if this action were between the plaintiff and TURTON. The sub-section, however, has no application to the circumstances of the present case.

In paragraph 8 of the defence, it is pleaded that the agreements and promises alleged in the Statement of Claim are not evidenced in writing as required by proviso (d) to section 3 (D) of the Civil Law of British Guiana Ordinance, cap. 7. That is indeed so: and therefore the plaintiff cannot obtain a decree of specific performance unless there has been part performance. Counsel for the defendant submitted that such part performance must be specifically pleaded in a reply, and that as no reply was filed, the plea founded on proviso (d) to section 3 (D) of Cap. 7 must necessarily succeed, and the action be dismissed

In *CUMBERMAC* v. *CYRUS* (1931-37) L.R. B.G. 692, 693, CREAN, C.J. of British Guiana, delivering the judgment of the West Indian Court of Appeal, said:

> A further argument, which has been emphasised by counsel for the appellant is, that as there was no plea of "part performance" in the reply of the respondent to the defence of the appellant, he is debarred from calling oral evidence as to the alleged agreement. In our opinion, the facts set out in the respondent's statement of claim manifestly indicate that he was relying on part performance of the contract, as a ground of his claim, and we can see no necessity for a repetition of these facts in the reply, as the issue was already clearly raised.

In the present case, the plaintiff pleaded that an oral agreement of lease with respect to the W1/2 of the W1/2 of the lot 79, Agricola, was made on the 23rd February, 1937, between himself and LYDIA ISABELLA ALVES, he pleaded the terms of the alleged agreement, and he then alleged that:

> The said LYDIA ISABELIA ALVES immediately after agreeing as aforesaid delivered possession of the aforesaid quarter lot of land to the opponent (plaintiff) who thereupon erected a building and other erections thereon to the value of $700. The opponent (plaintiff) is still in possession of the said quarter lot of land and has paid all rent due therefor.

The facts therein pleaded manifestly indicate that the plaintiff was relying upon part performance of the contract, as a ground of his claim in opposition; and there was no necessity for him to file a reply repeating the allegations which were already made in the Statement of Claim, issue on which allegations were already joined by the defence.

Evidence has been led on behalf of the plaintiff, and it has not been disputed by the defendant, that prior to the 23rd February, 1937, the W1/4 of lot 79, Agricola; the property of LYDIA ISABELLA ALVES, was not in beneficial occupation, and there was no house upon the land; that from the 23rd February 1937 to the present time, the plaintiff, who was a stranger to the deceased, has been in possession of the W1/4 of lot 79, Agricola; that the plaintiff erected a house upon the land which he enclosed with palings; and that the plaintiff has paid to the deceased the sum of $5 a year as "lease rent" from the 23rd February, 1937, to the 22nd February, 1944, in respect of his occupation of the land.

From these facts and circumstances, the inference is clear that the possession of the W1/4 of lot 79, Agricola, from the 23rd February, 1937, to the present time, by the plaintiff, who was a stranger to the owner of the land, coupled with the payment of vent, shows that there was some agreement of lease between the plaintiff and LYDIA ISABELLA ALVES, the owner of the said quarter lot.

The oral contract pleaded by the plaintiff is one for a lease for ten years, with a right of renewal, and with a provision that in the event of any intention on the part of LYDIA ISABELLA ALVES to sell the W1/4 of lot 79, Agricola, she was to offer the same first to the plaintiff.

Counsel for the defendant has further submitted that the acts of part performance, whether pleaded or proved, are not unequivocal; that they could be just as referable to an agreement for a tenancy from year to year as to an agreement of lease for ten years with a right of renewal, and containing the terms, as pleaded or proved. He cited *BRITAIN* v. *ROSSITER* (1879) 11 Q.B.D. 123, and *MADDISON* v. *ALDERSON* (1883) 8 Appeal Cases 467, and he submitted that there was no part performance of the particular type of lease pleaded, namely one for ten years, and that the action should therefore be dismissed.

The simple answer to this submission is that, if it were correct, no oral agreement for a lease could be specifically enforced, as the acts of part performance in themselves could not show whether they relate to a lease for 3, 4, 5, 6, 7, 8, 9, 10, or any

other number of years. I shall, however, refer to some of the authorities, in order to show that judicial authority has already determined the matter, in a manner which is inconsistent with the submission of counsel for the defendant.

In *MORPHETT* v. *JONES* (1818) 1 Swanston 181, Sir T. PLUMER, M.R. said:

> The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms, the Court regarding what has been as a consequence of contract or tenure.

This passage was cited, with approval, by the Earl of SELBORNE, L.C. in MADDISON v. ALDERSON, supra, at page 479. In FRAME v. DAWSON (1807) 14 Vesey, 387, 388, Sir William Grant, M.R. said:

> The principle of the cases is that the act (that is to say, of part performance) must be of such a nature, that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to show what the agreement is.

This passage was cited, with approval, by LORD O'HAGAN in MADDISON v. ALDERSON,supra, at page 484, and he added:

"Then, but not till then."

At page 479 of the judgment in MADDISON v. ALDERSON. supra, the Earl of SELBORNE said:

> All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged.

And at page 491, Lord FITZGERALD said:

> The Lord Chancellor has well laid down that the acts relied on as performance to take the case out of the statute must be unequivocally and in their own nature referable to some such agreement as that alleged, and I may add must necessarily relate to and affect the land the subject of that agreement.

There is nothing in the passages which I have cited from the judgments of the House of Lords in MADDISON v. ALDERSON, upon which any reasonable argument can be founded that acts of part performance, in the case of an oral agreement of lease for a number of years, must show, in themselves, that they relate to a contract for the period of years pleaded and that they cannot relate to a contract for a less or greater number of years.

However, LORD O'HAGAN; at page 485 of the judgment in MADDISON v. ALDERSON, supra, made use of the following words:

> There is no conflict of judicial opinion, and in my mind no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance, in one particular. It must have relation to the one agreement relied upon; and to no other. It must be such, in Lord Hardwicke's words, "as could be done with no other view or design than to perform that agreement." It must be sufficient of itself, and without any other information or evidence, to satisfy a Court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced.

This statement is relied upon by counsel for the defendant as meaning that, to admit parol evidence of the terms of the contract, the part performance must be such as to show the very

same contract as the plaintiff alleged. However, *FRY,* in his treatise on Specific Performance, 1921, 6th edition, page 277, paragraph 581, says:

> The acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged. But if the acts go as far as this, they are admissible, for it seems evident that all that can be gathered from acts of part performance is the existence of some contract in pursuance of which they are done, and the general character oft the contract:they cannot, unless possible in some very singular case, be themselves sufficient evidence of the particular contract alleged, because they cannot in themselves show all the terms of the contract from which they flow. They may be evidence of an unknown contract, but the making known what that contract is, must be the result of the evidence which the acts in question are allowed to introduce.

The head-note to *BRITAIN* v. *ROSSITER,* supra, is as follows: "The doctrine as to part performance, whereby a contract not enforceable by an action at law, owing to the provisions of the Statute of Frauds, S. 4, was rendered enforceable in equity, was confined to *suits as to the sale* of interest in land, and its operation has not been extended by the provisions of the Supreme Court of Judicature Act, 1873." This head-note is slightly inaccurate, as the Court of Appeal, at pages 129 and 131 of the report, indicated that the doctrine of part performance was confined to suits concerning land, not to suits as to the sale of interests in land. A contract for the sale of an interest in land is only one of the contracts concerning land to which the doctrine of part performance is applicable.

In *BROUGH* v. *NETTLETON* (1921) 2 Ch. 25, P.O. LAWRENCE, J., held that where an option to purchase was one of the terms of an oral agreement of tenancy as to which there was part performance, the tenant was entitled to prove that an option to purchase was included in the terms of the oral agreement.

In *CYRUS* v. *CUMBERMAC* (1931-37) L.R. B.G 412 VERITY, J., said:

> The occupation of the premises for a period, the payment of rent and the issue by the defendant of receipts for rent during that period—these acts in themselves are evidence of the existence of a contract of tenancy, and the plaintiff is entitled to show what were the terms—a monthly tenancy from month to month, or a tenancy for a period.

In that case the dispute was as to whether there was only a monthly tenancy, or whether there was a tenancy for 3 years. In the present case the dispute (as appeared from the argument of counsel for the defendant on the preliminary objection) is as to whether there was only a tenancy from year to year, or whether there was a tenancy for 10 years with a right of renewal and with a right of pre-emption in the event of the landlord desiring to sell the premises leased.

In *CUMBERMAC* v. *CYRUS* (1931-37) L.R. B.G. 693, CREAN, C.J. delivering the judgment of the West Indian Court of Appeal, said:

> It is agreed that the acts of part performance can only be relied upon for this purpose (that is to say, to take the case out of proviso

> (d) to section 3 (D) of the Civil Law of British Guiana Ordinance, cap. 7) if they are such as to be referable to no. other title than is contained in the alleged contract or in some such contract. If, however, the acts of part performance are referable to some such contract, and are consistent with the contract alleged, oral evidence is admissible as to the precise terms of the contract. The necessity for writing is dispensed with, and the Court is entitled to find what the parties have actually agreed, although the terms of the agreement go beyond those to which the acts of part performance in themselves point.

On the authorities which I have cited, the preliminary objection taken by counsel for the defendant must be overruled, and the plaintiff is entitled to lead oral evidence to show what were the terms, and all the terms, which were agreed upon.

There is a distinct conflict of testimony as to where the agreement of tenancy between the plaintiff and LYDIA ISABELLA ALVES was made. CEPHAS JAMES TURTON who purchased the W1/2 of lot 79, Agricola from the defendant on the 3rd July, 1943 (28 days after the death of LYDIA ISABELLA ALVES) by private treaty, and in whose favour the defendant seeks to pass transport of the W1/2 of lot 79, Agricola, gave evidence that the agreement was made at Agricola; the plaintiff and the niece of the deceased stated that it was made at the house of the deceased in Alberttown. I accept the testimony of the plaintiff and of his witness on this point. TURTON deposed that it was in 1938, and not early in 1937 as deposed to by the plaintiff when he gave the plaintiff the address of the deceased in Georgetown. TURTON changed the number of the year in order to make it appear that the agreement could not have been made in Georgetown.

The plaintiff and his witness INEZ STEPHENS deposed as to the terms of the oral agreement of lease as pleaded in paragraph 1 of the Reasons of Opposition. It is natural that the plaintiff who was going to erect a house on the land (which house, when erected, cost $700) would wish security and permanence of tenure, and would wish to purchase the W1/2 of the W1/2 of lot 79, Agricola, in case LYDIA ISABELLA ALVES wished to sell it. The cost of removing the plaintiff's house from the land would probably be more than the "price which CEPHAS JAMES TURTON was able to persuade the defendant to sell the W1/2 of the W1/2 of lot 79 Agricola to him for, namely 1/2 of $100 or $50. I am satisfied, after paying due regard to the circumstance that this is a claim against the estate of a deceased person that the terms of the oral agreement as pleaded, were agreed upon between the plaintiff and the deceased.

The deceased placed the plaintiff into possession of the W1/2 of the W1/2 of lot 79, Agricola. TURTON never picked any fruits on that quarter lot, as alleged by him. The plaintiff erected a house on the land at the cost of $700, and he enclosed the quarter lot with palings. The deceased was well aware that a house was to be erected upon the land. The plaintiff paid his land rent regularly, and he paid the rates levied by the Village Council of Agricola in respect of his house, regularly. The deceased promised the plaintiff on many occasions that the oral terms of

the agreement would be reduced into writing; but she did not fulfil her promise.

Having accepted the evidence of the plaintiff and of his witness, I find that the acts of part performance pleaded and proved, related not to a tenancy from year to year, but to a tenancy for ten years, with the right of renewal, and subject to the terms and conditions set forth in paragraph 1 of the Reasons of Opposition.

There will therefore be judgment for the plaintiff against the defendant

(a) for specific performance of the oral agreement of lease, as set forth in paragraph 1 of the Reasons of Opposition;
(b) for an order declaring the opposition entered on the 31st July, 1943, to be just, legal and well founded;
(c) for an injunction restraining the defendant from passing transport of the W1/2 of the W1/2 of lot 79, Agricola, in favour of CEPHAS JAMES TURTON or of any other person without first offering to sell it to the plaintiff; and
(d) for costs certified for counsel.

Judgment for plaintiff.

Solicitor: *W. D. Dinally; F. I. Dias.*

Re TRADE MARK No. 1745A (No. 2).

[1943. No. 395.—DEMERARA.]

BEFORE DUKE, J. (Acting). 1944. MARCH 13, 20.

Practice and procedure—Originating motion—Presented to Registrar to be filed—Authority in writing to solicitor to act for applicant—Not required to be produced to Registrar—Rules of Court, 1900, *Order 3 rule* 9.

Practice and procedure—Originating motion—Filed on behalf of company not domiciled or resident within the jurisdiction—Power of attorney by company in favour of some one in this colony —Not necessary.

Where a solicitor presents to the Registrar an originating motion to be filed, he is not required to produce to the Registrar an authority in writing, signed by the applicant (or by his attorney) appointing the solicitor to act for him in the matter of the originating motion.

An originating motion may be filed on behalf of a corporation domiciled or resident out of the Colony, even though the corporation has no attorney in this Colony.

Re TRADE MARK No. 1745A (No. 2).

Preliminary objection to motion by The Florsheim Shoe Company for the rectification of the register of trade marks by removing therefrom the mark therein registered in Class 38 and numbered 1745 A. The facts and arguments sufficiently appear from the judgment.

H. C. Humphrys, K.C., for applicant.

S. L. van B. Stafford, K.C., for respondent J. Frederick Cameron, the registered proprietor of trade mark No. 1745 A.

Registrar of Trade Marks, in person.

Cur. adv. vult.

DUKE, J. (Acting): This is an originating notice of motion filed on behalf of THE FLORSHEIM SHOE COMPANY, which is incorporated under the laws of the State of ILLINOIS, United States of America. This corporation has no attorney in the Colony. The notice of motion was filed by Mr. J. Edward de Freitas, as solicitor for the applicant, and when it was filed there was not produced to the Registrar an authority in writing signed by the applicant authorising him to act for the applicant in the matter of the originating motion. Counsel for the respondent has taken the preliminary objection that, by reason of these circumstances, the proceeding's herein should be struck out as having been filed without authority.

Rule 9 of Order 3 of the Rules of Court, 1900 is as follows:

> The plaintiffs solicitor, unless authorised by a general power *ad lites* passed and executed in the office of the Registrar, shall, when presenting a writ of summons to the Registrar, produce an authority in writing, signed by the plaintiff or his attorney, appointing the solicitor to act for him in the action. Such authorisation may be indorsed upon the writ itself or may be contained in a separate document, and in such latter case shall be filed with the writ.

Counsel for the respondent has submitted that an originating notice of motion (which is the form of application adopted by the applicant) is subject to rule 9 of Order 3 of the Rules of Court, 1900. In England, there is no rule similar to that rule, and I am unable to extend it to include a reference to originating notices of motion. The rule refers to writs of summons, and to writs of summons alone. Where a solicitor presents to the Registrar an originating motion to be filed, he is not required to produce to the Registrar an authority in writing, signed by the applicant (or by his attorney) appointing the solicitor to act for him in the matter of the originating motion.

In England, an originating notice of motion may be filed on behalf of a corporation domiciled or resident out of England, even though the applicant has no attorney in England. There is no local rule to the contrary, and so I must hold that the originating motion herein was properly filed even though it is made on behalf of a company which is incorporated under the laws of the State of Illinois, U.S.A., which company has no attorney in this Colony. The preliminary objection is therefore overruled, and the hearing of the motion will proceed.

Preliminary objection overruled.

Solicitors: *J. Edward de Freitas,* for applicant;
H. V. vanB. Gunning, for respondent.

Re TRADE MARK No. 1745A (No. 1).

[1943. No. 395.—Demerara.]

BEFORE DUKE, J. (ACTING).

1944. January 3, 10, 17.

Trade marks—Register of—Rectification of—Motion for—Registered proprietor out of jurisdiction—Sufficient notice to—What is—That copy of motion sent to him with intimation that proceedings pending which night affect his interest.

Practice and procedure—Striking out proceedings—Notice of motion —Name of applicant not stated in—Affidavit in support of motion—Filed with motion—Name of applicant stated in affidavit—Application to strike out notice of motion—Refused.

Practice and procedure—Amendment—Notice of motion—Name of applicant not stated therein—Affidavit in support of motion—Filed with motion—Name of applicant stated in affidavit—Amendment of notice of motion to include name of applicant—Granted.

There being no provision under the Trade Marks Ordinance, cap. 59, or under any local rule of court, for the service, out of the jurisdiction of the Court, of an originating notice of motion for the rectification of the register of trade marks, it was sufficient, where the registered proprietor of the trade mark in question is resident out of the jurisdiction of the Court, to send, as was done by the applicant, a copy of the notice of motion by post to the registered proprietor of the trade mark with an intimation that it was sent in order that he might be informed that proceedings are pending in this Court which might affect his interests.

In re La Compagnie Generale D'Eaux Minerales et de Bains de Mer (1891) 3 *Ch.* 451, 458, *and In re King* & *Go's Trade Mark* (1892) 2 *Ch.* 62, 465, 479, 480, 482, 486, 488, 490, C.A., applied.

A motion was filed for the rectification of the register of trade marks. The name of the applicant was not stated in the motion, but in the affidavit filed in support, the name of the applicant was sufficiently stated. "The registered proprietor of the trade mark was resident out of the jurisdiction out of the Court, and the applicant sent to him a copy of the notice of motion but not a copy of the affidavit. From the history of the case, the registered proprietor, when he received the

copy of the notice of motion, could have had but very little doubt as to who the applicant was. He filed in the Registry of Court an authority to a solicitor to act as his solicitor and agent in the matter as well as an application for leave to intervene in the proceedings. On the motion coming on for hearing, he applied that the motion be struck out, and the applicant applied that the motion be amended by inserting his name therein.

Held (1) that the application that the motion be struck out must be refused as it sufficiently appeared from the notice of motion and the affidavit (which together constituted the pleading of the applicant) who the applicant was; and

(2) that the application for the amendment would be granted as no injustice or hardship would be suffered by the respondent thereby.

PRELIMINARY OBJECTION to motion by The Florsheim Shoe Company for the rectification of a trade mark.

H. C. *Humphrys, K.C.,* for applicant

S. L. van B. Stafford, K.C., for registered proprietor of trade mark.

Cur. adv. vult.

DUKE, J. (Acting): On the 17th November, 1943, a notice of motion, returnable for the 6th December, 1943, was filed under section 34 of the Trade Marks Ordinance, cap. 59, by the solicitor for the applicant, for an order that the registration (*sic*) of trade marks kept under the above-mentioned Ordinance may be rectified by the removal of the mark therein registered in Class 38 and numbered 1745 A, or that such other order for the rectification of the said register may be made as to the Court shall seem fit.

The name of the applicant is not stated in the notice of motion which is addressed to J. Frederick Cameron and to the Registrar of Trade Marks. Along with the notice of motion there was filed an affidavit by C. W. Schaaf, the Vice-President and Secretary of The Florsheim Shoe Company, a corporation duly organised and existing under the Laws of the State of Illinois, United States of America.

J. Frederick Cameron is not resident within the jurisdiction of this Court, and it was not possible to serve the notice of motion upon him in this Colony. He resides in Trinidad out of the jurisdiction of this Court. There is no provision under the Trade Marks Ordinance, cap. 59, or under any local rule of Court, for the service, out of the jurisdiction of this Court of an originating notice of motion for the rectification of the register of trade marks. Such being the case, the practice as laid down by Stirling, J. in *In re La Campagnie Generale D'Eaux Minerales et de Bains de Mer* (1891) 3 Ch. 451, 458, followed by Kekewich, J. and considered sufficient by the Court of Appeal in *In re* King and Co's *Trademark* (1892) 2 Ch. 462, 465, 479, 480, 482, 486, 488, 490, was properly followed by the solicitor for the applicant, that is to say, a copy of the notice of motion was sent to J. Frederick Cameron with an intimation that it was sent in order that he might be informed that proceedings are pending in this Court which might affect his interests.

The solicitor for the applicant did not, however, send to J. Frederick Cameron in Trinidad a copy of the affidavit filed in support of the notice of motion. Had copies of both documents been served on J. Frederick Cameron, he might have taken the objection, as was successfully taken in *In re La Campagnie Generate D'Eaux Minerales et de Bains de Mer*, supra, that the solicitor for the applicant had made an illegal and unauthorised attempt to serve him, out of the jurisdiction of this Court, with the notice of motion.

On the .6th December, 1943, counsel appeared in Court on behalf of J. Frederick Cameron. The latter filed in the Registry of Court on the 15th December, 1943, an authority dated the 8th December, 1943, to a solicitor to act as his solicitor and agent in this matter, as well as an application for leave to intervene in these proceedings for the rectification or removal of the entry on the Register in respect of Trade Mark No. 1745 A. J. Frederick Cameron has submitted to the jurisdiction of this Court, and although, when the copy of the notice ,of motion was served upon him out of the jurisdiction of this Court, he was not a respondent, (see *re La Campagnie Generale D'Eaux Minerales et de Bains de Mer* (1891) 3 Ch. 458, per Stirling, J.), he is now a respondent to the motion, in the same manner as the Registrar of. Trade Marks

Although the name of the applicant does not appear in the notice of motion, it sufficiently appears from the accompanying affidavit of C. W. SCHAAF that the applicant is THE FLORSHEIM SHOE COMPANY. The notice of motion and the affidavit of SCHAAF constitute the pleading of the applicant. The facts relied on by the applicant, as well as the order asked for and the section of the Trade Marks Ordinance which the applicant proposes to invoke in his favour are stated in the affidavit: and the notice of motion repeats the order sought in these proceedings. It is not therefore possible to accede to the submission of counsel for the respondent Cameron that the notice of motion should be struck out because the name of the applicant is not stated therein. The preliminary objection is therefore overruled.

Counsel for the applicant has asked that the notice of motion be amended by inserting the words "on behalf of "THE FLORSHEIM SHOE COMPANY" between the words "in the "forenoon" and the words "for an order." If this application is granted, it will make clear what is apparent when the affidavit is read: further, no injustice of hardship will be suffered by the respondent Cameron. It would appear from the affidavit filed on behalf of the applicant (and no affidavit has been filed in opposition or in denial) that when the respondent Cameron received the notice that these proceedings were pending and that the motion would come on for hearing on the 6th December, 1943, he could have had but very little doubt that the person who was applying that the respondent's Trade Mark No. 1745 A should be removed from the register of trade marks, was THE FLORSHEIM SHOE COMPANY; and even if some infinitesimal doubt still persisted in his mind, such doubt could have been erased, before the motion came on for hearing on the 6th December, 1943, by his instructing his solicitor

to peruse the file in these proceedings. Up to the present, the respondent Cameron appears to have carefully refrained from exercising any curiosity, or from displaying any anxiety, as to the particulars or details of the proceedings filed by the applicant herein. The amendment asked for is therefore granted.

The hearing of the motion will proceed.

Solicitors: *J. Edward de Freitas; H. V. van B. Gunning.*

G. R. CLAPHAM *v.* DAILY CHRONICLE, *et al.*

GEORGE RUTHLAND CLAPHAM, Plaintiff,

v.

DAILY CHRONICLE Limited, CHARLES NOEL DELPH and ALBERT EUSTACE ISAACS, Defendants.

[1942. No. 345.—DEMERARA.]

BEFORE SIR JOHN VERITY, C.J. 1944. MARCH 20.

Libel and slander—Libel—Publication—Defence of fair comment on matters of public interest—Only one defence—Not necessary to separate facts from comment in publication or in defence—What must be proved to establish defence—That facts wherever they are to be found are substantially true—That matters of opinion wherever expressed are fair and honest opinion on those facts—Defence destroyed where comment passes out of domain of criticism itself—But not necessarily by exaggeration in expression of one's views.

Libel—Publication—Reasonably capable of a defamatory meaning—Defamatory.

The so-called "rolled-up plea" in a defence to an action for libel in fact raises only one defence, that being the defence of fair comment on matters of public Interest.

Sutherland v. *Stopes* (1925) A.C. 162, applied.

It is not incumbent, in the case of the so-called "rolled-up plea", upon the defendant either by the form of his publication or by the nature of his pleadings to pick out which part consists of statements of fact and which part consists of matters of opinion.

Aga Khan v. *Times Publishing Co.* (1924) 1 K.B. 675 applied.

In order that the so-called rolled-up plea should succeed, the defendant must establish that the facts stated, wherever they are to be found, are true, and that the matters of opinion, wherever expressed, are fair and honest comment on those facts.

Exaggeration, even gross exaggeration, in the expression of one's views, does not necessarily destroy the protection afforded those who are at liberty to criticise the public acts of another, although it may be so where comment "passes out of the domain of criticism itself".

McQuire v. *Western Morning News* (1903) 2 K.B. 100, applied.

In relation to the pianoforte playing of the plaintiff at a public performance the defendants wrote: "It was an insult to our intelligence, it did not take a musical genius to detect the mistakes the performer made".

Held that the words are not only capable of bearing a defamatory meaning but are in fact defamatory of the plaintiff in the way of his profession as a musical performer.

Action by the plaintiff against the defendants for libel. The facts and arguments sufficiently appear from the judgment.

A. J. Parkes and *S. I. Cyrus,* for the plaintiff.

C. Vibart Wight, for the defendants.

Cur. adv. vult.

VERITY, C.J.:

In this case the plaintiff seeks to recover damages in respect of an alleged libel contained in an article written by the third-named defendant and published in the "Daily Chronicle" newspaper of which the defendant company are the proprietors and the second named defendant is the printer and publisher.

The plaintiff is a composer, performer and teacher of music and on the 3rd October, 1942, he took part in a certain public performance at Fort Canje Theatre in Berbice. It appears from the evidence that the plaintiff played four piano solos and the accompaniment to a number of songs sung by Miss DeRushe, one of his pupils.

The third-named defendant was present at the performance and thereafter wrote an account which was published in the "Daily Chronicle" on the 7th October, 1942." The headline directly referring to the plaintiff runs "London Pianist Disappoints Canje Audience" and those parts of the account which, it is submitted, are defamatory of the plaintiff, are as follows: "I saw people sulk, I heard others speak in disappointing terms. “Some even complained to me after Ruthland Clapham's piano recital at “the Canje last Saturday night. 'It is an insult to our 'intelligence' one “minister told me. It did not take a musical genius to detect the mistakes “made during Beethoven's Minuet and Rackmaninoff's Prelude in C sharp “minor. Among some of this Town's leading musicians who attended and “showed visible signs of disappointment were Mrs. Ruby McGregor, the “Rev. N. S. Shellock, Mr. Sammy Nicholas and Mrs. Kunkle.”

The defendants do not deny publication of this matter as concerning the plaintiff but they plead that it is not defamatory and further that "in so far as the words consist of allegations of fact "they are true in substance and in fact; in so far as they consist of expressions of opinion they are fair comments made in good "faith and without malice upon the said facts which are matters "of public interest."

The words which refer to the disappointment of the audience, if they stood alone, I might be prepared to hold are incapable of bearing and do not in fact bear a defamatory meaning, for mere disappointment may result from many causes entirely independent of the skill or competence of the performer. When however the writer proceeds to publish the statement "It was an insult to our intelligence", even though this comment is not his own, and that "it did not take a musical genius to detect the mistakes the "performer made," then indeed I am unable to hold otherwise than that the words are not only capable of bearing a defamatory meaning but are in fact defamatory of the plaintiff in the way of his profession as a musical performer.

It remains to be seen whether the plea which I have set out is open to the defendants and if so whether it has been established by the evidence.

In the first place it may be convenient to recall that the plea in this case is no more than a plea that the publication complained of fairly and honestly comments on a matter of public interest. It is true that the form of the plea is that which has been called

"the rolled up plea" but this was described by Lord Finlay in *Sutherland v. Stopes* (1925, A.C. at p. 162) as a "misnomer based "on a misconception of the nature of the plea." His Lordship added that this plea "has been "sometimes treated as containing two separate defences rolled into one but "it in fact raises only one defence, that being the defence of fair comment "on matters of public interest." The averment that the facts were truly stated "is merely to lay the necessary basis for the defence on the ground of fair comment."

It may be well also to clear the ground of another misconception: that it is requisite for the defendants to distinguish plainly either in the publication itself or in their pleadings what are the facts stated and what are the comments. Support for this view is sought in the statement to be found in Gatley on Libel and Slander (2nd Edn. p. 378) where the learned author states ". .a critic should never mix up his comments with the facts on which they are based." That this statement is rather by way of counsel than the setting out of a legal requirement may be seen by reference to the words of the learned author of Odgers on Libel and Slander (6th Edn. p. 575) where in regard to this particular plea, he says "It was only intended to be used where allegations of fact were sometimes inextricably-mixed up with comment in the libel and where the comments were based upon the facts stated in the libel." Indeed it is clear from the judgments of the Court of Appeal in the *Aga Khan* v. *Times Publishing Co.* (1924, 1. K.B. 675) that it is not incumbent upon the defendant either by the form of his publication or by the nature of his pleadings to pick out which part consists of statements of fact and which matters of opinion. "For," said Bankes, L.J., "category to which the several statements belong is a question for the jury." It is necessary however in order that this plea should succeed that the defendants should establish that the facts stated, wherever they are to be found, are true, and that the matters of opinion wherever expressed are fair and honest comment on those facts.

With these principles in mind I would proceed to the consideration of the present case. It is true that facts and opinions are by no means tabulated or otherwise clearly distinguished by the writer of the article. As was pointed out in the case last referred to by me, even had he attempted to do this he might have been wrong in his classification. Nevertheless I experience little difficulty in distinguishing those parts of the account which appear to me to be statements of fact and those which appear to be in the nature of comment thereon. It is tolerably clear, I think, that when the writer states that the plaintiff made mistakes in the playing of certain pieces of music and when he states that certain members of the audience including some of the town's leading musicians displayed disappointment either by voice or demeanour, he is stating facts. When on the other hand he concludes that the plaintiff disappointed the audience as a whole or that the performance was an insult to the intelligence of the audience, or that the mistakes could be detected even by one who was not a musical genius, then he is expressing an opinion by way of comment on those facts. He must therefore establish

that the facts are truly reported for only truth can be the basis of fair comment, and he must further establish that the opinions he expressed in regard to the facts are fair and honest comment.

The defendants are neither to seek advantage by the application of too literal an interpretation. Such a construction is to be placed upon them as would appear open to a reasonable man, and the effect as well as the meaning of the precise words used must bear the same test. Thus they cannot escape responsibility for the statement "It is an insult to our intelligence" as a comment upon the proceedings by proof that, as a matter of fact, it is true that one minister said so. By its publication, without disclaimer, the writer had adopted the comment as his own and would so be understood. On the other hand if they succeed in establishing the substantial truth of a statement of fact then they are not to be penalised because it may not have been precisely established in detail. Thus if, in fact, "some sulked" and "some complained" the substance of the statement is proved even though the writer has not given evidence that he himself saw them sulk or that they complained to him, as for the sake of artistry he alleged in his report.

The first issue of fact is whether or not the plaintiff made mistakes in the playing of certain pieces of music. He most emphatically denies this and gives reasons for his denial: that the first-named piece is simple and one which he has played many times; and that in the second piece that part in which it is suggested that he made mistakes is of such a nature that the player, if playing from memory, would completely break down if he made a mistake. It appears from all the evidence that the two pieces are very well known and that they especially attracted the notice of those who gave evidence for the defendants because they were so familiar to them. All save two of these witnesses aver that the plaintiff made mistakes in playing these two pieces. Of the exceptions, one would not say that he could detect mistakes but having heard the second piece played by its composer he did not find that the plaintiff's performance appealed to him and indeed considered it to be an insult to his intelligence. The other expresses himself as greatly disappointed, his disappointment, passing from disgust to amusement.

Two of the witnesses might no doubt be described, with due allowance for the language of journalism, as amongst the town's leading musicians, one an enthusiastic amateur and the other an apparently successful professional teacher of music. Both of these witnesses were able to state unhesitatingly that the plaintiff made mistakes in playing these two pieces and to indicate certain precise particulars in which he misplayed them.

It has been submitted that the defendants cannot avail themselves of this testimony in that the writer of the article cannot rely on facts which were not within his knowledge at the time he wrote the article but I think that the proper view is that he is quite at liberty to adduce other evidence to confirm his own observation and so establish the truth of his statement. Here the writer professes himself to have observed mistakes. If this be true he may not then have been in a position through lack

of musical training to identify their precise nature nor in a position now to recall them in detail. He is at liberty, however, to substantiate his own observations by the evidence of those better qualified than himself in this regard who were also present and themselves not only heard but identified the errors. I have no doubt whatever from the way the defendants' witnesses gave their evidence that they are honest witnesses and that so far as Mr. Lindley and Mrs. McGregor are concerned they are adequately qualified to judge of the occurrence of the mistakes to which they referred.

Taking all the evidence into consideration I can reach no other conclusion but that the plaintiff as a fact on that occasion did make mistakes in the playing of these two pieces of music and that these mistakes were observed by members of the audience who were not trained musicians. The defendants have therefore established the substantial truth of the first statement of fact contained in the article.

I am also satisfied on the evidence as a whole that certain members of the audience showed such visible signs of disappointment as those indicated by the writer of the article. It would indeed be strange if those whose feelings of disappointment amounted to disgust showed no such signs, and if, as witnesses aver, a measure of the applause was derisive, this in itself would be an expression of, at least, lack of appreciation on the part of others besides those who actually gave evidence as to their emotions. The defendants have therefore established the truth of the second statement of fact contained in the article. The question then arises whether the opinions expressed in the report are to be considered fair and honest comment on these facts so stated.

In the first place the report comments that the plaintiff disappointed the audience. Is this a fair comment upon the facts? Including the writer who was himself a member of the audience several witnesses have stated their disappointment and there is not doubt that members of the audience displayed this in a manner apparent to the observer. In the absence of any evidence which would go to show that these persons constituted but a small proportion of the audience or that a large proportion of the audience dissented from this view I do not think" it an unfair comment that the audience was disappointed. If, as the plaintiff and his witness Miss De Rushe aver, the audience as a whole were so pleased that their applause might truthfully be described as "thunderous" or their reactions "sensational" then indeed the comment based upon the statement that a limited number only were disappointed could hardly be called fair and would not be honest. There is, however, no support for these statements. Out of the whole of the audience but one person is called as a witness who is able to express appreciation, and that person a brother-in-law of one of the performers. In these circumstances I cannot say that the comment is unfair.

In regard to the statement that the mistakes made were such that they could be detected by a person who was not a musical genius this would appear to be a fair comment in the circum-

stances, for while there may be but little merit in the use of the phrase "musical genius" in this connection, it is apparent that the mistakes were observable by others besides those who have some musical training.

The weightiest part of the comment is to be found in the opinion expressed that the performance was an insult to the intelligence of the audience and it remains to be seen whether or not this falls within the limits of fair comment. Exaggeration, even gross exaggeration, in the expression of one's views does not necessarily destroy the protection afforded those who are at liberty to criticise the public acts of another, although this may be so where comment "passes out of the domain of criticism itself," to use the words "of Collins, M.R, in *McQuire* v. *Western Morning News* (1903) 2 K.B., p. 100. Can it be said that the phrase now under consideration does this, or that the whole article does so? It is true that to describe the plaintiff's performance as an "insult to the intelligence" of the audience is to use strong and perhaps exaggerated language, but on the facts as truly stated in the article can it be said to go beyond the limits of honest comment? There can be but little doubt that one who may truly be described as a "London pianist" and is to be credited therefore with skill perhaps above the average, shows but little respect for the musical appreciation of a country or provincial audience if he plays well-known pieces of music in such a manner that mistakes are obvious to comparatively untrained listeners. Comment expressed in such terms would, I think, be well within the limits of fair comment and I am further of the opinion that a mere exaggeration of such a comment and that is all the defendants have published, would not go beyond them.

Taking the article complained of either piece by piece or as a whole I find that the plea of fair comment has been established and there is nothing in the evidence to lead me to the conclusion that the defendants or any of them were actuated by malice or any indirect or improper motive. The plaintiff has sought to establish this by reference to alleged false statements relating to other parts of the entertainment, but I am unable to hold that a mere expression of opinion that Miss De Rushe appeared "overworked" or to describe the retirement of the conductor of the band through illness as a "collapse" can be evidence of malice. Nor should I find such evidence in the alleged statement by the writer of the article that he did not think that criticisms of such concerts should be invariably eulogistic for, if they are to serve any useful purpose, they should hot.

There is no doubt, indeed it was not contested, that the matter is one of public interest, and with that finding the defendants' plea is completely established and the plaintiff fails in his claim.

I should wish to add that while the report truly states certain facts, fairly if strongly comments thereon and is therefore not actionable, it does not perhaps do complete justice to the performance it purports to describe nor to the ability of the plaintiff to which his past record and the testimony of more than one witness pays tribute. Had the writer been more charitably disposed or had he sought to produce a more well-balanced criticism of the

concert as a whole he might well have given praise where praise was due as generously as he lavished adverse comment. I am yet to learn, however, that a newspaper report is actionable because it does not preserve due balance in its terms or that a person who sets out to criticise adversely the public acts of another is to be liable to damages if he does not at the same time catalogue that other's virtues or good deeds.

Those who seek the opinion of the public in the course of their profession and in the service of their own interests expose themselves to public criticism and if they fail to serve that end must not complain. The plaintiff sought by the favourable publicity he hoped to obtain from this concert to enhance his musical reputation and increase the number of his pupils. In so doing he exposed himself to the risk of adverse criticism and it was that which he secured. If, as may possibly be deduced from the evidence, he took less care in his performance in this country theatre than he would have done in London, he has only himself to blame. The views of the audience and the criticism of the newspaper reflect rather upon the skill displayed by him on this particular occasion than upon what may well be his more usual high standard of musical ability. If the general public appear to have given greater weight to an isolated failure than to a reputation earned by previous success this may be an example of that caprice which the "famous and the notorious alike learn to expect. They should perhaps learn also to meet with equanimity both praise and blame. It is those who have not yet learned this lesson who tend to aggravate their loss by seeking the further publicity of a libel action which cannot succeed unless the criticism of their acts goes beyond the generous limits allowed to those who would exercise their freedom of expression.

Judgment will be entered for the defendants with costs.

Judgment for defendants.

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

THE FLORSHEIM SHOE COMPANY, Applicant,

v.

JOHN FREDERICK CAMERON, Respondent.

[1943. No. 385.—DEMERARA.]

BEFORE DUKE, J. (Acting).

1943. DECEMBER 6; 1944. JANUARY 3, 10, 17; FEBRUARY 7, 14, 29;

MARCH 13, 20, 24.

Trade mark—Registered in United Kingdom—Registered in colony—Effect of such registration—As from date of registration in United Kingdom—Trade Marks Ordinance, cap. 59, *sections* 67, 68.

Trade mark—Registered in colony—Identical trade mark previously registered in United Kingdom—Subsequently registered in colony—Application to remove local trade mark from register—Entry expunged—Trade Marks Ordinance, cap. ET, *sections* 34, 67, 68*—Local marks not used in colony—Entry expunged, and not varied.*

FLORSHEIM SHOE CO. *v.* J. F. CAMERON

Trade mark—Registration of—Identical mark, or so nearly resembling first mark as *to be calculated to deceive or to lead to confusion in trade or among purchasing public—Second mark expunged from register —Trade Marks Ordinance, cap.* 59, *sections* 18, 34.

Trade mark—Registration of identical marks—When permitted by Court—Concurrent user or other special circumstances—Trade Marks Ordinance, cap 59, *section* 20.

Trade mark—United Kingdom trade mark registered in Colony—Cancellation of—Trade Marks Ordinance, cap. 59, *section* 77.

Upon registration in Part C of the register kept under the Trade Marks Ordinance, cap. 59, of a trade mark register in the United Kingdom, the registration has effect, subject to the proviso to section 68, as if it were registered in the Colony on the date of its registration in the United Kingdom.

On an application made under section 34 of the Trade Marks Ordinance, cap. 59, by the proprietor of a registered trade mark, the Court made an order expunging from the register of trade marks the entry therein of an identical trade mark subsequently registered in the name of another proprietor.

Under section 18 of the Trade Marks Ordinance, cap 59, the test is whether the mark sought to be registered bears so close a resemblance to the mark already registered as to be calculated to deceive or to lead to confusion in the trade or among the purchasing public.

……Pepsi-Cola Company v. Coca-Cola Company (1939) L.R.B.G. 250, 253, W.I.C.A., applied.

An order will not be made under section 18 of the Trade Marks Ordinance, cap. 59, to vary an entry in the register of trade marks if there are no circumstances to induce the Court to so order.

Honest concurrent user under section 20 of the Trade Marks Ordinance, cap. 59, considered.

Cancellation under section 70 of the Trade Marks Ordinance, cap. 59, of registration of United Kingdom trade mark in Part C of the register, considered.

Motion for the rectification of the register of trade marks by removing therefrom a mark therein registered therein in Class 38 and numbered 1745 A. The facts and arguments sufficiently appear from the judgment.

H. C. Humphrys, K.C., for the applicant, The Florsheim Co.

S. *L. van B. Stafford,* K.C., for the respondent John Frederick Cameron, the registered proprietor of trade mark 1745 A.

Cur. adv. vult.

DUKE, J. (Acting): This is an application (brought by way of originating notice of motion) by THE FLORSHEIM SHOE COMPANY for an order that the register of trade marks kept under the Trade Marks Ordinance, Chapter 59, may be rectified by the removal of the mark therein registered in Class 38 in the name of the respondent JOHN FREDERICK CAMERON, and numbered 1745 A.

The trade mark No. 1745 A consists entirely of the word "FLORSHEIM" which appears in plain large capitals. It was registered with effect as from the 21st May 1937, the date upon which the application for registration was received by the Registrar of Trade Marks. The mark is registered in Class 38 in respect of boots and shoes.

On the 5th June, 1940, THE FLORSHEIM SHOE COMPANY applied for registration, in Part A of the Register, of their mark "THE FLORSHEIM SHOE," with shield device, there was no opposition to the registration, and the mark was registered as No. 1914 A with effect as from the date of application.

On the 14th November, 1940, THE FLORSHEIM SHOE COMPANY applied to the Registrar of Trade Marks for an order removing the entry on the Register in respect of Trade Mark No. 1745 A. On the 27th February, 1941, JOHN FREDERICK CAMERON filed a counter-statement in answer to the statement filed by THE FLORSHEIM SHOE COMPANY, and in that counter-statement JOHN FREDERICK CAMERON made a counter-application for an order removing the entry on the Register in respect of Trade Mark No. 1914 A, on the ground of his prior registration of Trade Mark No. 1745 A. The counter-application of JOHN FREDERICK CAMERON could not lawfully be heard by the Registrar of Trade Marks as it was filed by a solicitor of the Supreme Court who was not a licensed patent agent. Neither the application nor the counter-application could lawfully be heard by the Registrar of Trade Marks because *firstly*, hearing was not requested in the prescribed form or at all, and *secondly*, no hearing fee was paid. The proceedings before the Registrar of Trade Marks have not been heard or determined.

By section 34 of the Trade Marks Ordinance, Cap. 59, the court may, on the application in writing of anyone aggrieved by any entry wrongly remaining on the register, make any order for expunging or varying the entry it thinks fit.

THE FLORSHEIM SHOE COMPANY is the owner of trade mark No. B. 409557 which was registered under date the 9th November 1920 in the United Kingdom in Class 38 (Schedule III) in respect of shoes. This registration has been renewed for a period of fourteen years from the 9th November 1934. The trade mark consists of the words "THE FLORSHEIM SHOE" with a shield device which is very similar to, but not identical with, the shield device which appears on Trade Mark No. 1914 A. On the 23rd June 1942 the United Kingdom trade mark was registered under The Third Part of the Trade Marks Ordinance, Chapter 59, in Part C of the Register. Sections 67 and 68 of the Ordinance re as follows:

> 67. The certificate of registration shall confer on the applicant privileges and rights subject to all conditions established by law of the colony as though the certificate of registration in the United Kingdom had been issued with an extension to the colony.
>
> 68. Privileges and rights so granted shall date from the date of registration in the United Kingdom and shall continue in force only so long as the registration in the United Kingdom remains in force:
>
> Provided that no action for infringment of the trade mark shall be entertained in respect of any use of the trade mark prior to the date of issue of the certificate of registration in the colony.

It therefore follows that although the United Kingdom trade mark No. B 409557 was not registered in this Colony until the

23rd June 1942, the trade mark, upon registration in this colony, took effect as from the 9th November 1920 subject, however, to the proviso contained in section 68.

In considering whether the Registrar of Trade Marks should have accepted the respondent's application in May 1937 in respect of trade mark No. 1745 A, the United Kingdom trade mark No. B 409557 of the 9th November 1920 must be deemed to have been on the register at the time the respondent's application was filed. By section 18 of the Trade Marks Ordinance, cap. 59, no trade mark shall be registered in respect of any goods or description of goods identical with one belonging to a different proprietor which is already on the register with respect to those goods or that description of goods, or so nearly resembling it as to be calculated to deceive.

Counsel for the respondent has submitted that the United Kingdom trade mark No. B 409557 of the 9th November 1920 and the local trade mark No. 1745 A of the 21st of May 1937 are not similar. The United Kingdom trade mark consists of the words "THE FLORSHEIM SHOE" with a shield device; "THE" appears *in* small script characters over "FLORSHEIM;" "FLORSHEIM" appears in large script characters (only the "F" being in capitals) diagonally between "THE" and "SHOE;" "SHOE" appears in plain block letters (about one half as large as the capital "F" in "FLORSHEIM") below "FLORSHEIM." The make-up of the trade mark gives prominence to the word "FLORSHEIM" which is the distinctive part of the trade mark. The local trade mark No. 1745 A consists entirely of the word "FLORSHEIM" in plain block capitals. I have considered the submission of counsel but I am unable to agree with it. As pointed out by the West Indian Court of Appeal sitting at Antigua in *PEPSI-COLA COMPANY* v. *COCA-COLA COMPANY* (1939) L.R. E.G. 250, 253, the test is whether the mark sought to be registered bears so close a resemblance to the mark already registered as to be calculated to deceive or to lead to confusion in the trade or among the purchasing public. Applying that test, I find that the local trade mark No. 1745 A so nearly resembles the United Kingdom trade mark as to be calculated to" deceive persons who may purchase shoes bearing the local trade mark No. 1745 A, into believing that they have in fact purchased shoes made by the applicant THE FLORSHEIM SHOE COMPANY. That being so, the entry in the register of trade marks No. 1745 A (although properly made when it was in fact made), wrongly remains in the Register, ever since the 23rd June, 1942, upon which date application was filed for the registration in this Colony of the United Kingdom trade mark. The applicant is aggrieved by the entry which wrongly remains in the Register, and he is entitled under section 34 of the Trade Marks Ordinance, cap. 59, to an order for expunging or varying the entry in the name of the respondent.

Counsel for the applicant submits that an order should be made expunging the entry of trade mark No. 1745 A from the register of trade marks, while counsel for the respondent has submitted that the entry should be varied by, for example, sub-

stituting "CAMERON'S FLORSHEIM" for the mark "FLORSHEIM" registered under his name as Trade Mark No. 1745 A. The respondent has never used, in this Colony, the name of FLORSHEIM in respect of boots and shoes. In the statement which THE FLORSHEIM SHOE COMPANY filed with the Registrar of Trade Marks on the 14th November, 1940, it was disclosed to the respondent JOHN FREDERICK CAMERON that a trade mark which includes the word "FLORSHEIM" was registered in Great Britain on the 9th November, 1920, as Trade Mark No. B 409557, and was renewed on the 9th November, 1934. The respondent filed his counter-statement on the 27th February, 1941. He, however, restrained himself from making an application in writing to the Registrar of Trade Marks to amend his Trade Mark No. 1745 A, although he knew, on the 27th February, 1941, if not before, of the existence of the registration in the United Kingdom of the trade mark of THE FLORSHEIM SHOE COMPANY, such trade mark including therein the word "FLORSHEIM". There are no circumstances which would induce the Court to vary the entry by substituting "CAMERON'S FLORSHEIM" for "FLORSHEIM."

Counsel for the respondent has stressed that relief could, and should, be afforded to the respondent under section 20 of the Trade Marks Ordinance, cap. 59, which is as follows:

> In case of honest concurrent user or of other special circumstances which in the opinion of the Court make it proper to do so, the Court may permit the registration by more than one proprietor of the same trade mark, or of nearly identical trade marks, for the same goods or description of goods, subject to any conditions and limitations as to mode or place of user or otherwise the Court thinks right to impose.

On the 21st August, 1935, the respondent registered the trade mark "FLORSHEIM" (No. 21 of 1935) in the colony of Trinidad and Tobago, in respect of boots and shoes. In August, 1936, the respondent received a letter dated the 11th August, 1936, from J. D. SELLIER & COMPANY, Solicitors, in Trinidad for THE FLORSHEIM SHOE COMPANY, informing him *inter alia*, that their client was entitled to the use of trade mark "FLORSHEIM". On the 21st May, 1937, the respondent registered the trade mark "FLORSHEIM" (No. 1745 A) in this Colony in respect of boots and shoes. In 1937 THE FLORSHEIM SHOE COMPANY instituted an action No. 403 of 1937 in the Supreme Court of Trinidad and Tobago against the respondent JOHN FREDERICK CAMERON. This action was tried on the 30th and 31st days of October, 1939, and the 1st November, 1939, before His Honour Mr. W. J. Gilchrist, acting Chief Justice who delivered judgment on the 16th November, 1939, declaring, *inter alia*, that the registration by the defendant (respondent herein) of the trade mark numbered No. 21 of 1935 in the Trade Marks Register of the Colony of Trinidad and Tobago was calculated to deceive and ought to be set aside. The respondent has never used the trade mark "FLORSHEIM" in this Colony. There is no question of concurrent user. When the respondent registered the trade mark "FLORSHEIM" in this Colony on the 21st May, 1937, he well

knew of the claim of THE FLORSHEIM SHOE COMPANY, even though he may not have fully known all the grounds upon which the claim of the company was based. The respondent has no legal, or moral, claim, in this Colony, to the use of the word "FLORSHEIM:" he has never sold, or attempted to sell, in this Colony, footwear bearing the trade mark No. 1745 A. The respondent made a gamble for the trade mark "FLORSHEIM", and he has lost. There are no circumstances in this case which would justify the Court in allowing the respondent's trade mark No. 1745 A to remain on the register under section 20 of the Trade Marks Ordinance, cap. 59.

Section 70 of the Trade Marks Ordinance, cap. 59 is as follows:

> The Court shall have power, upon the application of any person who alleges that his interests have been prejudicially affected by the issue of a certificate of registration, to declare that the exclusive privileges and rights conferred by the certificate have not been acquired on any of the grounds upon which the United Kingdom registration might be cancelled under the law for the time being in force in the United Kingdom.

In the course of his argument, counsel for the respondent submitted that the word "FLORSHEIM" was not registrable as a trade mark. He referred to section 8 of the Trade Marks Ordinance, cap. 59, and he stated that FLORSHEIM was not an invented word, that it was the name of a village in PRUSSIA and therefore according to its ordinary signification a geographical name. This issue was not raised by the respondent in his affidavit, and the applicant therefore did not file an affidavit in reply. I am therefore unable, in these proceedings, to determine whether or not the United Kingdom registration under date November 9, 1920, can be cancelled in England by reason of the mark not being registrable, under the law which was in force in the United Kingdom when the registration was there made, or under any other law which may be relevant. The respondent, if he is so advised, can raise this issue on an application brought under section 70 of the Trade Marks Ordinance, cap 59. I should, however, invite attention to sections 4, 5, 9, 10, 13, 19 and 32 (5) of, and to paragraphs 1 (3) and 1 (4) in the Third Schedule to, the Trade Marks Act, 1938, and to the provisions for re-classification of goods contained in the Trade "Marks Rules made under the authority of that Act.

The applicant is entitled to an order expunging the entry of the respondent's trade mark No. 1745 A from the register of trade marks, and that order I now make. The costs of the applicant of and incidental to this application will be recovered by the applicant against the respondent, and I certify this application as being fit for counsel. A sealed and certified copy of the order herein is to be served by the applicant upon the Registrar of Trade Marks in accordance with section 34 (1) (d) of the Trade Marks Ordinance, cap. 59, and with rule 100 of the Trade Marks Rules, 1929.

Application granted.

Solicitors: *J. Edward deFreitas; H. V. van B, Gunning,*

C. NERO *v.* J. GALLOWAY, L.C. of Police, No. 4048.

CLARENCE NERO, Appellant (Defendant),

v.

JOHN GALLOWAY, LANCE CORPORAL OF POLICE No. 4048, Respondent (Complainant).

[1943. No. 432.—DEMERARA.]

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

1944. MARCH 24.

Evidence—Situation of particular places within Colony—Judicial notice of—Cannot be taken—Evidence Ordinance, cap. 25, *s.* 25*(xvi).*

Judicial notice cannot be taken of the situation of particular places within the Colony.

Appeal by the defendant from a decision of the Magistrate of the Berbice Judicial District convicting him of the larceny of pigs.

C. Lloyd Luckhoo, for appellant.

A. C. Brazao, Crown Counsel, 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 in the Magistrate's Court for the Berbice Judicial District for larceny of a number of pigs.

Two grounds of appeal were argued: first that the evidence as to identity of the pigs traced to the appellant as being those alleged to have been lost by the claimants was not sufficient or satisfactory; and secondly that the Magistrate had no jurisdiction to hear and determine the complaint.

In regard to the first ground we are satisfied that there was sufficient evidence to justify the learned Magistrate in convicting the appellant in spite of certain apparent contradictions, and that the reasons which led him to his conclusions on the evidence are sound. With his findings in this regard therefore we see no reason to interfere.

In regard to the second ground it appears that the offences were committed prior to the 17th August, 1943, upon which date certain alterations of the boundaries of the Berbice and East Demerara Judicial Districts were made by Order-in-Council. It is contended that the places from which the pigs were stolen were situate at the date of the theft within the East Demerara Judicial District and that although at the date of the hearing these places were situate within the limits of the Berbice Judicial District the complaints should have been heard by the Magistrate of the former District.

The whole weight of the argument rests upon the assumption that Little Abary and Catherine were situate in the East Demerara Judicial District at the date of the offences but there is no evidence upon the record to support this assumption.

The complaints, dated the 31st August, 1943, describe the offence as having been committed in the Berbice Judicial District. The witnesses swore that Little Abary and Catherine are in that District. There is no evidence to show that they were at any time within the limits of any District other than the Berbice Judicial District.

Counsel for the appellant suggested that the statements, one that "Little Abary is about 30 miles from Bachelor's Adventure" and the other that "Catherine is about 4 miles from Mahaicony "Police Station" show that these places were within the East Demerara Judicial District at the time the offences were committed but we have no judicial knowledge of the situation of either Bachelor's Adventure or the Mahaicony Police Station and we are none the wiser for the proof of the distance of Little Abary or Catherine from either of these places.

It would have been easy for the appellant to have secured evidence in support of this contention but he did not do so and the learned Magistrate was right not to use any personal knowledge he might have believed himself to possess as to the situation of these particular localities in relation to the boundaries of his district. It is a matter for proof, and the evidence, such as it was, pointed rather the other way.

There being no evidence to show that the places in question were in any way affected by the Order-in-Council, the question of the effect of that Order upon the jurisdiction of the Court in relation thereto does not arise.

Upon the record the Magistrate for the Berbice Judicial District had jurisdiction and the second ground of appeal fails also.

The appeal is therefore dismissed with costs.

Appeal dismissed.

BHOOLAI, Plaintiff,

v.

GIRWAR and MOHAMED SADIQ, Defendants.

[1943. No. 275.—DEMERARA.]

BEFORE DUKE, J. (Acting).

1944. MARCH 23, 24, 29.

Immovable property—Transfer of—To be perfected by transport.

Immovable property—Land sold—Wire resting upon—Not immovable property.

Gift—Of immovable property—Must be perfected by transport—Pre-existing contract of sale by donor—Right of purchaser to oppose transport in favour of done.

Opposition to execution sale—Immovable property sold and purchaser placed in possession—Transport not passed—Immovable property levied upon as property of vendor—Advertised for sale at execution—No right in purchaser to oppose sale—Where no genuine debt due by vendor to judgment creditor—Then right in purchaser to oppose sale—Even though judgment creditor did not know of contract of sale.

Fraud—General allegations of—Not an averment of fraud.

Sale of goods—Growing crops—When goods for purpose of Sale of Goods Ordinance, cap. 65*—Possession given to purchaser under contract of sale of immovable property—No contract for sale of growing crops—Sale of Goods Ordinance, cap.* 65, *sections* 2, 28.

In this Colony, no transfer of immovable property can take place unless perfected by transport.

Mangru v. *Kalla* (1931-37) L.R.B.G. 414, 418, and *Surejpaul* v. *Ramdeya and Sarju* (1942) L.R.B.G. 309, 315, applied.

Wire resting upon immovable property is not immovable property.

Bissember v. *Maughn* & *Weithers* (1943) L.R.B.G. 260 applied.

An owner of land is entitled to give it away but he must do so in the proper manner, that is to say, by passing transport which may be opposed by any person to whom he has by an existing enforceable contract of sale agreed to sell it.

An owner of land is at liberty to consent to judgement for a debt which does not exist in fact, thereby causing his land to be taken in execution for non-payment of the judgement debt, but he is not so entitled where he has by a pre-existing enforceable contract of sale agreed to sell the land to another person. Where there is such a contract, the judgment by consent would be obtained in fraud of the rights of the purchaser under the contract, and the purchaser would have a right to oppose the sale at execution, for non-payment of the judgment debt, of the land which was the subject of the contract of sale. It would be immaterial that the judgment creditor did not know of the pre-existing contract of sale by the owner of the land who has consented to judgment, because the judgment creditor would be a volunteer and would have acquired the judgment otherwise than by way of valuable consideration.

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

Pereira v. *Insanally* (1931-37) L.R.B.G. 18, 21 and *Gonsalves* v. *Demerara Mutual Life Assurance Society Limited* (1931-37) L.R.B.G. 146, 147, applied.

A purchase of property not completed by transport is insufficient to debar a judgment creditor of the vendor from having such property taken in execution and sold to satisfy his debt.

Gangadia v. *Barracot* (1919) L.R.B.G. 216, 217, *Persaud* v. *Nawole,* Limited Jurisdiction, 30th March, 1903, *Junkie* v. *Gangadin*, Limited Jurisdiction, 4th November, 1906, and *Mangru* v. *Kalla* (1931-37) L.R.B.G. 414, 418, 419, applied.

There is no contract for sale of growing crops where under a contract for the sale of land the purchaser is placed in possession of the land.

Growing crops are in their nature, immovable property.

Eldorado Block Co-Operative Bank v. *James* (1931-37) L.R.B.G. 76, applied.

Meaning of "growing crops" in section 2 of the Sale of Goods Ordinance, cap. 65, and section 28 of Chapter 65, considered.

Opposition action to a sale at execution. The judgment creditor was joined as a defendant. The facts and arguments appear from the judgment.

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

T. Lee, for the defendant Mohamed Sadiq.

The defendant Girwar did not enter appearance to the writ but he was present in Court throughout the trial.

Cur. adv. vult.

BHOOLAI *v.* GIRWAR and M. SADIQ.

DUKE, J. (Acting): On the 1st July 1943 MOHAMED SADIQ filed a writ, No, 202 of 1943 Demerara, against GIRWAR in which it was alleged that on the 14th November, 1941 MOHAMED SADIQ lent to GIRWAR the sum of $600, that on the 13th August 1942 GIRWAR repaid to him the sum of $100, and that there was due to him, at the date of the writ, the sum of $500. The writ, which was specially indorsed, was returnable for the 12th July 1943. It was served upon GIRWAR on the 1st July 1943. On the 2nd July 1943 GIRWAR consented, before a proper officer in the Registry of the Supreme Court, to judgment being entered against him in terms of the writ of summons. On the 12th July 1943 MOHAMED SADIQ applied for judgment in terms of the consent, and on the 13th July 1943 by order of Court made that day, judgment was entered for MOHAMED SADIQ against GIRWAR for the sum of $500, and $45 costs. On the 14th July 1943 MOHAMED SADIQ requested the Registrar to issue a writ of execution to levy upon a piece of land part of lot 4, south section of Canal No. 2 Polder, with the buildings and erections thereon. A writ of execution in the usual form was issued the said day. On the 17th July 1943 the following property was taken in execution at the instance of MOHAMED SADIQ and in pursuance of the order of Court of the 13th July 1943:

> A piece of land part of lot number 4 (four) south section of Government land in Canal No. 2 situate in the Canals Nos. 1 and 2 Polder on the west bank of the Demerara River in the county of Demerara and colony of British Guiana, said lot being laid down and defined on a plan of certain portion of Government land in Canal Nos. 1 and 2 Polder by Frank Fowler, Acting Crown Surveyor, dated 29th March 1902, the said piece of land being 7 (seven) roods in facade, and adjoining a piece of land 10 (ten) roods in width, measured from the western extremity of the said lot part of the said lot having been transported to MALWA on the 7th March 1903 by the entire depth of the said lot with the building and erection thereon.

The property taken in execution was immovable property and was the property of GIRWAR. In the *Official Gazette* of the 24th and 31st days of July 1943 and the 7th August 1943 MOHAMED SADIQ caused the Registrar to advertise the aforesaid property for sale at execution on the 10th August 1943. On the 7th August 1943 the plaintiff BHOOLAI entered opposition to the sale, and on the 16th August 1943 the plaintiff filed a writ of summons herein against the defendants GIRWAR and MOHAMED SADIQ claiming the following relief:

(1) an order that the Registrar and his agents be restrained from selling the aforesaid property at execution;
(2) an order setting aside the judgment obtained by consent on the 13th July 1943 in the action of MOHAMED SADIQ versus GIRWAR, No. 202 of 1943 Demerara;
(3) a declaration that the levy made on the 17th July 1943 at the instance of Mohamed SADIQ was illegal, and an order setting aside the levy;
(4) an order that the opposition entered on the 7th August 1948 was just, legal and well-founded;
(5) $500 damages;
(6) such other order as the Court may deem just; and
(7) costs.

By agreement in writing made on the 4th August 1932 between the defendant GIRWAR and the plaintiff BHOOLAI, GIRWAR agreed to sell the aforesaid property to BHOOLAI for the sum of $550. The sum of $100 was paid by BHOOLAI on account of the purchase price, at the time the agreement was made. It was part of the agreement that possession of the property sold was immediately given by GIRWAR to BHOOLAI who at once entered into possession. The plaintiff alleges that on a subsequent date he paid the sum of $100 to GIRWAR as a further payment on account of the purchase price: he has produced no voucher, but I accept his statement as being correct. In the *Gazette* of the 15th, 22nd and 29th days of August 1942 GIRWAR gave notice of his intention to pass transport of the aforesaid property in favour of BHOOLAI. On the 29th August 1942 BAIJNAUTH, the son-in-law of GIRWAR, entered opposition to the passing of the said transport; he claimed, *inter alia*, that GIRWAR owed him the sum of $275 and he instituted an action, No. 278 of 1942 Demerara, against GIRWAR to enforce the opposition. That action came on for trial on the 11th May 1943; GIRWAR agreed to pay BAIJNAUTH the sum of $240 upon the passing of the transport by GIRWAR in favour of BHOOLAI, BAIJNAUTH agreed to withdraw the opposition, the action was settled accordingly, and an order of Court was made giving effect to the terms agreed upon.

In paragraph 5 of the plaintiff's reasons of opposition, the plaintiff alleged that the action which MOHAMED SADIQ brought against GIRWAR was a collusive one, and brought with the connivance of GIRWAR. And paragraph 7 of the reasons of opposition was as follows:

> The said GIRWAR was and is not indebted to the said MOHAMED SADIQ for the sum of $500 or at all. The said alleged debt is fictitious and fraudulent and is the result of a conspiracy between the said MOHAMED SADIQ and GIRWAR to defraud the opponent (the plaintiff BHOOLAI) of the said property and of the wire fence and of his cultivation thereon. No consideration ever passed from the said MOHAMED SADIQ to the said GIRWAR in respect of the said debt.

These allegations are denied by the defendant MOHAMED SADIQ who has pleaded that GIRWAR was indebted to him on the 1st July 1943 in the sum of $500, and that he is still so indebted. Counsel for the plaintiff referred to *BOODHANSINGH* v. *SHIVSANKAR et al*, Limited Jurisdiction, 22nd July 1910, and to *PEROO* v. *DOOKNIE* et al (1919) L.R.B.G. 150, and he submitted that there was a right of opposition in the plaintiff to oppose the sale at execution. Counsel for the defendant MOHAMED SADIQ stated that in both of those cases a decree of specific performance of a contract of sale of land had been made by the Supreme Court, against the person whose property was subsequently taken in execution; and he pointed out that GIRWAR was not ordered by the Court to pass transport of the land in question, to the plaintiff BHOOLAI. Counsel for the defendant MOHAMED SADIQ submitted that even if the allegations in paragraphs 5 and 7 of the Reasons of Opposition were substantially proved, the plaintiff would not have a right to oppose. I do not agree with this sub-

mission. An owner of land is entitled to give it away but he must do so in the proper manner, that is to say, by passing transport which may be opposed by any person to whom he has by an existing enforceable contract of sale agreed to sell it. An owner of land is at liberty to consent to judgment for a debt which does not exist in fact, thereby causing his land to be taken in execution for non-payment of the judgment debt, but he is not so entitled where he has by a pre-existing enforceable contract of sale agreed to sell the land to another person. Where there is such a contract, the judgment by consent would be obtained in fraud of the rights of the purchaser under the contract, and the purchaser would have a right to oppose the sale at execution, for nonpayment of the judgment debt, of the land which was the subject of the contract of sale. It would be immaterial that the judgment creditor did not know of the pre-existing contract of sale by the owner of the land who has consented to judgment, because the judgment creditor would be a volunteer and would have acquired the judgment otherwise than by way of valuable consideration: in this case, however, this point does not necessarily fall for decision by the Court, as I am satisfied on the evidence that on the 1st July 1943 MOHAMED SADIQ knew that GIRWAR had entered into an agreement to sell the land. In the present case, if on the 1st July 1943 when the writ in the action No. 202 of 1943 was filed by MOHAMED SADIQ against GIRWAR, there was in fact no genuine debt due and payable by GIRWAR to MOHAMED SADIQ, the judgment obtained by consent in the action would have been obtained in fraud of the rights of the plaintiff under the existing and enforceable agreement of sale of the 4th August, 1942; and the plaintiff would have a right to oppose the sale at execution, advertised at the instance of MOHAMED SADIQ, of the land which GIRWAR had agreed to sell to him.

Was there a genuine debt? Counsel for the defendant MOHAMED SADIQ submitted that the onus was on the plaintiff to prove that there was no genuine debt, and at the close of the case for the plaintiff he submitted that there was no case for the defendant to answer. At that time there was no evidence that the debt was not genuine, but as counsel for the defendant MOHAMED SADIQ did not close his case, I declined at that stage to state what my view was as to the effect of the evidence given on behalf of the plaintiff. The defendant MOHAMED SADIQ then gave evidence of the making of the loan, and he was corroborated by RAMPERSAUD SINGH. Both the defendant MOHAMED SADIQ and his witness were closely cross-examined by counsel for the plaintiff. At the close of the case for the defence, counsel for the defendant MOHAMED SADIQ submitted that his client had affirmatively proved, that there was a genuine debt of $500 due by GIRWAR to MOHAMED SADIQ, alternatively, that the plaintiff had failed, on the whole evidence, to establish that the debt was not a genuine one. GIRWAR did not enter appearance to the writ, but he was present in Court throughout the whole of the trial. He was not called as a witness. No direct evidence was led in this Court in con-

tradiction, or in opposition, to the evidence given on behalf of the defendant MOHAMED SADIQ. At the close of the whole case, counsel for the plaintiff submitted that the onus was upon the defendant MOHAMED SADIQ to establish that the debt was genuine, and he had failed to discharge that onus, alternatively, that the circumstances of the case showed that the debt was not a genuine debt, and that the defendant, MOHAMED SADIQ could not have made the loan as alleged by him. I have carefully considered the various circumstances which were referred to in detail by counsel for the plaintiff, and I have arrived at the affirmative finding that on the 1st July 1943 there was in fact due by GIRWAR to MOHAMED SADIQ the sum of $500. The plaintiff's claim to oppose the execution, sale, in so far as it is based on the allegation that the debt was not a genuine debt, therefore fails.

Counsel for the plaintiff has submitted that the evidence discloses fraud, collusion and conspiracy between GIRWAR and MOHAMED SADIQ to deprive the plaintiff of the benefits of the agreement of sale made on the 4th August 1942 between GIRWAR and the plaintiff. It is true that the plaintiff has pleaded collusion and conspiracy, but I can find no evidence on the record in support. In *PEREIRA* v. *INSANALLY* (1931-37) L.R. B.G. 18, 21, Savary, J, said:

> General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.

In *GONSALVES* v. *DEMERARA MUTUAL LIFE ASSURANCE* SOCIETY LIMITED (1931-37 L.R. B.G. 146, 147, the learned judge repeated this statement as to the law and practice of the Courts, and he cited *WALLINGFORD v. MUTUAL SOCIETY* (1880) L.R. 5 A.C. 697, *per* Lord SELBORNE, L.C., and *LAWRENCE v. NORREYS* (1890) L.R. 15 A.C. 221 *per* Lord Watson, as authorities in support. The only overt act which is alleged by the plaintiff as being an act in furtherance of the conspiracy relates to the action brought by MOHAMED SADIQ against GIRWAR for $500. I have already found that the sum of $500 was in fact due by GIRWAR to MOHAMED SADIQ, and there are no other facts, pleaded or proved, from which an inference could properly be drawn that there was collusion and conspiracy between GIRWAR and MOHAMED SADIQ.

Counsel for the plaintiff has however submitted that, whatever may have been the law of the Colony up to and including the 31st December 1916, since the coming into force of the Civil Law of British Guiana Ordinance, cap. 7 (formerly Ordinance No. 15 of 1916) where the registered owner of land has entered into a contract of sale and has delivered, in pursuance thereof, possession to the purchaser, the purchaser has a right to oppose a sale at execution of the land. In *GANGADIA* v. *BARRACOT* (1919) L.R. B.G. 216, 217, Dalton, J., speaking of the law of the colony as it existed up to and including the 31st December 1916 said:

> At the time the cases of *PERSAUD* v. *NAWOLE* Limited Jurisdiction, 30th March 1903 and *JUNKIE* v. *GANGADIN*, Limited Jurisdiction, 4th November 1906, were decided, and so long as the common law remained unchanged, it is quite clear that a purchase of immovable property not completed by delivery *coram lege loci* (in this colony by formal transport before a judge), is insufficient to debar a judgment creditor of the vendor from having such property taken in execution and sold to satisfy his debt.

By section 3 (4) (c) of Ordinance No. 15 of 1916, the title to immovable property shall not vest in any purchaser or other transferee or claimant unless and until the transfer has been registered in accordance with any Ordinance or Rules now or hereafter dealing" with such registration. When this section was enacted on the 1st January 1917, the Rules then in force for obtaining the record of such a transfer by the Registrar were contained in Order 2 of Part 2 of the Rules of Court, 1900. They were the ordinary transport Rules which were in force under the old common law, and when *PERSAUD* v. *NAWOLE* and *JUNKIE* v. *GANGADIN* were decided. With reference to the law as it existed from the 1st January 1917 under section 3 (4) (c) of Ordinance No. 15 of 1916, Dalton, J. said:

> There seems no doubt that, although the old common law has been abrogated, it is still necessary for a sale to be completed by formal delivery (i.e. transport) to defeat a judgment creditor's claim to levy upon the property sold as the property of the vendor.

Section 3 (4) (c) of Ordinance No. 15 of 1916 was repealed by section 41 of the Deeds Registry Ordinance, 1919 (No. 17) which came into force on the 1st January 1920. Sections 11 (1) and 20 of that Ordinance, so far as is material, are as follows:

> 11(1) It shall not be lawful for any person in whom the title to any immovable property situate in this colony vests, to transfer.....that property except by passing and executing a transport.....of the same before the Court.
>
> 20(1) A transport of immovable property passed after the commencement of this Ordinance shall vest in the transferee the full and absolute title to the immovable property or to the rights and interest
> therein described in the said transport subject to
>
> (2) A transport.....passed before the commencement of this Ordinance and in force thereat shall, after the expiration of two years from such commencement thereof if still in force vest in the transferee thereof the full and absolute title to the immovable property therein described, subject to —

Sections 11 (1) and 20 (2) of Ordinance No. 17 of 1919 are now sections 12 (1) and 21 (2) of the Deeds Registry Ordinance, cap. 177 Section 20 (1) of Ordinance No. 17 of 1919, so far as is material to the present point, has been substantially replaced by section 3 of the Deeds Registry (Sales in Execution) Ordinance, 1936 (No. 4), relating to judicial sale transports, and by section 21 (1) of the Deeds Registry Ordinance, cap. 177, relating to transport other than judicial sale transports. In GANGADIA v. BARRACOT, supra, Dalton, J. continued:

> And, it seems to me, that will still be the law after the 1st January 1920, when the Deeds Registry Ordinance, 1919 which repeals section 3(4) (c) of the Civil Law Ordinance, comes into force, if sections 11 and 20 thereof be read together.

That *obiter dictum* was followed, and approved, by G. J. de FREITAS, J. (Acting),. as his judgment in *MANGRU* v. *KALLA* (1931-37) L.R. B.G. 414, 418, 419. I see no reason for disagreeing, indeed I entirely agree, with that judgment in which he stated:

> I more than once in the course of the argument indicated to Counsel that until the Court of Appeal ruled to the contrary I should adhere to my opinion that in this Colony no transfer of immovable property could take effect unless perfected by transport. This was the law before the coming into force on the 1st January 1917 of the Civil Law Ordinance and still continues to be the law, notwithstanding the provisions of section 3 (B) as to the application of the doctrines of equity, as administered in England.

The submission of counsel therefore fails.

The writ of execution was issued on the 14th July 1943, and the levy was made on the 17th July 1943. The plaintiff has been in possession, since the 4th August 1942, of the parcel of land so levied upon, and his possession is under an agreement of sale made in writing on the 4th August 1942 between GIRWAR and the plaintiff. In this Colony, no transfer of immovable property can take place unless perfected by transport: see *MANGRU* v. *KALLA* (1931-37) L.R. B.G. 414, 418, and *SUREJPAUL* v. *RAMDEYA* and *SARJU* (1942) L.R. B.G. 309, 315. In *ELDORADO BLOCK CO-OPERATIVE CREDIT BANK* v. *JAMES* (1931-37) L.R. B.G. 76, Savary, J. held that where the owner of a house is also the owner of the land on which the house stands, the house is immovable property. On the authority of this judgment, growing crops are in their nature immovable property. Counsel for the plaintiff has, however, submitted that the growing crops on the land were "goods" within the meaning of section 2 of the Sale of Goods Ordinance, cap. 65, that the property in them had passed from GIRWAR to the plaintiff prior to the date of the levy, that under section 28 of the Ordinance the levy was illegal in so far as it related to the growing crops which were not excepted from the levy, and that the opposition was just legal and well-founded in so far as it relates to the growing crops on the land levied upon. By section 2 of the Sale of Goods Ordinance, cap. 65, "goods" includes growing crops which are agreed to be severed before sale or under the contract of sale. Instances of "growing crops" within the meaning of section 2 are as follows: (1) where an owner of land agrees to sell a field of growing padi, when reaped, to a purchaser at a stated price per bag; and (2) where an owner of land agrees to sell a field of growing padi to a purchaser for a fixed sum. "Growing crops" do not fall within the definition of "goods" in the Sale of Goods Ordinance, cap. 65, unless it is agreed that they are to be severed either before sale or under the contract of sale. If "growing crops", in any particular case, are not "goods" within the meaning of section 2 of Chapter 65, then the rules in the Sale of Goods Ordinance, cap. 65 as to passing of property, along with the consequential rules in section 28 (which provides that a writ of execution against goods shall not prejudice the title to the goods acquired by any person in good faith and for valuable consideration unless that person had, at the time he acquired

his title, notice that the writ had been delivered to, and remained unexecuted in the hands of the marshal or bailiff) would not be applicable to the growing crops in question. The agreement of sale made on the 4th August 1942 between GIRWAR and the plaintiff was an agreement for the sale of immovable property under which agreement possession was given to the purchaser, the plaintiff BHOOLAI, who thereby and thereupon became entitled to the use of the fruits of the land, including the growing crops. It was not an agreement for the sale of growing crops agreed to be severed before sale, neither was it for the sale of growing crops agreed to be severed under the contract of sale: indeed, it was not a contract for the sale of growing crops at all. Further, section 2 of the Sale of Goods Ordinance, cap. 65, contemplates cases where an owner of land remains in possession but the purchaser of the growing crops has a licence, coupled with an interest, either to enter upon the land and obtain delivery of the crops after they have been reaped and measured, or to enter upon the land and reap the crops. The growing crops on the land which is the subject matter of the agreement of sale of the 4th August 1942 made between GIRWAR and the plaintiff BHOOLAI do not fall within the meaning of "growing crops" in the definition of "goods" in section 2 of the Sale of Goods Ordinance, cap. 65 and are therefore not "goods" for any of the purposes of the Sale of Goods Ordinance, cap. 65. The submission of counsel therefore fails.

The claim of the plaintiff against the defendant MOHAMED SADIQ has failed. It is dismissed with costs, and judgment will be entered for the defendant MOHAMED SADIQ against the plaintiff BHOOLAI accordingly, and also for a declaration that the opposition entered by the plaintiff on the 7th August 1943 to the sale at execution of the property described in the statement of claim was not well-founded.

The plaintiff gave evidence that he purchased some wire from the defendant GIRWAR for the sum of $65. In *BISSEMBER* v. *MAUGHN* & *WEITHERS* (1943) L.R. B.G. 260, I held that building materials resting upon land sold were not immovable property. The wire was not on the land purchased by the plaintiff from GIRWAR, but if it had been resting on that land, it would not have been immovable property. The evidence shows that the wire was on other land, so that it was movable and not immovable property, and the rules for the passing of property contained in the Sale of Goods Ordinance, cap. 65 would therefore apply. There is no evidence that the defendant GIRWAR has broken his contract with respect to the sale of the wire.

The land which the defendant GIRWAR agreed to sell to the plaintiff has been taken in execution, and GIRWAR is unable to pass transport thereof in favour of the plaintiff. The plaintiff paid GIRWAR the sum of $200 on account of the purchase price of the land. The plaintiff has been in possession of the land and entitled to reap the fruits thereof as from the date of the agreement of sale; and I am not satisfied that the plaintiff spent as much as the sum of $200 which he alleges he spent in improv-

ing the land. I therefore think that a fair estimate of the general damages suffered by the plaintiff will be the sum of $50. There will therefore be judgment for the plaintiff against the defendant GIRWAR for the sum of $250 with costs, such costs however not to include any costs occasioned by, or incidental to, the issues raised by the plaintiff in paragraphs 5 and 7 of his reasons of opposition.

Judgment for plaintiff against Girwar;
Judgment for defendant Mohamed Sadiq.

Solicitors: *Carlos Gomes,* for plaintiff;

Albert McLean Ogle, for defendant Mohamed Sadiq.

JOEL GOMBERG, Plaintiff,

vs.

G. BETTENCOURT & CO., LIMITED, Defendants.

[1943. No. 1 DEMERARA.]

BEFORE SIR JOHN VERITY, C.J.

1944. APRIL 12.

Sale of goods—F.o.b. contract for—Goods sent by route involving sea transit—Sale of Goods Ordinance, cap. 65, s. 34(3)*—Applies to such contract.*

Sale of goods—Delivery of goods to a carrier—To be sent by route involving sea transit—Notice to be given by seller to purchaser—No notice required when buyer has in his possession all the information necessary to enable him to insure the particular shipment—Where notice given by seller to purchaser—Risk of loss in transit falls on buyer— Where no notice given and buyer has not necessary information—Risk of loss in transit falls upon seller—Sale of Goods Ordinance, cap. 65, *s.* 34.

Contract—Expressed terms in—General principle of law—Against adding implied terms.

Sale of goods—Contract for—Goods sent by route involving sea transit—Purchaser able to effect general covering policy on—Seller not relieved of obligation under Sale of Goods Ordinance cap. 65, *s.* 34 (3).

Section 34 of the Sale of Goods Ordinance, cap. 65, is applicable to f.o.b. contracts.

The notice required by section 34 (3) need not be given by the seller when the buyer has in his possession all the information necessary to enable him to ensure.

Wimble Sons and Co. v. *Rosenberg and Sons* (1913) 3 K.B.743,C.A., applied.

By section 34 (1) of the Sale of Goods Ordinance, cap. 65, the seller is relieved of risks in transit where he is authorised to make delivery to a carrier, but by section 34 (3) this relief is withheld in the case of sea transit unless he gives such notice to the buyer as will enable him to insure. In other words, if the seller gives notice, then the risk of loss in transit falls upon the buyer. In such case the buyer is in a position to decide whether to insure at all or against what risks he will insure. On

the other hand, if no notice is given and if the buyer has not the necessary information, then the risk in transit falls upon the seller and it is for him to decide whether he will protect himself against any such risks or all of them.

The circumstance that the buyer might have been able to effect a general covering policy in respect of the goods to be sent by sea transit is not enough to relieve the seller of his obligation under section 34 (3) of the Sale of Goods Ordinance, cap. 65, and, unless he is otherwise relieved, the goods remained at his risk during transit.

The general principle is against adding to contracts of terms which the parties have not expressed, but a term will be implied if necessary to prevent the intention of the parties from being defeated.

Luxor (Eastbourne) Ltd. v. *Cooper* (1941) 1 A.E.R. 52, applied.

Action by the plaintiff against the defendants for the price of goods sold and delivered. The facts and arguments sufficiently appear from the judgment.

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

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

Cur. adv. vult.

VERITY, C.J.: In this case the plaintiff claims $452 the price of goods sold and delivered to the defendant company on or about 14th February, 1942.

There is little or no conflict as to the facts and it appears that during August and September 1941 the defendant company ordered certain goods from the plaintiff who carries on business in Canada. The order indicated that the contract was for shipment f.o.b. Montreal. On 14th February, 1942, the plaintiff posted certain parcels containing the goods at the Montreal Post Office, and on 27th April, 1942, the Director of Postal Services there informed him that these parcels had been lost at sea by enemy action.

The plaintiff claims that delivery was made by him to the defendant company by the act of posting the parcels, that from that time the goods were at the risk of the defendant company and that upon them the loss must fall. He therefore demanded payment which was refused.

The defendant company set up by way of defence that there was no delivery to them within the meaning of section 34 of the Sale of Goods Ordinance, Ch. 65, and further that the plaintiff having failed to give such notice as is contemplated by subsection (3) thereof the goods remained at the seller's risk in transit, the loss therefore falling upon him. The defendant company further contends that apart from the statutory liability it was an implied term of the contract that the plaintiff should insure the goods against risk of all kinds, including loss by war risk, charging the defendant company with the cost thereof, and that the plaintiff having failed to insure against war risk it is upon him that the loss must fall.

It is clear from the evidence that the plaintiff gave no actual notice to the defendant company which would have enabled them to insure the goods and further that the plaintiff did not insure the goods himself against war risks. The plaintiff con-

tends, however, that the defendant company had in their possession such sufficient particulars as, *on* the authority of *WIMBLE SONS* & *CO., v. ROSENBERG* & *SONS* (1913) 3 K.B., 743, relieved the plaintiff of any obligation to give notice, and he denies that it was an implied term of the contract, arising either from trade usage or their course of business, that he should insure the goods against war risk or at all.

It is desirable in the first place to make clear what are the positions of the seller and buyer by virtue of the statute. Section 34 of the Ordinance provides that where the seller is to send the goods to the buyer it is not necessary that he should deliver the goods into the buyer's hands but that delivery to a carrier is *prima facie* deemed to be delivery to the buyer. Sub-section (2) is immaterial in this case, and sub-section (3) provides for cases in which the goods are to be sent by a route involving sea transport in circumstances in which it is usual to insure.

The provisions of sub-section (1) relieve the seller from his duty to deliver but by sub-section (3) certain obligations are imposed upon him in default of which the goods remain nevertheless at his risk during transit. While therefore proof by him of delivery to a carrier is sufficient to establish *prima facie* delivery to the buyer yet if in fact the goods are lost in transit he must go further and establish that he has discharged those obligations which would relieve him of liability for loss. This he may do either by proof of notice to the buyer or of possession by the buyer of such sufficient information as would render notice unnecessary.

One of the most interesting cases cited by counsel for both parties is that of *WIMBLE v. ROSENBERG* to which I have already referred. The Lord Justices were not unanimous on either of the two main points which fell for decision in that case but perhaps the most effective judgment is that of Buckley, L.J. who was able to carry one other of the Lord Justices with him on each point. By this decision it is laid down (a) that the provisions of the relevant sub-section are applicable to f.o.b. contracts, and (b) that no such notice as is required by that sub-section need be given by the seller when the buyer has in his possession all the information necessary to enable him to insure. It is the latter aspect with which the Court is the more concerned in the present case for, with the greatest respect for the dissenting judgment of Lord Justice Hamilton on this point and for the observation of Lord Reading thereon in *NORTHERN STEEL & HARDWARE CO., LTD.* v. *JOHN BATT & CO., LTD.* (33 T.L.R. at p. 517), the application of the sub-section to f.o.b. contracts appears to be based upon sound reason. That the majority of the Court was right upon the second point has never been questioned and, in each case, it would appear to be necessary to determine whether sufficient notice has been given or whether sufficient information was otherwise in the possession of the buyer.

It is contended in the present case either that the contract itself amounted to sufficient notice or that it put the defendant company in possession of all the facts necessary to enable them

to insure. This question must be determined by the facts but with due regard to the terms and effect of the statute.

The argument put forward by the plaintiff amounts to this: that the order given by the defendant company to the plaintiff's local agent stated the nature, quantity and value of the goods and the ports of shipment and of discharge, and that upon these facts it was possible for the buyer to insure at any time after he had given the order. On the other hand the defendant company contends that they were not aware when the order had been accepted by the plaintiff, if at all, until after the date of the shipment nor were they aware of the ship or other means of transit nor of the date upon which the goods were to be shipped. To this the plaintiff replies that the course of dealing between the parties disclosed that the buyer was not invariably informed that the order had been accepted but that in the absence of notification to the contrary the buyer was entitled to assume acceptance after the lapse of a reasonable time, and further that as regards the means of transit their course of dealing showed that such goods were invariably shipped by parcel post from Montreal.

Nevertheless it is not contended, and I do not think that it could be reasonably contended, that the defendant company had in their possession at any material time such sufficient particulars as would have enabled them to insure this specific shipment but it is submitted on behalf of the plaintiff that it was sufficient to have enabled the defendant company to have secured "open" or "floating cover." That is as it may be, but in this connection it is of interest to observe the opinion of Buckley, L.J., in *Wimble* v. *Rosenberg* where he says "In this state of facts it was contended “that the buyer could have protected himself by a general covering policy. “In my judgment this would not constitute a good answer to the buyer's “contention. To say that he could cover himself by a general policy is “equivalent to saying that in every case, without knowledge of the “particulars, he is already in possession of all the information which “enables him to insure. The result is that the sub-section is reduced to “silence.” Although in that case it was held that the buyer had the necessary information and a decision on this point was therefore unnecessary, I find myself with great respect in complete agreement with the Lord Justice's dictum. In the present case I am entirely satisfied that the defendant company had not the necessary information to enable them to insure this particular shipment, that the fact that they might have been able to effect general covering policy is not enough to relieve the plaintiff of the obligation thrown upon him by the Statute and, unless he is otherwise relieved, the goods remained at his risk during transit.

The plaintiff relies in a measure; however, on the course of business between the parties to establish what I take counsel to mean as an agreement otherwise which would take the matter out of the sub-section.

This argument was not developed very fully by counsel who relied rather upon his earlier submission as to notice, actual or constructive, within the statute, but as I understood him, he

appeared to submit that from the course of business between the parties it might be inferred that the defendant company had so far acquiesced in the plaintiff's dealing with the goods as to make that course of dealing an implied term of the contract which, if the plaintiff pursued it, would take the case out of the statute. This course of dealing was that the plaintiff gave no notice to the defendant company as required by the subsection but that he himself insured the goods by ordinary postal insurance, and the Court is invited to find that the defendant company having accepted goods so insured acquiesced in this course and cannot now be heard to say that the plaintiff, while following it, is to be liable for loss the result of a risk against which he had at no time insured.

In order to appreciate how far such an implied term would carry the parties it is desirable to bear in mind the effect of section 34 upon the respective liabilities of the parties. By subsection (1) the seller is relieved of risks in transit where he is authorised to make delivery to a carrier but by sub-section (3) this relief is withheld in the case of sea transit unless he gives such notice to the buyer as will enable him to insure. In other words, if the seller gives notice then the risk of loss in transit falls upon the buyer. In such case the buyer is in a position to decide whether to insure at all or against what risks he will insure. On the other hand if no notice is given and if the buyer has not the necessary information, then the risk in transit falls upon the seller and it is for him to decide whether he will protect himself against any such risks or all of them.

Now the evidence as to the course of business which it is submitted abrogates these rules, goes to show that on, six previous occasions the defendant company had ordered goods from the plaintiff, that in no instance had the plaintiff given notice, that in three of these instances the plaintiff indicated by his invoice that the goods had been insured against unspecified risks and that in three instances the invoice did not disclose that the goods had been insured at all. If this Court is to conclude that this course of dealing warrants the implication of some further agreement between the parties it would appear that I must hold that the defendant company in such circumstances waived their right to notice, either actual or constructive, and agreed to assume the risk in transit which would otherwise have been the seller's upon the condition that the seller should decide whether to insure or not and if so against what risks, it being understood that if the seller failed to insure against any particular risk or even failed to insure at all the loss should still fall upon the buyer.

It would be difficult for any Court so to construe a contract unless such terms were expressed in the clearest and most unambiguous language, for it appears to be so one-sided in its effect that no reasonable person would be expected to agree to it. That I should imply such a term from so indefinite a course of conduct would be to go far beyond the powers of the Court, for as was said by Lord Wright in *Luxor (Eastbourne) Ltd v Cooper* (1941) 1 A.E.R. at p. 52, "the general principle is against

"the adding to contracts of terms which the parties have not "expressed", nor in the present case can it be said that some such term as is suggested "must be implied if the intention of the "parties is not to be defeated", for where the parties are silent the law implies the requisite term as to liability in any circumstances which may arise. There is moreover, no evidence of trade usage from which any such tacit variation of the incidents of an ordinary f.o.b. contract, as modified by the statute, may be inferred and I see no such course of dealing as would entitle the court to consider that any such variation was in the minds of and consented to by both parties as would operate as part and parcel of the special contract between them and thus take the matter out of the sub-section.

While, on the other hand, I would not go so far as to say that from the course of dealing there may be an implied term, such as counsel for the defendant company suggests, by which the plaintiff undertook to insure on the buyer's behalf against all risks including war risk, yet it does appear to me that by failure to give notice to the defendant company, who were at the material times without notice of the essential particulars, the plaintiff failed to rid himself of liability for all risks of transit and with this the defendant company is in no way concerned. If the seller failed also to protect himself against loss in transit it must fall upon him. The defendant company are entitled to rely upon the position created by statute and cannot be made to shoulder the plaintiff's loss occasioned by his own failure, first to notify the defendant company and secondly to insure himself against the risk of loss which in the circumstances was his and his alone.

There must therefore be judgment for the defendant company with costs. Certified fit for Counsel.

Judgment for defendants.

Solicitors: *J. Edward de Freitas; Vivian C. Dias.*

A. A. BARRINGTON, Plaintiff,

v.

WILLIAM CORREIA, SYLVINO JOSEPH CORREIA, ALEXANDER AUGUSTUS CORREIA, PETER VIEIRA and HILARY CORREIA trading under the name and style of "DEMERARA FILM EXCHANGE COMPANY" whose registered address is at lot 189 Waterloo Street, Georgetown, Demerara, Defendants.

[1944. No. 63—DEMERARA.]

BEFORE DUKE, J. (Acting) in Chambers.

1944. MARCH 6, 13, 20, 27; APRIL 15, 24, 27, 28.

Practice and procedure—Application for interlocutory orders—Affidavits filed in—Allegations in—To be precise,

Practice and procedure—Writ of summons—Contents of—Defendant represented in Colony by attorney—Name of attorney to be stated at head of writ—Not where defendant is within jurisdiction—Rules of Court, 1900, *Order* 3, *rule* 3.

Practice and procedure—Writ of summons—Service of—Employee— Meaning of—Includes a partner of defendant where writ served on partner at place of business of partnership—Rules of Court, 1900, *Order* 7, *rule* 4.

Allegations made in affidavits filed in interlocutory proceedings should be precise; and a deponent to such an affidavit cannot complain if the Court or a Judge refuses to treat as certain what is not precise and what ought to have been rendered certain.

Under Order 3, rule 3 of the Rules of Court, 1900, where a defendant is represented in the Colony by an attorney but the defendant is within the jurisdiction of the Court, the name of the attorney is not required to be stated at the head of the writ.

The word "employee" in rule 4 of Order 7 of the Rules of Court, 1900 must be deemed to include a person with whom the defendant is carrying on business in partnership, at the place where the writ is served.

Summons by the defendant Alexander Augustus Correia for an order setting aside the writ of summons and the service thereof, in so far as he was concerned.

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

J. A. Luckhoo, K.C., for the respondent (plaintiff).

Cur. adv. vult.

DUKE, J. (Acting): On the 18th February, 1944, the plaintiff issued a writ against WILLIAM CORREIA, SYLVINO JOSEPH CORREIA, ALEXANDER AUGUSTUS CORREIA, PETER VIEIRA and HILARY CORREIA, trading under the name and style of "Demerara Film Exchange Company" whose registered address is at lot 189 Waterloo Street, Georgetown, Demerara. I have considered the submission to the contrary, but I think that it is sufficiently indicated in the writ that the defendants William Correia, Sylvino Joseph Correia, Alexander Augustus Correia, Peter Vieira and Hilary Correia were sued because they are partners, and were sued as partners, of DEMERARA FILM EXCHANGE COMPANY, and that the registered address of that firm is at lot 189, Waterloo Street, Georgetown, Demerara.

On the 12th March, 1940, the said defendants filed particulars for registration of the firm DEMERARA FILM EXCHANGE COMPANY as required by section 5 of the Business Names (Registration) Ordinance, cap. 58. The defendants stated that the principal place of business of the firm was lot 189 Waterloo Street, Cummingsburg, Georgetown, and that the place of usual residence of ALEXANDER AUGUSTUS CORREIA, at the time of the registration of the firm on the 12th March, 1940, was lot 14 Broad Street, Georgetown, Demerara. The defendants have not, since the registration aforesaid, given any notice to the Registrar of Deeds of any change in the particulars as registered on the 12th March, 1940.

The plaintiff was therefore entitled to assume that the usual place of residence of the defendant on the 18th February 1944 was

at 14, Broad Street, Georgetown, and that his usual place of residence was within the jurisdiction of this Court.

On the 18th February 1944 at the registered address or principal place of business of DEMERARA FILM EXCHANGE COMPANY, the writ in this action was served upon the defendant SYLVINO JOSEPH CORREIA personally. At the same time and place, the writ herein was served upon the defendants WILLIAM CORREIA, ALEXANDER AUGUSTUS CORREIA, PETER VIEIRA and HILARY CORREIA by leaving with the said SYLVINO JOSEPH CORREIA four sealed and certified copies of the writ, one for each of the said four defendants.

On the 29th February 1944 the defendant ALEXANDER AUGUSTUS CORREIA obtained leave from a judge in chambers to enter conditional appearance to the writ. Such appearance was duly entered, and on the 3rd March 1944 the defendant ALEXANDER AUGUSTUS CORREIA by his attorney ANTONIO ALOYSIUS VIEIRA took out the summons herein for an order setting aside the writ of summons filed herein against him and the service thereof on the ground of illegality and irregularity.

In support of the summons ANTONIO ALOYSIUS VIEIRA swore to an affidavit on the 2nd March 1944 in which he stated:

(1) that he is the duly constituted sole acting attorney in this Colony of the defendant ALEXANDER AUGUSTUS CORREIA;

(2) that the said defendant is now in Trinidad, that he at present resides in Port-of-Spain, and that for the past six years he has resided in Trinidad where he is engaged in business;

(3) that he (the sole acting attorney of the defendant ALEXANDER AUGUSTUS CORREIA) resides, and for the past five years has resided, at 27, Broad Street, Georgetown;

(4) that he (the sole acting attorney of the defendant ALEXANDER AUGUSTUS CORREIA) is employed at "Correia's Wine Factory" situate at 14 Broad Street, Georgetown where he has been employed for the past ten years, and that he has no place of business unless his place of employment can be called such;

(5) that he (the sole acting attorney of the defendant ALEXANDER AUGUSTUS CORREIA) has never resided at lot 189, Waterloo Street, Georgetown, Demerara, and that it has never been his place of business;

(6) that ALEXANDER AUGUSTUS CORREIA has not been sued as represented in this Colony by ANTONIO ALOYSIUS VIEIRA his attorney, that he (the sole acting attorney of the defendant ALEXANDER AUGUSTUS CORREIA) has not been sued in his representative capacity as attorney for the said ALEXANDER AUGUSTUS CORREIA, and that the writ of summons herein was not directed to him (the sole acting attorney of the defendant ALEXANDER AUGUSTUS CORREIA), nor served upon him the said ANTONIO ALOYSIUS VIEIRA as such attorney or at all; and

(7) that on the 18th February, 1944 a sealed copy of the said writ of summons was served upon one SYLVINO JOSEPH CORREIA, at lot 189 Waterloo Street, Georgetown, Demerara, which service, as appears from the return of service, the plaintiff purports to be service upon the defendant ALEXANDER AUGUSTUS CORREIA.

In England, where a writ is directed to an individual, service must be effected personally, unless the Court otherwise orders by giving directions as to substituted service: see Order 9 of the English Rules of the Supreme Court. In this Colony, it is not the general rule that a writ directed to an individual must be served personally. The general rule as to service is contained in Rule 4 of Order 7 of the Rules of Court 1900, and is that such a writ may be served not only by delivery to the defendant personally, but also by delivery to an adult inmate or employee at the place of residence or business of the defendant, and, if the defendant is out of the jurisdiction of the Court, by delivery to the attorney of the defendant, or to an inmate or employee at the place of residence or business of the attorney. An order under Order 8 of the Rules of Court 1900 for substituted service is not required where service of a writ can be effected at the last known or usual place of abode or business of a defendant, or, if the defendant is out of the jurisdiction of the court, where service can be effected upon an attorney of the defendant, or at the last known or usual place of abode or of business of the attorney. The text of Rule 4 of Order 7 of the Rules of Court, 1900, is as follows:

> If the Defendant be within the jurisdiction of the Court service may be effected by delivery of the copy of the writ to him or to any adult inmate or employee at his last known or usual place of abode or of business, and if he be out of the jurisdiction of the Court but represented by Attorney, service may be similarly effected on the Attorney or at his last known or usual place of abode or of business.

The writ herein was served by the marshal who is an officer of the Supreme Court. By Rule 1 of Order 9 of the Rules of Court 1900, whenever the Marshal is unable for any reason promptly to effect service thereof in the manner provided by Order 7, Rule 4, he shall report the fact to the Court or a Judge setting forth the reasons why he has been unable to effect such service. The marshal made no report of any inability to effect service, promptly or otherwise, upon the defendant ALEXANDER AUGUSTUS CORREIA. Indeed, he purported to effect service upon that defendant by delivering a sealed and certified copy of the writ to SYLVINO JOSEPH CORREIA, an adult, at the registered address, or principal place of business, of DEMERARA FILM EXCHANGE COMPANY of which firm ALEXANDER AUGUSTUS CORREIA AND SYLVINO CORREIA are two of the partners. The Marshal has made a return of service, and by the last paragraph of Rule 5 of Order 7 of the Rules of Court 1900 the return of service is proof of the facts therein stated until the contrary be shown.

By section 5 (1) (d) of the Business Names (Registration) Ordinance, cap. 58, it is provided that every firm required under the Ordinance to be registered shall furnish the registrar of deeds with a statement in writing in the prescribed form containing, *inter alia,* the following particulars, namely, the usual residence and the other business occupation (if any) of each of the individuals who are partners. By section 8 it is provided that whenever a change is made or occurs in any of the particulars registered in respect of a firm, such change must be registered

within fourteen days after the change or any longer period allowed by the registrar of deeds. By section 9 it is provided that if a change in particulars is, without reasonable excuse, not registered within the time prescribed every partner in the firm shall be liable on summary conviction to a fine not exceeding $25 for every day during which the default continues.

From the register of business names, it appears that on the 18th February 1944 ALEXANDER AUGUSTUS CORREIA had his usual place of residence within the Colony. However, his attorney has filed an affidavit in which it is stated:

> 2. The said Alexander Augustus Correia is now in the island of Trinidad, British West Indies and at present resides at 82A Woodford Street, Port-of-Spain and for the past six years resided in the said Island of Trinidad where he is engaged in business.

It is alleged on behalf of ALEXANDER AUGUSTUS CORREIA that his usual place or residence, contrary to what is registered, is now in the island of Trinidad; but it will, I think, be conceded that a person whose usual place of residence is outside the colony may nevertheless be within the jurisdiction of this court at the time of the service of the writ. If the defendant ALEXANDER AUGUSTUS CORREIA was indeed out of the jurisdiction of the Court on the 18th February 1944 it would have been a simple matter for his attorney ANTONIO ALOYSIUS VIEIRA to say so specifically. He has, however, refrained from saying so, although he has said that on the 2nd March 1944 (when the affidavit was sworn) ALEXANDER AUGUSTUS CORREIA was then in the island of Trinidad. I am unable to draw the inference that on the 18th February 1944 ALEXANDER AUGUSTUS CORREIA was out of the jurisdiction of this Court. For the purposes therefore of the present summons, he must be treated as being within the jurisdiction of this Court on the 18th February 1944.

It also appears from the register of business names that on the 18th February 1944 ALEXANDER AUGUSTUS CORREIA was carrying on business in partnership with SYLVINO JOSEPH CORREIA and others under the name and style of DEMERARA FILM EXCHANGE COMPANY, and that the principal place of business of the partnership was at lot 189, Waterloo Street, Georgetown. It is not alleged on behalf of ALEXANDER AUGUSTUS CORREIA that he has in fact ceased to be a partner in DEMERARA FILM EXCHANGE COMPANY, neither is it alleged that he was carrying on business, or had a place of business, at any other place in the colony: on the other hand, it is alleged on his behalf that he is engaged in business in Trinidad. The only place of business in the Colony of ALEXANDER AUGUSTUS CORREIA is at 189, Waterloo Street, the principal place of business of DEMERARA FILM EXCHANGE COMPANY.

Was a copy of the writ delivered to an adult employee of ALEXANDER AUGUSTUS CORREIA at his last known or usual place of business, within the meaning of Rule 4 of Order 7 of the Rules of Court, 1900? Service on an employee at the last known or usual place of business of the employer is good service upon the employer under that Rule. If it is reasonable to assume that an employee will deliver a copy of a writ to his employer, it is still more reasonable to believe that a partner would act

likewise. I am therefore of the opinion that the word "employee" in Rule 4 of Order 7 of the Rules of Court 1900 must be deemed to include a person with whom the defendant is carrying on business in partnership, at the place where the writ is served.

Such being the case, it follows that the writ was properly served upon ALEXANDER AUGUSTUS CORREIA by delivering a copy of it at lot 189 Waterloo Street to SYLVINO JOSEPH CORREIA a person with whom the defendant ALEXANDER AUGUSTUS CORREIA carries on business in partnership at the said address.

By rule 3 of Order 3 of the Rules of Court, 1900 it is provided that where a writ of summons is issued against a defendant who is represented in this Colony by an Attorney there should he stated at the head of the writ the name of the Attorney. Counsel for the defendant ALEXANDER AUGUSTUS CORREIA referred to *ATTORNEY GENERAL* and *TOWN CLERK OF GEORGETOWN* v. *WILD & COMPANY, LTD.* (1927) L.R.B.G. 110 and submitted that the writ was irregularly issued against ALEXANDER AUGUSTUS CORREIA and should be set aside so far as the defendant is concerned, as although he was out of the jurisdiction on the 18th February 1944 and was represented *by* an attorney, it was not stated at the head of the writ, or any where else in the writ, what was the name of the Attorney. This submission, however, fails as the defendant ALEXANDER AUGUSTUS CORREIA has failed to establish that on the 18th February 1944 he was out of the jurisdiction of this Court.

It is unnecessary for me to express any opinion on the submissions of counsel for the plaintiff (1) that it is not competent for ANTONIO ALOYSIUS VIEIRA to file this summons on behalf of ALEXANDER AUGUSTUS CORREIA; (2) that ALEXANDER AUGUSTUS CORREIA is estopped from asserting that on the 18th February 1944 he was not within the jurisdiction of the Court within the meaning of Rule 4 of Order 7 of the Rules of Court, 1900; or (3) that the writ was properly served in accordance with Rule 10 of Order 7 of the Rules of Court, 1900. I should, however, point out that ANTONIO ALOYSIUS VIEIRA describes himself in his affidavit not as "sole attorney" of ALEXANDER AUGUSTUS CORREIA, but as his "sole acting attorney"; and he has not produced the document under which he purports to act. It may very well be that, if ALEXANDER AUGUSTUS CORREIA is to be treated as being out of the jurisdiction of the Court on the 18th February 1944, service was properly effected in accordance with the second part of Rule 4 of Order 7 of the Rules of Court, 1900. Allegations made in affidavits filed *in* interlocutory proceedings should be precise; and a deponent to such an affidavit cannot complain if the Court or a Judge refuses to treat as certain what is not precise and what ought to have been rendered certain.

The summons filed herein on the 3rd March 1944 on behalf of the defendant ALEXANDER AUGUSTUS CORREIA for an order setting aside the writ of summons filed herein against him and the service thereof upon him is dismissed with costs, and I certify for counsel. The conditional appearance of the defendant ALEXANDER AUGUSTUS CORREIA will stand as

unconditional as from the date of this order. Leave to appeal is granted,

Application dismissed.

Solicitors: *J. Gonsalves*, O.B.E., for defendant Alexander Augustus Correia, the applicant; D. P. *Debidin* for the respondent, the plaintiff.

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WEST INDIAN COURT OF APPEAL

REPORTS OF DECISIONS

OF

THE COURT

SITTING IN

BRITISH GUIANA, ST. KITTS AND GRENADA.

[1944.]

JUDGES OF THE COURT:

H. W. B. BLACKALL, Esquire, (Chief Justice of Trinidad and Tobago), President.

Sir ALLAN COLLYMORE, Knt., (Chief Justice of Barbados).

Sir JOHN VERITY, Knt., (Chief Justice of British Guiana).

Clement MALONE, Esquire, (Chief Justice of the Windward Islands and Leeward Islands).

C. C. DEAR, Esquire, (Acting Chief Justice of Barbados).