

**JUDGES**  
OF THE  
**SUPREME COURT OF BRITISH GUIANA**

DURING 1946.

SIR JOHN VERITY, KT.	— Chief Justice. (From January 1 to June 10).
JOSEPH ALEXANDER LUCKHOO, K.C	— First Puisne Judge. Acted as Chief Justice from January 1 to December. 31.
FREDERICK MALCOLM BOLAND	— Second Puisne Judge. Acted as First Puisne Judge from January 1 to December 31.
DONALD EDWARD JACKSON	— Acting Second Puisne Judge (From January 1 to January 6, and from September 1 to December 31).
EDGAR MORTIMER DUKE (a)	— Acting Second Puisne Judge (From January 7 to August 31).
DONALD EDWARD JACKSON	— Acting Additional Judge (From February 26 to May 1, and from May 21 to May 23).

(a) Appointed Solicitor-General on April 2, 1946.

**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 (1946) L.R.B.G.

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**CASES**  
DETERMINED IN THE  
**SUPREME COURT OF BRITISH GUIANA.**

LOPES & FERNANDES, LIMITED, Appellant

v.

THE COMMISSIONER, Respondent

1945 No. 426 — DEMERARA.

BEFORE LUCKHOO, C.J. (Acting) In Chambers.

1945. DECEMBER 10, 29; 1946. JANUARY 7.

*Excess profits tax—Computation of standard profits—Company—Controlling interest of directors in—Working proprietor—"Worked full time in the actual management or conduct of the trade or business"—Interpretation of—Excess Profits Tax Ordinance, 1941 (No. 1), section 5 (2).*

*Words—"Worked full time in the actual management or conduct of the trade or business"—Excess Profits Tax Ordinance, 1941 (No. 1), section 5 (2).*

By section 5 (2) of the Excess Profits Tax Ordinance, 1941 (No. 1) the expression "working proprietor" means a proprietor who, has, during more than one-half of the chargeable accounting period in question, worked full time in the actual management or conduct of the trade or business.

*Held* (1) that the words "worked full time in the actual management or conduct" do not mean exclusive management or conduct;

(2) that the words "full time" mean full time as is understood in the particular trade or business, and do not mean "all the time";

(3) that the word "actual" means in fact, that the management or conduct of the trade or business must not be pretended or notional, and that being available only is insufficient to constitute actual management or conduct;

(4) that no person can be a working proprietor unless he takes a substantial part in the actual management or conduct of the trade or business.

APPEAL by Lopes & Fernandes, Limited from a decision of the Commissioner of Income Tax disallowing the claim of the company that Helena Amelia Fernandes was a working proprietor within the meaning of section 5 (2) of the Excess Profits Tax Ordinance, 1941 (No. 1).

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

*E. M. Duke*, acting Solicitor-General, for the respondent.

*Cur. adv. vult.*

LUCKHOO, C.J. (Acting): The point to be determined in this appeal is whether the respondent was justified or not in hold-

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ing that Mrs. Helena A. Fernandes was not a "working proprietor" of the appellants during the chargeable accounting period ending 31st day of January, 1941.

In approaching consideration of this point a perusal of the provisions of the Income Tax Ordinance, Chapter 38, by which these proceedings are brought is necessary. Section 45 thereof prescribes the procedure for appeals against assessments and refers to subsection (5) of the preceding section, the proviso to which reads "provided that in the event of anyone who, under subsections (2) and (3) of this section, has applied to the Commissioner for a revision of the assessment made upon him failing to agree with the Commissioner as to the amount at which he is liable to be assessed, *his right of appeal* to a judge under the provisions of this Ordinance against the assessment made upon him, shall remain unimpaired."

The onus of proving that the assessment complained of is excessive is on the appellant. It is a statutory one, and evidence is permitted to be received at the hearing of the appeal, if tendered.

By way of record all I have before me on the part of the appellant is a document in which the grounds of the appeal are set out, and on the part of the respondent a statement of the material facts upon every point specified in that document together with reasons in support of the assessment. The correspondence which passed between the appellants' Solicitor and the respondent forms annexures to the very limited record.

I have no minutes of the proceedings which took place before the Commissioner when the matter engaged his attention under the procedure laid down by subsection (4) of section 44 of the Ordinance, and therefore my examination in this appeal is limited to the evidence led before me and the admissions, if any, by the respondent of certain facts raised in the appeal.

The appellants' contention is that Mrs. Fernandes is a "working proprietor" within the meaning of the provisions of section 5 (2) of the Excess Profits Tax Ordinance, 1941 as amended by a later Ordinance passed in that year (No. 28 of 1941) by which charges of excess profits tax were based on four-fifths instead of three-fifths of the excess, and providing for an increase of the amount of the deduction before the excess tax is calculated in the case of a "working proprietor."

Lopes and Fernandes, Limited, now in liquidation, the appellants were incorporated in the year 1935 as a limited liability company under the Companies (Consolidation) Ordinance, Chapter 178, and carried on several kinds of businesses at Nos. 53, 78 and 79 Villages, and at Plantations Springlands and Skeldon on the Courantyne Coast of the County of Berbice. These businesses comprise two licensed retail spirit shops with two provision departments attached, a licensed retail spirit shop, two groceries, a wholesale provision department, a gasolene filling station and a rice-mill. The registered office of the Company was at all material times at lot C, Plantation No. 78, Courantyne, Berbice.

For the purpose of supplying those businesses with goods the Company purchased a great deal of the same from business firms

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in Georgetown, and also imported certain articles. It was necessary, in the circumstances, for the Company to have an office in the City of Georgetown, which was then housed at lots 141 and 142, Waterloo Street, Georgetown, the residence of Mrs. Fernandes.

The appellants allege that the actual management or conduct of the business of the Company was carried on by Mrs. Fernandes at the said office. There the following books of the Company were kept, Merchant Purchases Ledger, Shipping Records, Cash Book, Petty Cash Book, Stock Book, Cheque Book, Bank Account Book and all the correspondence from abroad. The office which was on the ground floor contained two typewriters, an adding machine, a Roll top desk, two iron safes and office furniture. It was called the main controlling office.

At Springlands, there were kept a rough cash book, and a Daily Sales book which once per month used to be sent to the Office in Georgetown to be checked.

In effect the practical operation of the several businesses of the Company was confined to the Courantyne Coast, whilst the supply of goods to those businesses was directed from the Georgetown office and the principal books of the Company kept there.

At all material and relevant times Mrs. Fernandes owned 60 shares in the Company the remainder of the 240 shares to make up the complete share Capital of the Company being equally divided between Cyril Mathias and Louis Mathias.

It would appear from the evidence of Pancham who was the Customs and Shipping clerk in the employ of the Company that Louis Mathias managed and controlled the businesses on the Courantyne Coast, and Cyril Mathias and Mrs. Fernandes jointly performed services in connection with the Company's business at Georgetown. Except for a short period of two weeks in a year when she paid a visit to Springlands, Mrs. Fernandes who was then over 60 years of age remained in Georgetown, whilst Cyril Mathias paid six fortnightly visits in the course of the year to the Courantyne after being engaged in the work of the Company during the previous six-weekly periods.

With respect to Louis Mathias and Cyril Mathias who are directors and owned not less than one-fifth each of the shares of the Company, no question arises. The Commissioner has allowed for them the sum of \$4,800: — (Four thousand eight hundred dollars) each, having been satisfied that each was a "working proprietor" in terms of the provisions of section 5 (2) of the Excess Profits Tax Ordinance, 1941.

The appellants contend that for Mrs. Fernandes they should be allowed a like sum as during the chargeable accounting period in issue she also was a "working proprietor" of the Company, and that the Company was entitled to use as its standard profits the sum of \$14,400:— (Fourteen thousand four hundred dollars) in which case it was not liable to pay excess profits tax, as that sum was in excess of the profits of \$10,032:— (Ten thousand and thirty-two dollars) of the Company, for that period.

The appellants submit that Mrs. Fernandes during more than one-half of the said period worked *full time* in the actual manage-

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ment or conduct of the business of the Company and rely upon the evidence of two witnesses called by them to satisfy the onus of proof, the Commissioner (Respondent) not having allowed the sum of \$4,800:— (Four thousand eight hundred dollars) upon an application to him for a revision of the assessment. It becomes necessary to ascertain in addition to the evidence led before me by the appellants, what statements in their grounds of appeal have been admitted or partly admitted by the respondent.

In paragraph 18 of the respondent's statement he admits that Helena Fernandes attended to the business when she was required so to do:—

- (a) for the purpose of attending meetings of the directors and of the Company,
- (b) for the purpose of considering quotations obtained by the Company's clerk as to the prices of goods,
- (c) for the purpose of signing cheques on behalf of the Company and
- (d) in the case of any unforeseen circumstances such as an accident to a craft carrying the goods of the Company, in which event she was informed, and as chairman of the directors she took whatever action was necessary.

(i) The respondent conceded that Mrs. Fernandes also paid occasional visits to the Courantyne Coast, when she no doubt, inspected the various business premises of the Company and discussed with the two other directors the conduct of the business of the Company.

(ii) All directors' meetings, and general and extra-ordinary meetings of the Company were held at lots 141 and 142 Waterloo Street, Georgetown, and

(iii) The goods of the said businesses were ordered in Georgetown, and all payments for the said goods and all cheques were signed by Mrs. Fernandes.

The two witnesses called on behalf of the appellants were Anthony Marques Stanislaus Barcellos, Auditor of the Company since its Incorporation and who remained as such until the Company went into liquidation on the 8th day of January, 1945, and Ingram Pancham, already mentioned, who performed the duties of a Customs and Shipping clerk from the year 1936 to the 16th day of December, 1944.

There are essential differences in the evidence of these two witnesses, and in the absence of Mrs. Fernandes who at the time this appeal came on for hearing was unfortunately indisposed, as shown by a doctor's certificate exhibited to me, and could not attend, and Cyril Mathias who is away from the Colony and ought to have given material evidence had he been here, I have to make a finding as to what part Mrs. Fernandes took in the management or conduct of the Company's business in order to qualify her as a "working proprietor" within the meaning of the section of the Ordinance.

Barcellos' visits to the Company's office at Waterloo Street were at irregular intervals about two or three times per week, throughout the year, except when he was absent from Georgetown. He detailed in his evidence what services he alleges Mrs. Fernandes performed, and according to him save for visits either

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from Louis Mathias or Cyril Mathias once in every five weeks during the year she (Mrs. Fernandes) assumed with the help of Pancham, the burden in the management or conduct of the Company's affairs at the Georgetown end.

Pancham, who spent most of his time out of doors, stated that Cyril Mathias lived in Georgetown at 235 Camp Street, and attended to the Company's business with Mrs. Fernandes and once at the end of every six weeks he (Cyril Mathias) would journey to the Courantyne Coast, and that during his absence no additional work was thrown on the shoulders of Mrs. Fernandes.

Of these two witnesses, the one who in my opinion is in a better position to know what work Mrs. Fernandes did in the course of a year, is Pancham.

Barcellos has greatly drawn upon his imagination, and I believe is apt to associate inferences he has been able to draw from an examination of the Company's books and other documents with what he regarded as the true facts as they existed.

Let me give an illustration of what I mean. He describes with particularity the number of books and documents kept on the premises at Waterloo Street. There is no evidence as to the person or persons who wrote in those books. Cyril Mathias, according to Barcellos' evidence, together with his brother Louis Mathias had the management or control of the Company's business on the Courantyne, hence Mrs. Fernandes bore the brunt, if not all, of what had to be done in Georgetown.

The comparison below will enable one to appreciate some of the essential differences in the evidence of these two witnesses.

Barcellos' story is that both Louis and Cyril Mathias managed and controlled the business of the Company on the Courantyne. Pancham states Cyril Mathias lived at 235 Camp Street, Georgetown, and together with Mrs. Fernandes looked after the business here.

Barcellos deposes to the fact that Louis and Cyril Mathias came to Georgetown once in every five weeks then they would go into Water Street for the purpose of the Company's business but that Mrs. Fernandes may veto goods ordered by them. Pancham's version is that Cyril Mathias would be in Georgetown for six out of every eight weeks. He had a lot of work to do in Georgetown. He would look after the correspondence and sign orders. He spent the remaining two weeks in visiting the business places on the Courantyne. In his absence from Georgetown, Mrs. Fernandes would sign orders. Again Barcellos' narrative differs from that of Pancham in that he credits Cyril Mathias with service being rendered by him for the Commodity Control Board with regard to the distribution by the Company of certain articles of foodstuffs during the time he was stationed at Springlands, whilst on the other hand Pancham states he (Cyril Mathias) would fulfil such engagements when in town. I am left in doubt as to what were the duties undertaken by Mrs. Fernandes which would satisfy the conditions required by law to qualify her as a "working proprietor."

The sub-section to be construed reads as follows: —

"the expression *"working proprietor"* means a proprietor who has, during more than one-half of the Chargeable Accounting period in question, *worked full time* in the actual management or conduct of the trade or business."

To interpret the material words of the section in order to ascertain the true meaning let me first deal with the word "actual." It must mean in fact. Being available only is insufficient. It must not be pretended nor notional. The actual management or conduct means taking a *substantial* part in it. "*Worked full time* in the actual management or conduct" does not mean *exclusive* management or conduct. There may be joint management or conduct of the trade or business, hence the Ordinance allows for working proprietors. The puzzle in the sub-section is to be found in the words "*full time*." The words "Full time" do not mean "all the time". They point to *some standard* by means of which one can gauge whether the time spent is the full time, or something less than that, and suggests *that the standard* is to be found independently of the individual in question. He is to work full time as full time is understood in the particular business.

The proprietor must work full time in the management or conduct of the trade or business.

The substantial ground for decision is, have the appellants discharged the onus of satisfying me that the respondent was not justified in holding that Mrs. Fernandes was not a "working proprietor."

The answer is dependent on the facts on which I can rely and whether or not those facts enable me in holding that Mrs. Fernandes worked full time as full time is understood in the particular business. The nearest approach to the truth is to be found in the answers given in the cross-examination of Pancham and to find from those answers that Mrs. Fernandes was a "working proprietor" for the chargeable accounting period ending 31st day of January, 1941 would be to rely upon a standard associated with her individually rather than to look to the cardinal point on which the standard must be based independently of the individual in question.

It may be that, had Mrs. Fernandes not been incapacitated by illness from giving evidence, and had Cyril Mathias been available to do so, sufficient facts might have emerged to satisfy me that the respondent had allowed an excessive assessment, and that Mrs. Fernandes had allocated to herself certain amount of work in the business of the Company in Georgetown and worked full time as full time is understood in the particular work assigned to her. This has not been established by the evidence tendered by the appellants.

That Mrs. Fernandes, resident on the premises where the Georgetown office was carried on, and in the sense contended for by Mr. Humphrys, was available, and also worked to a certain extent there can be no doubt, but the appellants have failed to establish affirmatively, or in a measure beyond reasonable doubt that she worked "full time" in the actual management or conduct of the business of the Company as contemplated by the provisions of the sub-section.

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In the particular circumstances, and my decision is limited to the Chargeable Accounting period ending 31st January, 1941, the appeal must be dismissed with costs.

*Appeal dismissed.*

Solicitors : *CARLOS GOMES; VIVIAN C. DIAS*, acting Crown Solicitor.

## LOWTON v. JOHN ARCHIBALD SUTTON &amp; Ors.

LOWTON, Plaintiff,

v.

JOHN ARCHIBALD SUTTON, BASIL ADAMS, JOHN ADAMS  
and HARRY ADAMS, Defendants.

1945. No. 354—DEMERARA.

BEFORE LUCKHOO, C.J. (ACTING):

1946. MARCH 8, 11, 12, 13, 14; APRIL 6.

*Detinue—Goods property of plaintiff—In possession of second person—Delivered by him to a third person—Money due by second person to third person—Demand by owner for delivery of goods—Refusal to deliver unless paid sum due by second person—Refusal evidence of a conversion.*

*Torts—Joint tortfeasors—How constituted—Liability.*

*Torts—Joint tortfeasors—No right of indemnity between—Exception to rule.*

If a man buys goods and they turn out to be the property of another, the owner has a right to receive them back, except in case of a sale in market overt; and if the person who has them in his possession refuses to deliver them to the owner unless he is paid a sum of money which he claims, he will be guilty of a conversion.

Where several persons so concur in some act or default which is tortious that each is responsible for the breach of duty, they are called joint tortfeasors. A person whose legal right is injured by a tort so committed has a right of action against all or any of such joint tortfeasors.

Exception to the rule that there is no right of indemnity between joint tortfeasors, considered.

ACTION by the plaintiff Lowton against the defendants John Archibald Sutton, Basil Adams, John Adams and Harry Adams for detinue of a sloop and damages for wrongful detention. The defendants Basil Adams, John Adams and Harry Adams filed a counterclaim against Lowton and John Archibald Sutton. The facts sufficiently appear from the judgment.

*F. R. Jacob*, for the plaintiff.

*J. O. F. Haynes*, for the defendant Sutton.

*A. J. Parkes*, for the defendants Adams.

*Cur. adv. vult.*

LUCKHOO, C.J. (ACTING) :

The "Aloma" a sloop registered as 30 tons with a length overall of 45 feet, a beam of 11 feet and 5 feet in depth and with a carrying capacity of 250 bags, was built on behalf of her then owners the plaintiff and one Ramdial Seecharran of the Corentyne District, in the month of August 1944. She at first traded between the port of Springlands in this Colony and Nickerie on the Dutch mainland and up the Corentyne River with lumber and rice and later on between Springlands and the Port of Georgetown transporting lumber and rice and returning with foodstuffs for Messrs. Lopes and Fernandes Ltd., carrying on business at No. 79 Village. Each trip to Georgetown and back occupied a period of from 10 to 12 days.

At all material times prior to January 1945 the possession and

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control of the sloop was in the plaintiff, the navigation thereof being entrusted to one Reggie Massiah. It would appear that the plaintiff made his own arrangements for the carriage of freight and as to where the sloop should operate and there were at least three occasions when, with the permission of the plaintiff, trips to load sand at Tuschen away from the normal route were made by the captain.

In the month of December 1944 the plaintiff was informed by telegram that the "Aloma" had foundered somewhere in the Essequibo River in consequence of which he travelled to Georgetown and met the captain who informed him that the sloop had sunk between Fort and Hog Islands in that river. Without authority, it would seem, the captain had undertaken on behalf of the first-named defendant John Archibald Sutton to transport a quantity of wallaba wood from one of the grants of Greenheart Producers Ltd., a company with a registered office then at lot 40 Water Street, Georgetown, and of which Sutton was a director and general manager. It was while on its way to Georgetown that, for some unexplained reason, the sloop foundered and became so submerged that it was only at low tide that the mast was visible for a height of six feet. When in January, 1945, the plaintiff and a diver named Philip Gouveia located the sloop off Hog Island the only things they were able to salvage were the mainsail, jib and some of the tackling.

A few days later the plaintiff on his return to Georgetown met Sutton who suggested that the plaintiff might put up the sum of \$500 to pay Sutton for salvaging the sloop. The plaintiff travelled to Springlands to consult his partner Seecharran and one Jerome deSouza whose interest in the transactions was derived from a loan he had made to Seecharran when the sloop was being built. According to the evidence Sutton had meanwhile communicated with DeSouza, a relative of his. Seecharran, finding himself unable to raise his share of the funds, sold his interest to deSouza, who together with the plaintiff collected a certain sum. On the 15th February, 1945, the sum of \$100 was paid to Sutton the balance being payable when the sloop was raised and beached.

For 16 days the plaintiff stood by and on the 30th March the sloop floated and was beached on the eastern side of Hog Island. On the 5th April a further sum of \$100 was paid over to Sutton, making a total payment of \$200. On the 9th of April deSouza received from Sutton a letter (Ex. C) in which he stated that the salvage operations had cost \$898. He (Sutton) had made his own arrangements with Basil Adams, the second-named defendant, a diver, to do the work. In that letter Sutton pressed for immediate payment of \$700 to cover the expenses incurred by him and threatened to sell the sloop for which he said he had an offer of \$1,000, to cover his outlay. He described the sloop as being in good condition and expressed the view that with an expenditure of \$500 it could be put in first class working order. In the penultimate paragraph of the letter which he signed "Archie" he said that the amount of \$700 should be remitted to him by Wednesday the 11th April. That letter was followed by a telegram to De-

Souza in these terms: "Creditors in connection with salvaging "Aloma" "pressing except I receive \$500 to meet embarrassing demands by noon "Wednesday 11th instant will conclude sale and remit your balance after "expenses paid—Sutton." Simultaneous with the despatch of that telegram was another to Basil Adams, diver, at Wakenaam: "Have decided to sell boat try "travel Georgetown Wednesday to complete deal."

Apparently at the time the sloop was salvaged Basil Adams, with full knowledge that the same belonged to Lowton and deSouza had offered to purchase it but was told by Sutton that it was not his and could not be sold. On the 12th April it was made clear to Sutton by both Lowton and deSouza, co-owners, by a joint telegram, that he was not to sell: "You are not authorised "to sell sloop "Aloma" Lowton travelling to Georgetown meet you "tomorrow." Nevertheless it is alleged on behalf of the defendants Adams that without knowledge of that fact and in the bona fide belief that Sutton was duly authorised to sell the sloop, he having exhibited what purported to be an authority from deSouza to sell, they purchased the boat for the sum of \$1,000, paying in cash the sum of \$825 and the balance being the amount due by Sutton to Basil Adams for services rendered in salvaging. A receipt for \$1,000 (Ex.H) was then written and issued to them.

On the other hand Sutton alleges that in consequence of the telegram of the 12th April, which he received before the Adams arrived at his office on that day, he informed them that he was specifically instructed not to sell and that the only opportunity they could get to purchase the sloop was if the owners didn't pay for salvaging it. In that event he would report to the Harbour Master (the Controller of Wrecks) who would put it up for sale at public auction and sell it to pay the expenses of salvaging. Sutton states that the sum of \$1,000 was then deposited with him (made up as stated above) and that he told them that when that opportunity arose he would act for them. It was in those circumstances, Sutton further states, that he issued the receipt which runs as follows: "Received from Basil John and Aaron Adams " (brothers) all of Zeelandia, Wakenaam, the sum of one thousand "dollars for the purchase of sloop "Aloma" recently salvaged (31st "March 1945) and now lying at Mr. W. Brown's landing at Hog "Island, Essequibo River." This receipt was witnessed by one Reginald Barton whose evidence I shall refer to later. Aaron Adams is the same person as Harry Adams, the last named defendant in this action.

It is admitted that Sutton then gave a written authority (not produced) directed to W. Brown to deliver the sloop to John Adams with whom Sutton had arranged for its removal from Hog Island to Zeelandia and whom Sutton had agreed to pay for the removal and for taking care of it. Sutton said he took this precaution as he had no intention to let go of the sloop until all the salvage expenses had been paid and also to prevent the boat from slipping back into the channel in which it had foundered.

I have to find at this stage what was the real agreement between the parties in order to determine, not the liability of the

## LOWTON v. JOHN ARCHIBALD SUTTON &amp; Ors

defendants vis-a-vis the plaintiff but as between themselves, against which of them damages should be awarded and by whom the costs of the plaintiff should be paid, should I find the sloop had been wrongfully detained from the plaintiff. Did the Adamses really believe that Sutton had authority to sell when no authorisation had ever been read to them and does the maxim *caveat emptor* not apply in view of the fact that they knew the sloop was owned by the plaintiff and deSouza?

In coming to a conclusion as to the real nature of the transaction I must consider not only the terms of the receipt (Ex.H) but also the conduct of the defendants just prior to the issue of that receipt, what happened on the visit of the plaintiff and Sutton to Zeelandia on the 28th April and the subsequent correspondence bearing on the matter. The wording of the receipt is equivocal but taken with the other circumstances with which I shall presently deal, it supports the story given by Sutton that the sum of \$1,000 was deposited with him by the Adamses on the conditions stated in his evidence and that there was no agreement of sale as alleged by them. One would expect the Adamses, with knowledge that the sloop belonged to Lowton and deSouza and had only been salvaged and beached within a fortnight before, to take care that the receipt should incorporate the alleged authority to sell or to have asked to see the authorisation which, it is alleged, by Reginald Barton, was exhibited at the time of the alleged sale, and more especially when, according to Barton, Sutton is alleged to have said: ".....don't worry about the other partner, I have sent a letter and a telegram and have not received a reply yet."

Why was Sutton to pay for the removal from the beach at Hog Island to Zeelandia and for watching the sloop if the receipt was for the sale by Sutton to the Adamses of a sloop then lying at Brown's landing?

On the 28th of April Lowton, who had to find not merely \$500, Sutton's original estimate of the cost of the salvaging, but the sum of \$1,000 instead and had fully met his obligations on the 27th April, proceeded in the company of Sutton to Zeelandia where the sloop had been taken by the Adamses and there John Adams was told that Lowton was the owner of the sloop and had fully paid the salvage expenses and that it was to him the sloop was to be delivered. Adams agreed and showed Lowton some of the tackling including the steering wheel, block and tackle, hatch cover, and clamps which had been removed for safety from the sloop then lying on the Zeelandia beach not far from Adams' house.

Plaintiff told ADAMS that he would immediately commence repairs to the sloop and Adams undertook to deliver what tackling he had upon the completion of the repairs. Nothing was then said by Adams as to the purchase of the sloop from Sutton or of the repayment of the \$1,000. On the evidence I find that the real agreement is as stated by the defendant Sutton. I do not accept the evidence of John Adams that Sutton said that he was one of the Adams brothers to whom he had sold the sloop. I would have expected the plaintiff to reply: He couldn't do so because we sent him a telegram not to sell.

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The conduct of John Adams hereafter negatives any ownership of the sloop by him and his brothers. He admitted he lent plaintiff his bicycle, introduced him to a boat builder, found him a place to reside during his stay in Wakenaam and for three weeks watched the repairs being effected. It was only when the repairs were completed and the plaintiff requested delivery of the tackling that for the first time John Adams told him he had purchased the boat from Sutton for \$1,000. Adams thereupon refused to deliver it.

After that refusal the plaintiff consulted a solicitor. In the presence of Lance Sgt. Major Mentore plaintiff made another demand on John Adams for the delivery of the sloop and tackling. This was refused, Adams informing Mentore that he had purchased the sloop from Sutton and that he would not give up the sloop until he had got back his \$1,000.

In the meantime Sutton had interviewed deSouza, plaintiff's partner, at Springlands and disclosed to him the transaction he had with the Adamses. He admitted he had taken \$1,000 from the diver (Basil Adams) and his brothers and that he did not have the money to return to them. He was asking for time and wanted Lowton and deSouza to agree not to enforce delivery before the 20th June when he expected to raise the necessary \$1,000 to pay to Adams. It would appear that deSouza was willing to give the time asked for but there is no evidence that the plaintiff also agreed.

After the interview with deSouza Sutton dispatched a telegram to John Adams in which he stated that he had arranged with plaintiff and deSouza to let the sloop and tackling remain in Adams' custody for one month in order to enable him to settle. This was followed by a letter dated the 23rd May in which Sutton reiterated his assurance to Adams that the sloop and tackling were not to be removed until he paid in full the amount he had received from them. However on the 21st June the plaintiff arrived at Zeelandia with an authorisation from Sutton and showed it to John Adams who in the presence of two witnesses again refused delivery of the sloop and tackling. In a letter dated 19th June sent by Sutton to the Adamses there was enclosed a cheque for \$1,000 drawn by the Greenheart Producers Ltd. in favour of John, Aaron and Basil Adams. In that letter Sutton again made mention of the fact that the sum he was returning was the amount which had been deposited by the Adamses with him for the purchase of the sloop "Aloma". This letter which was produced from the custody of the Adamses is important. It is necessary for me to set out extracts from this letter as they affect my consideration of the question of the joint liability of the defendants to the plaintiff and of the question of costs.

The first extract of importance is as follows:

"Mr. de Souza the owner with whom I had dealings in this matter has authorised me to deliver the sloop "Aloma" left in your custody to Lowton, who is well known to both John and Basil Adams."

"This therefore serves to inform you that delivery of the sloop "Aloma" complete with all tackling and equipment as salvaged must

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be made to Mr. Lowton as soon as he calls on you for delivery of the same." The next and equally important passage is as follows:

"Would you be good enough to forward me an account of the expenses incurred in removing the said sloop from Hog Island to Wakenaam for me to effect settlement."

The authorisation which Lowton presented as stated above reads as follows:

"I hereby authorise the bearer Lowton of Crabwood Creek to take possession of the sloop "Aloma" complete with all tackling and/or equipment as salvaged as left by me in the custody of John Adams, at Zeelandia, Wakenaam, the same being the property of G. de Souza and Lowton of 79 Village, Corentyne."

There was no excuse in my opinion for the refusal by the Adamses to make delivery of the sloop and tackling to Lowton when he presented that authority.

The case of *Loeschman v. Machin* (1880) 2 Shark. p. 311, quoted by Mr. Haynes clearly shows that the Adamses were not justified in refusing to make delivery. The general rule is that if a man buys goods and they turn out to be the property of another, the owner has a right to receive them back, except in the case of a sale in market overt and if the person who has them in his possession refuses to deliver them to the owner unless he is paid a sum of money which he claims, he will be guilty of a conversion.

It would appear that John Adams was not satisfied with the cheque and wanted payment in cash. He was told by Sutton that before the cheque could be cashed it had to be endorsed by all the payees named therein and as Basil was absent John returned home to obtain Basil's signature. On John's return to Georgetown with the cheque fully endorsed and upon presenting it for payment at Barclays Bank they were informed that payment had been stopped. Sutton gave as his reason for so doing that Lowton had instituted criminal proceedings against him for conversion. Sutton did not thereafter pay to the Adamses the amount due to them nor did the Adamses on their part deliver the sloop and tackling to the owners.

I have set out at length the salient facts of the case and I have come to the conclusion that Sutton and the Adamses have all been responsible for the wrongful detention of the sloop and tackling. It was the duty of the Adamses to make delivery and then if so advised bring an action against Sutton for the amount due to them. Sutton's action in stopping payment of the cheque is in the teeth of his letter to the Adamses of the 19th June and of the authorisation which he handed to Lowton on the 21st of June.

Where two or more persons have so conducted themselves as to be liable to be jointly sued each is responsible for the injury sustained by reason of their common act. As it is stated in Halsbury's Laws of England (2nd Ed.) p. 187: "Where several persons so concur in some act or default "which is tortious, that each is responsible for the breach of duty, they are "called joint tort-feasors. A person whose legal right is injured by a tort so "committed has a right of action against any or all of such joint

"tort-feasore". This liability may arise out of some joint enterprise or action in which they are concerned.

The plaintiff has given evidence of the earnings of the sloop since it was built in August 1944 until it foundered in December of the same year. It made three trips for Ramjohn, two for Wajidally and two for Rahaman, all at \$100 per trip. There were three trips between Tuschen and Georgetown with sand at \$48 per trip and on the return trips to Springlands cargo was taken for Lopes and Fernandes Ltd. on at least three occasions earning about \$50 on each trip. Of these earnings at least 10% went as commission to either Lowton or de Souza for procuring the freight and of the remainder one-half was paid to the captain for himself and crew and the other went to the owners. This works out at a net profit to its owners of at least \$100 per month. The book kept by de Souza (Ex.L) shows that in two 7-day trips from Springlands to Georgetown and back the "Aloma" earned for its owners \$120.68. Allowing for minor repairs, extra tackling and lifebuoys purchased during that period I estimate the least possible net profit to have been \$80 per month.

The sloop should have been delivered to the plaintiff on or about the 17th May 1945. This date was extended to the 20th June on the authority of de Souza and apparently not objected to by Lowton. Delivery was not made until the 8th day of March, 1946, a period of detention of nearly nine months. There is some slight evidence that the hull of the sloop has been attacked by barnacles which would impair its speed but I do not take that into consideration in estimating the amount of damages I should award.

The plaintiff has been very unfortunate in having to spend such a large sum in salvaging operations but the sloop was newly built and was worth about \$3,000. He also suffered loss of earnings for the period above stated. I award him the sum of \$720 as damages against all of the defendants jointly and severally and the full costs of the action. The counterclaim by the second, third and fourth named defendants against him is dismissed.

It is clear that the sum of \$1,000 deposited by the second, third and fourth named defendant in the circumstances as I have found is repayable to them by the defendant Sutton. It was at Sutton's request that the sloop was towed from the beach at Hog Island to the beach at Zeelandia, for which he agreed to pay and that the Adamases were requested by him to keep a watch over the sloop until delivery was made to the plaintiff. Having found that the other defendants were instructed by defendant Sutton to retain possession and control of the sloop until the 20th day of June, the defendant Sutton is liable to pay the expenses incurred in towing the sloop to Zeelandia — \$15, for services in watching it from the date of removal from Hog Island to the 20th June — a period of nine weeks — at \$3 per week, together with the sum of \$4 for cleaning it. These amounts aggregating \$1,046 should have been paid by Sutton. He has since paid \$1,000, leaving a balance of \$46, for which amount I give judgment against him in favour of the other defendants, with costs of the counterclaim.

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Mr. Partes on behalf of the Adams brothers conceded that on the facts deposed to by his clients and by Sutton he could not resist judgment in the plaintiff's favour on the ground of detention, but urged that in so far as Sutton was concerned there arose from the circumstances an implied promise by Sutton to indemnify the Adamses for whatever they might be called upon to pay to the plaintiff, either by way of damages or costs, for the detention of the sloop.

It was further contended that although it is clear law that there is no right of indemnity between joint tort-feasors, nevertheless the circumstances of this case brought it within the exception where a man who buys the goods of another from a person who has no authority to sell them is a wrongdoer to the person whose goods he takes but yet he may recover compensation against the person who sold the goods to him.

Even if I were to find that the Adams brothers had purchased the sloop in good faith believing that Sutton had authority to sell I could not properly give judgment in the form in which the counterclaim is framed. But I do not so find. The transaction of the 12th April 1945 was not one of sale by Sutton to Adams of the plaintiff's sloop and tackling. The defendants Adams were well aware of the fact that the sloop was the property of the plaintiff and that Sutton had no authority to sell, as I have found, and in fact he did not sell. They undertook the risk of parting with the sum of \$1,000 to Sutton on a speculation and refused to deliver the sloop when the owner demanded it. They would have been entitled to an indemnity only if at Sutton's request they had done an act which was not in itself manifestly tortious to their knowledge and such act turned out to be injurious to the rights of a third party. See *Sheffield Corp. v. Barclay* (1905) A.C. p. 397. In *Betts v. Gibbons* (1834) 2 A & E, 57, at p. 75, the main question was whether the defendant undertook to indemnify the plaintiff. No express undertaking was found but the facts were such that if they had been put to the jury they would have found such a contract. There the plaintiff was instructed not to deliver.

In the instant case the second, third and fourth named defendants were specifically instructed to do so and they refused. As was pointed out the act which brought about the litigation was the non-delivery of the sloop, not the stoppage of the payment of the cheque. But in so far as Sutton is concerned he is equally responsible, having authorised Brown originally to deliver the sloop to the Adamses and later stopping the payment of the cheque.

The order of the Court therefore is that judgment be entered against the defendants for the return to the plaintiff of the sloop and tackling in their possession at the time of the demand by the plaintiff for delivery, in default thereof the defendants shall pay to the plaintiff the value of the sloop and tackling which I fix at \$3,000.

I award damages in favour of the plaintiff against the defendants in the sum of \$720 and full costs of the action. The counterclaim brought by the second, third and fourth named defendants against the plaintiff is dismissed.

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There will also be judgment against the defendant Sutton on the counterclaim in favour of the other defendants for the sum of \$1,046 less the sum of \$1,000 paid since the trial of the action had begun, together with the costs occasioned by the counterclaim.

*Judgment on claim for plaintiff against defendants; on counterclaim by second, third and fourth named defendants against plaintiff and first named defendant, judgment in favour of plaintiff and in favour of second, third, and fourth named defendants.*

Solicitors: *H. A. Bruton*, for plaintiff; *M. A. Charles*, for defendant Sutton; *W. D. Dinally*, for defendants Adams.

ROSE ALEXANDRINA BOVELL,  
Plaintiff,

v.

CLEMENT WILFRED EDWARD ALLEN,  
Defendant.

1945. No. 435—DEMERARA.

Before LUCKHOO, C.J. (Acting):

1946. MARCH 21, 26, 27; APRIL 13.

*Landlord and tenant—Rent restriction—Premises let—Premises to which Rent Restriction Ordinance, 1941(No.23) applies—Tenant cannot be dispossessed—Except under authority of an order or judgment of the Court—Made under section 7.*

Where premises let are premises to which the Rent Restriction Ordinance, 1941 (No. 23) applies, the tenant cannot be dispossessed except under the authority of an order or judgment of the Court made in accordance with the provisions of section 7 of the said Ordinance.

ACTION by the plaintiff Rose Alexandrina Bovell also known as Rose Harmon against the defendant Clement Wilfred Edward Allen for damages arising from the disturbance by the defendant of the lawful occupation of certain premises let by the defendant to the plaintiff.

*J. L. Wills*, for the plaintiff.

The defendant appeared in person.

*Cur. adv. vult.*

LUCKHOO, C.J. (Acting): Until she was disturbed on the 1st day of October 1945, in her occupation of premises situate at lot 135 Waterloo Street, Georgetown, the plaintiff had been carrying on during the previous twenty-five years a cake shop known by the name of "Rose Harmon" parlour. At all material times, she was a tenant of the defendant and paid to him the sum of \$8.25 per month as rent.

The plaintiff is the wife of one Joseph Nathaniel Bovell a stevedore labourer employed by Garnett & Co., Ltd. of Water Street, Georgetown, and was before her marriage Miss Rose Harmon, from which the parlour took its name.

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This parlour which was centrally situated in relation to the "Astor" and "Metropole" Cinemas together with other parlours in that area enjoyed a very good business in the sale of cakes, bread, confectionery, aerated drinks, coffee, chocolates, ices, bananas, cooked food, cigarettes and matches, and wood, to habitues of the above Cinematograph houses and to friends of her husband who work in Water Street, and made the parlour their rendezvous on pay day.

For very many years both before and after the establishment of the two picture houses the plaintiff, by steady attention, built up a prosperous business which she alleges has been destroyed by the illegal, unauthorised and unwarranted interference by the defendant and in breach of the covenant for quiet enjoyment to be implied from her tenancy of those premises.

The defendant became the owner by transport on the 28th day of March, 1944, of the property situate at 135 Waterloo Street. These premises comprise a two-storied building the upper storey of which was tenanted by Joseph Bovell, plaintiff's husband where both of them resided. The lower storey the floor of which was 18 inches from the ground housed the plaintiff's parlour at the back of which rooms were let to several tenants.

On the acquisition of these premises by the defendant the plaintiff, her husband and others attorned tenants to him and continued in occupation paying the rental due by them respectively until the events hereinafter described occurred.

Soon after he became owner, the defendant served notices to quit both on the plaintiff and her husband with respect to their tenancies, and on the 6th day of September 1944 he filed suits for possession against them which in one case was struck out as not being maintainable and in the other in which possession was refused. In both he gave notices of appeal but did not prosecute the same. On the 5th day of September 1945, exactly one year after the filing of the first suit, he filed a second one after the usual notice to quit was served on the plaintiff. It was during the pendency of that suit that the defendant purported to exercise a right to enter upon the premises in order to effect repairs and improvements and to raise the building to a height of 13 or 14 feet off the ground which resulted in the institution of this action by the plaintiff claiming an injunction restraining the defendant from entering the tenement or from destroying or otherwise injuring her goods and chattels therein or in any way interfering with her occupation thereof; damages in the sum of \$2,000: for trespass and deprivation of her rights of tenancy and costs.

It would be well at an early stage of this judgment to set down what was the state of the law in relation to a landlord and tenant and their respective rights under a tenancy agreement prior to the passing of the Rent Restriction Ordinance, No. 23 of 1941 and what it is since then in so far as the recovery or possession of tenements is concerned.

By section 14 of the Rent and Premises Recovery Ordinance, Chapter 92 the mere failure to pay rent of a house or room where the rent did not exceed the rate of five dollars a month, within

fourteen days in case of a monthly tenancy, and seven days in the case of a weekly tenancy, determined the tenancy giving the right to the landlord to proceed to recover possession of the same.

By section 15 of the said Ordinance where the term or interest of any tenant of a tenement held by him at will or for a term, either without being liable to the payment of rent, or at a rent not exceeding the rate of two hundred and forty dollars a year, has ended or has been determined by a legal notice to quit, or otherwise, if the tenant refuses or neglects to deliver up possession of them, the proceedings laid down under sub-section 1 of the said section shall be lawful.

The well-known case of *HEMMINGS v. STOKE POGES GOLF CLUB* (1920) 1 K.B. 720 C.A. illustrates the extent to which a landlord under the common law may go, in order to re-enter his premises after a determination of the tenancy and the holding over by a tenant of those premises.

There *the remedy* of self-help was also available to him in such circumstances, it being conceded that he was free to regain possession peaceably and without the use of force.

From the decision of the Court in the *STOKE POGES GOLF CLUB* case, it would seem that the landlord will not be liable for any damage which may be done to the tenant's goods in the course of their removal from the premises provided that a reasonable degree of care is exercised.

In the *Second edition* of Halsbury's Laws of England volume 20 page 280 paragraph 315 there appears the following statement of the law

"Where the tenant fails to deliver up possession, the landlord is entitled to re-enter and take possession, subject only to certain statutory restrictions. Thus he can re-enter where the tenant has abandoned possession, or where he can effect the entry peaceably; and even if he enters forcibly, and is thus liable to criminal proceedings under the statutes, yet the tenant has no civil remedy against him in respect of the entry or in respect of the eviction, if no more force than is necessary is used.

The statutory restrictions referred to in the above passage are those which were passed during the 14th to the 18th centuries and dealt with forcible entry not to be made with a strong hand or with a multitude of people, but only in peaceable and easy manner; or forcible entry with unusual weapons; or with menace of life or limb; or to forcible entry and detainer. The landlord's common law rights have, however, been curtailed by the Increase of Rent and Mortgage Interest Restrictions Acts, 1920-1933, and by our local enactment the Rent Restriction Ordinance, No. 23 of 1941 in cases of Statutory tenancies. A landlord in my view is not lawfully entitled to adopt the extraordinary remedy as in the *GOLF CLUB* case but must first seek the leave of the appropriate Court to resume possession of the demised premises after a notice duly determining the tenancy.

In England by section 1 sub-section 2 of the Court's (Emergency Powers) Act 1939 it is enacted that

"subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate Court, — (a)

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to proceed to exercise any remedy which is available to him by way of — (1) the levying of distress; (11) the taking possession of any property or the appointment of a receiver of any property; (111) re-entry upon any land; (iv) the realisation of any security or the forfeiture of any deposit ..... provided that this subsection shall not apply to any remedy or proceeding available in consequence of any default in the payment of a debt, or the performance of an obligation being a debt or obligation arising by virtue of a contract made after the commencement of this Act."

Section 7 of the Rent Restriction Ordinance, No. 23 of 1941 prescribes the grounds on which the right to recover possession of the demised premises to which the Ordinance applies can be founded such recovery to be on an order or judgment of the appropriate Court.

The tenancy of the plaintiff falls within the provisions of Section 10 of the Ordinance and therefore governed by section 7 thereof.

The case of *BUTCHER v. POOLE CORPORATION* (1943) 1 K.B. 48 is very instructive in the sense that it interprets these Emergency Powers' enactments, and when leave is required before a landlord can take possession or re-enter upon any land. The plaintiff in that case brought an action in the County Court claiming damages for wrongful eviction, alleging that the defendants were exercising a remedy within the meaning of the subsection by way of taking possession of property or of re-entry on land, and could only lawfully do so with leave. The plaintiff was employed by the defendants and was required to live in a house provided by them rent free. His employment was terminated by notice on February 28, 1942, and the defendants demanded possession of the house. He did not give up possession, being unable to find other accommodation, and on March 13, without any application to the Court under the Courts (Emergency Powers) Act, 1939, section 1 sub-section 2 (a) the defendants evicted him. The Court of Appeal held that section 1 sub-section 2 (a) of the Courts (Emergency Powers) Act, 1939, applied only to remedies for default whereby the person against whom the remedy was exercised was deprived of some right of which he could not have been deprived but for the default, and had no application to the case of an absolute owner of land taking possession of it against a wrongdoer, so that the defendants were entitled to evict the plaintiff without leave even if it were assumed in his favour that he had occupied the house in his own right as tenant and not in right of the defendants as their servant.

There reference was made by the learned Master of the Rolls to the title of the Act which reads "An Act to confer on Courts certain powers in "relation to remedies in respect of the non-payment of money and the non-performance of obligations," and although it is well settled that the title of an Act of Parliament is not to be taken as limiting the provisions of the enactment, Lord Greene construed the language contained in the body of the Act and came to the conclusion that what the defendants did was outside the Act altogether.

It was argued in that case by counsel for the plaintiff who succeeded before the Judge of the County Court but whose judgment was reversed by the Court of Appeal that the defendants exercised a remedy, which was available to them, by way of the taking of possession of the property and also by way of re-entry on the land.

In the abstract, no doubt, said the Master of the Rolls, (at page 53),

"a person who takes what is his own is exercising a remedy, and it may be that he exercises that remedy against the will and in spite of the opposition of somebody else. The question, however, which we have to decide is, not whether it is correct in an abstract sense to describe the action of an owner of land who takes possession of his land as the exercise of a remedy by way of taking possession of land or re-entry, but whether in the context of this Act of Parliament it is a remedy of the kind referred to in section 1 sub-section 2 (a). It is useful to observe that a remedy by way of taking possession of land or re-entry on land, using the word 'Remedy' in the broadest sense, may be of two kinds. It may be a remedy the exercise of which determines or defeats some right or title in the person against whom it is exercised, or it may be a remedy the exercise of which is merely an exercise of the existing right of property of the person exercising it and does not in any way defeat or determine any estate, interest, or title of the person against whom it is exercised."

There can be no doubt in my mind, or for that matter of fact in the mind of the defendant Allen that when he purported to re-enter the parlour premises occupied by the plaintiff he was exercising a remedy in order to determine or defeat the right of tenancy in the plaintiff, and such re-entry required the leave of the Court.

The suit for possession which was filed on the 5th day of September, 1945, was based on the ground contained in the notice to quit dated the 29th day of May, 1945 that the defendant required the premises for his own use. This is one of the grounds contained in section 7 (1) of the Ordinance, and by (f) thereof the Court has first to consider if it is reasonable to make the Order or give the judgment.

It is not disputed that the provisions of Section 3 of the Ordinance apply to the present tenancy "provided that the application of this Ordinance to any house or part of a house shall not be excluded by reason only that part of the premises is used for business, trade or professional purposes."

In any case Regulations No. 16 of 1944 bring such premises under the Rent Restriction Ordinance of 1941. It may be thought that I have dealt too minutely with the legal aspect in this action as being unnecessary for this decision, but I have done so because, whilst it is true that tenants sometimes adopt an unreasonable attitude towards their landlords, the procedure laid down by law must be pursued however provocative and unjustifiable the conduct of their tenants may be.

In every contract of letting in whatever form it is expressed there is implied a covenant for quiet enjoyment. Like an express covenant, the implied covenant protects the lessee against all dis-

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turbance by the lessor, whether lawful or not, save under a right of re-entry.

The facts of this case are clear and admit of no doubt. I find that the defendant soon after he became the owner of the property in question attempted to obtain possession from both the plaintiff and her husband. The proceeding which he filed in the first instance referred to above against the plaintiff was struck out as not being maintainable. It was called and postponed on sixteen (16) occasions. He filed a fresh suit after a second notice determining the tenancy which after the acts of trespass and disturbance of plaintiff's occupation was struck out.

The defendant purchased the property of which the parlour was a part of it for the sum of \$7,140: subject to a first mortgage of \$4,500: in favour of the British Guiana and Trinidad Mutual Fire Insurance Company Ltd. He is a tailor by occupation and purchased it for the purpose of carrying on a tailor's shop on part of the lower storey and to use the upper storey as a place of residence. Becoming exasperated at the long delay in getting possession of his property and experiencing some trouble with his tenants he decided on the 27th day of September 1945, to take the law in his own hands, entered the premises with 5 or 6 carpenters and removed the back gallery leading to the upper storey tenanted by Joseph Bovell at \$12: per month. Although spoken to by Bovell late that afternoon as to his unauthorised act the defendant persisted in his actions and exclaimed that the place was his and he could do what he liked with it, and that no law could stop him.

On the following day the defendant re-entered the premises with his carpenters and disconnected the bathroom and kitchen from the building this after a second protest by Bovell to whom in answer the defendant said, he was not afraid of the law. The furniture, pictures and wares of the Bovells were then gathered and placed by the defendant's workmen in the centre of the room and covered with some carpets. On the 29th September the back and front stairways were taken down leaving no means of approach to the upper storey of the building. He (defendant) then started to tie the building from within preparatory to elevating the same at a later stage. It was on Monday the 1st day of October that the plaintiff's occupation of the parlour over a quarter of a century was disturbed when the defendant with ten (10) "lifters" and carpenters began the preliminary work of placing blocks and screws for lifting the building. Plaintiff's kitchen and steps used in connection with the parlour were removed. All the tenants then protested, but without avail. The carpenters and lifters ate some of the cakes and other goods in the parlour, took down the counter and threw the same into the yard, damaged three show cases and caused several glass jars and many dozens of empty aerated drink bottles to be lost and for several days after despite repeated protests from the plaintiff and her husband the defendant continued to carry out the purpose he had in mind to obtain from them possession of their respective tenancies. On or about the 13th day of October the building was raised to the extent of 13 feet. The windows, doors, sides and

inner walls of the parlour were all removed leaving a skeleton appearance of the parlour as the pictures put in by consent show.

On the 19th day of October when the defendant with a number of carpenters entered the premises and attempted to take off the roof, Bovell prevented them. During these nineteen days the plaintiff, I find, was unable to carry on her business and lost all her goods which were in the parlour save a few things.

I do not accept the story of the defendant that the plaintiff voluntarily decided to give up possession of the parlour at the end of September 1945, when at the same time she was strenuously resisting the suit for possession then pending before the Court. It is unbelievable that the plaintiff would, after building up a lucrative business in that area and a goodwill which must be of some value, willingly capitulate to the request of the defendant to give up vacant possession when the legal battle had just been renewed.

In face of the overwhelming evidence led on behalf of the plaintiff in support of her story, by her husband, Joseph Booker, Doris Paternella and Percy Willis the defendant would attempt to persuade me in confident tones that all was well in the state of Denmark. Everything he said went on smoothly. There was no protest, no quarrel and no ill-feeling, not realising the inconsistency of his story with his plea in paragraph 4 of the defence in which he complained that the plaintiff hindered the progress of the work for which he asks the Court for an injunction and damages to the extent of \$2,000: for trespass. Section 10 (1) of the Rent Restriction Ordinance is in identical terms with section 15 (1) of the Increase of Rent and Mortgage Interest Restrictions Act 1920 which reads

"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act...."

A statutory tenancy is created, and the terms of that statutory tenancy are to be the same as those which have prevailed during the contractual tenancy.

The above Acts were passed for the protection of tenants whose notice to quit has expired, and cannot be turned out of possession except by an order of the Court. A landlord has to go to Court and obtain an order for possession which is a matter of discretion as to whether the Court considers it reasonable to do so.

In *LAVENDER v. BETTS* (1942) 2 A.E.R. p. 72 the landlord wishing to obtain possession of a flat which he had let to the plaintiff on a weekly tenancy, removed the doors and windows rendering the flat habitable only at the great discomfort of the tenant. The tenancy had been duly determined by notice to quit. The tenancy was a statutory one. The defendant had made no application to any Court. There it was held that the acts of the landlord were a breach of the covenant for quiet enjoyment which was an implied term of the statutory tenancy and that the tenant was entitled to damages.

## R. A. BOVELL v. C. W. E. ALLEN

The plaintiff has given evidence of the stock-in-trade she had at the time of the dispossession and the net profits she made per week. I find from the evidence as near as I can that she had \$50: in stock and that her weekly sales amounted to \$75: which yielded her a net profit of \$15: per week. The three glass cases, jars and press, and bottles which were either destroyed or lost I estimate at \$50.

The plaintiff's rights have been transgressed. She has lost the goodwill which she had acquired, and her business occupied a good site for the kind of goods and drinks she sold.

I find that the defendant has violated the terms of the tenancy with the plaintiff and has committed a breach of the covenant for quiet enjoyment.

The plaintiff says this was a trespass upon her tenancy and wrongful interference with her rights thereunder, and in my view, she has proved her case.

I award her damages in the sum of \$500: for which I give judgment. Against that amount must be set off the rent due to the end of March, 1946. There will be no order for possession, but without prejudice to the right of the defendant to apply to the Magistrate's Court for possession. The plaintiff is entitled to her costs, certified fit for Counsel. The counterclaim of the defendant is dismissed with costs.

*Judgment for plaintiff; counterclaim dismissed.*

Solicitor for plaintiff: *H. A. Bruton.*

MILTON HANIFF, Appellant (Defendant),

v.

MARCUS PETERS, Respondent (Plaintiff).

1946. No. 79.

DEMERARA.

BEFORE FULL COURT: LUCKHOO, C.J. (Acting), BOLAND,

J. and DUKE, J. (Acting):

1946. MARCH 22; APRIL 26.

*Appeal—From magistrate's court—Notice of appeal—Lodged with clerk—Signed by appellant his counsel or solicitor—Copy served on respondent—Signature of appellant, his counsel or solicitor omitted therefrom—Copy as required by law not served—No jurisdiction in Court to hear appeal—Summary Jurisdiction (Appeals) Ordinance, cap. 16, sections 4 (1) (b), 8 (2), 8 (3), 11.*

*Appeals—From magistrate's court—Notice of appeal—Error or defect in—Of such a nature that Court would have no jurisdiction to hear appeal—No power in Court to amend—Summary Jurisdiction (Appeals) Ordinance, cap. 16, section 26.*

## MILTON HANIFF v. MARCUS PETERS

Where a copy of the written notice of appeal under section 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, omitted the signature of the appellant, his counsel, or solicitor, the direction in the sub-section that a copy must be served is not complied with, even though the original lodged with the clerk is signed.

*Henry v. Foo* (1931-1937) L.R.B.G. 443, applied.

The Full Court has no jurisdiction to hear an appeal where a copy of the written notice of appeal under section 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance, cap. 16, omitted the signature of the appellant his counsel or solicitor.

*Henry v. Foo* (1931-1937) L.R.B.G. 443, and *Dhajoo v. Thom* (1939) L.R.B.G. 265, applied.

An error or defect in a notice of appeal which is of such a nature that the Full Court would have no jurisdiction to hear the appeal cannot be amended by the Court under section 26 of the Summary Jurisdiction (Appeals) Ordinance, cap. 16.

APPEAL by the defendant Milton Haniff from a decision of a Magistrate of the Georgetown Judicial District in favour of the plaintiff Marcus Peters. On the hearing of the appeal, the respondent took the preliminary objection that the document purporting to be a copy of the notice of appeal which was served on the respondent, was a nullity and that the appeal should be dismissed.

*E. D. Clarke*, solicitor, for the respondent.

*C. Lloyd Luckhoo*, for the appellant.

*Cur. adv. vult.*

The judgment of the Court was delivered by DUKE, J. (Acting), as follows: —

Upon this appeal coming on for hearing Mr. E. D. Clarke, Solicitor for the respondent, drew the Court's attention to an affidavit which was filed on behalf of the respondent. The affidavit discloses that there was served on the respondent a document by way of a copy of a notice of appeal. This document was not signed by the appellant or by his counsel or solicitor, and it failed to show that the notice of appeal itself was so signed. The respondent's solicitor submitted that the document served upon the respondent was a nullity, and that the appeal should be dismissed.

The record shows that the written notice of appeal which an appellant is required, under section 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, to lodge with the clerk was duly signed in accordance with the provisions of section 11, which provides that the notice of appeal shall be signed by the appellant or by his counsel or solicitor.

Section 4 (1) (b) provides that, where verbal notice of appeal is not given under section 4 (1) (a), the appellant shall, within fourteen days after the pronouncing of the decision, lodge with the clerk a written notice of appeal and serve a copy thereof upon the opposite party. Section 8 (3) provides that the appellant shall, within fourteen days after receipt of the notice referred to in section 8 (2), draw up a notice of the grounds of appeal, and lodge it with the clerk and serve a copy thereof on the opposite

## MILTON HANIFF v. MARCUS PETERS

party. In *HENRY v. FOO* (1931-1937) L.R. B.G. 443 this Court (Crean, C.J. and Verity, J.) held that where a copy of the notice of the grounds of appeal omitted the signature of the appellant, his counsel or solicitor, the direction in section 8 (3) that a copy must be served had not been complied with although the original lodged with the clerk was signed. In *COURTAULD v. LEGH* (1869) L.R. 4 Exch. 126, 130, Cleasby, B, said "that it is a sound rule of construction to give the same meaning to the "same words occurring in different parts of an Act of Parliament or other "document." We therefore hold that, where a copy of the written notice of appeal omitted the signature of the appellant his counsel or solicitor, the direction in section 4 (1) (b) that a copy must be served is not complied with, even though the original lodged with the clerk is signed. Accordingly in our view the provisions of section 4 of the Summary Jurisdiction (Appeals) Ordinance were therefore not complied with, or observed by. the appellant.

In this case the written notice of appeal lodged with the clerk was signed by the appellant's counsel; and counsel for the appellant has submitted that the omission of the signature of the appellant's solicitor in the copy served upon the opposite party was a mere error or defect and that, under section 26 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, no appeal shall be dismissed on account of any error or defect in a notice of appeal which is in writing. Section 26 is as follows:

No objection shall be taken or allowed, on an appeal to any notice of appeal which is in writing for any alleged error or defect therein; but if the error or defect appears to the Court to be such that the respondent on the appeal has been thereby deceived or misled, the Court may amend it, and, if it is expedient to do so, may also adjourn the further hearing of the appeal, the amendment and the adjournment (if any) being made on any terms the Court deems just.

Counsel for the appellant has urged that section 26 applies to all errors and defects in a written notice of appeal, and thus seeks to distinguish this case from *HENRY v. FOO* which is with respect to a copy of a notice of grounds of appeal to which section 26 does not relate. If this contention is correct then an appeal could not be dismissed on the ground that the written notice of appeal which is lodged with the clerk is not signed. In *DHAJOO v. THOM* (1939) L.R. B.G. 265 it was stated by the West Indian Court of Appeal that it is the first duty of every Court, whether of first instance or on appeal, before adjudicating upon any given cause or matter, to satisfy itself on its jurisdiction. It therefore follows that whatever may properly be included in the expression "error or defect" in section 26 — and those words appear also in the three preceding sections — it does not, and cannot include an error or defect which is of such a nature that the Full Court would have no jurisdiction to hear the appeal. It is only when it has jurisdiction to do so that it could amend an error or defect.

Section 21 provides that where any respondent is in default of appearance at the time fixed for the hearing of an appeal, the Court shall not proceed to hear the appeal as against him unless and until it is satisfied by affidavit or otherwise that the provisions

## MILTON HANIFF v. MARCUS PETERS

of section 4, 5 and 8 of the Ordinance have been observed. Where a respondent appears and takes no objection, the Court may, unless it sees some reason to the contrary, properly assume that the provisions of sections 4, 5 and 8 of the Ordinance have been observed by the appellant. Where however, the respondent appears and takes the objection that the provisions of those sections or of any of them have not been observed by the appellant, the Court will make inquiry into the subject matter of the objection, and determine whether or not the objection is well-founded. In HENRY v. FOO, supra, the objection that the appellant did not, within the time limited by section 8 (3), serve on the opposite party a copy of the notice of the grounds of appeal showing the essential feature of a signature by the appellant his counsel or his solicitor, was treated by this Court as an objection going to the jurisdiction of the Court to hear the appeal. Similarly, the objection of the respondent that the appellant in this case did not, within the time limited by section 4 (1) (b), serve on the opposite party a copy of the written notice of appeal showing the essential feature of a signature by the appellant his counsel or solicitor, must be treated as an objection going to the jurisdiction of the Court to hear the appeal. The respondent has proved the facts on which his objection is founded, and it therefore follows that this Court has no jurisdiction to hear the appeal.

The preliminary objection is therefore upheld and the appeal is dismissed with costs.

*Appeal dismissed.*

ANTONIO CALISTO GONSALVES dosSANTOS,  
Appellant (Defendant),  
v.  
AGNES COLLINS,  
Respondent (Complainant).

1945. No. 512.—DEMERARA.

BEFORE FULL COURT: LUCKHOO, C.J. (ACTING), BOLAND, J.

AND DUKE, J. (ACTING):

1946. MARCH 22; APRIL 26.

*Landlord and tenant—Terms of tenancy—Oral agreement—Incidents of tenancy—Surrounding circumstances.*

S. was the appellant's tenant in respect of the upper flat of certain premises. S. sub-let to the respondent two rooms in the front portion of the upper flat at the rate of \$6.50 per month with an arrangement that the respondent should have the right to share in the use of the kitchen and bath as well as the backstairs leading down into the backyard. Access from respondent's front portion to the kitchen or bath could be gained only by going through a passage which was really one of the rooms in the back portion, unless respondent went down the front staircase and then round the house into the backyard and up the backstairs. Respondent's arrangement with S. included a right of way through this passage or room in the back portion for the purpose of going to and from the kitchen, bath or backstairs. The receipts for rent

## A. C. G. dos SANTOS v. AGNES COLLINS

did not expressly allude to the rights appurtenant to the sub-tenancy in respect of the two front rooms, but the respondent, from the time she went into occupation in May, 1942, did in fact enjoy these privileges as of right during the whole of the period whilst S's tenancy from the appellant subsisted.

The appellant was aware that the respondent was in occupation as a sub-tenant of S. In January 1943 the appellant complained to the respondent that he was not receiving his rent from S., and by his instructions the respondent paid her \$6.50 monthly rent not to S. but direct to the appellant, respondent's first payment to appellant being for the month ending 7th December 1942. The receipts were however made out by appellant as being for moneys "paid by respondent for S".

In March 1944 S's tenancy with the appellant terminated following upon proceedings for possession brought by the appellant against her in the Rent Assessor's Court. After S. had quitted possession the respondent remained in occupation of her front portion with full enjoyment as heretofore of the use of the kitchen, bath and backstairs with access thereto by way of the passage or back room in the back portion of the upper flat.

After collecting from the respondent a certain sum due by her for arrears of rent (which had apparently not been paid because of the possession proceedings which had been pending) the appellant on the 17th April 1944 entered into an oral agreement with the respondent that the respondent should in future be his tenant of the front portion at the same rental of \$6.50 per month and to get receipts in her own name. On the same day, the appellant received payment in advance for rent for one month ending the 7th May 1944: he then demanded that rent in future should be payable in advance to which, however, the respondent would not consent. The receipt issued by the appellant to the respondent on the 17th April 1944 was a receipt for rent for two rooms and nothing more.

*Held* that, in the absence of evidence that at the time of the agreement of the 17th April 1944, the appellant had by an express and unequivocal term curtailed the full enjoyment of the privileges of respondent's tenancy, it was a term of the tenancy between the appellant and the defendant that for the same rental of \$6.50 per month the respondent was to continue to enjoy all the incidents of her tenancy as before.

APPEAL by the defendant Antonio Calisto Gonsalves dos Santos from the decision of a Magistrate of the Georgetown Judicial District awarding damages to the plaintiff Agnes Collins in an action for disturbance of the quiet enjoyment of certain premises let by the defendant to the plaintiff.

*W. J. Gilchrist*, for the appellant.

*John Carter*, for the respondent.

*Cur. adv. vult.*

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

The Respondent recovered judgment against the Appellant in the sum of \$50.00 and costs in an action tried by one of the learned magistrates of the Georgetown Judicial District.

In her plaint she alleged that she had suffered damages through the wrongful act of the Appellant, who on or about the 17th April 1944 by himself, his servants and/or agents barred the door leading to the kitchen bath and backstairs in the upper fiat of premises at No. 52 Howes and Adelaide Streets, part of

which Respondent was then occupying as a tenant of the Appellant with the right to use the said kitchen, bath and backstairs.

The evidence disclosed that Respondent some time in May 1942 went into occupation of two rooms in the front portion of this upper flat as a sub-tenant of one Mrs. Skelekie, who rented the whole upper flat from Appellant, the back portion being divided between Mrs. Skelekie herself and another sub-tenant named Mr. Telesford. The rent payable by Mrs. Skelekie to the Appellant for the entire flat was \$11.00 per month, but she sublet to the Respondent at \$6.50 per month with an arrangement that the latter should have the right to share in the use of the kitchen and bath as well as the back stairs leading down into the backyard. Access from Respondent's front portion to the kitchen or bath could be gained only by going through a passage which was really one of the rooms in the back portion unless Respondent went down the front staircase, and then round the house into the back yard and up the back stairs. Respondent's arrangement with Mrs. Skelekie included, she stated in her evidence, a right of way through this passage or room in the back portion for the purpose of going to and from the kitchen, bath or backstairs. It would appear that although her receipts for rent did not expressly allude to these rights appurtenant to her sub-tenancy, Respondent did in fact enjoy these privileges as of right during the whole of the period whilst Mrs. Skelekie's tenancy from Appellant subsisted. Also, the occupiers of the back portion of the flat, it would seem, were allowed to pass through Respondent's front portion, whenever it was desired to go to or from the street by way of the front staircase. But as there was another easy means of getting out of the back portion by way of the back staircase this latter privilege, would seem, as Respondent stated in her evidence, to have been more in the nature of a licence granted gratuitously by Respondent. It certainly would not be an easement in law such as from the very beginning of the sub-tenancy Respondent would naturally insist upon as a condition, so as to enjoy without discomfort the very necessary household conveniences of a kitchen and bath.

Appellant was aware of Respondent being in occupation as a sub-tenant of Mrs. Skelekie, for in January 1943, Appellant complained to Respondent that he was not receiving his rent from Mrs. Skelekie, and by his instructions Respondent paid her \$6.50 monthly rent not to Mrs. Skelekie but direct to Appellant, Respondent's first payment to Appellant being for the month ending 7th December 1952. The receipts were however made out by Appellant as being for moneys "paid by Respondent for E. Skelekie".

In March 1944, Mrs. Skelekie's tenancy with the Appellant terminated following upon proceedings for possession brought by Appellant against her in the Court of the Rent Assessor, and Mrs. Skelekie went out of possession leaving Respondent still in occupation of the front portion. Mr. Telesford also vacated the part sublet to him.

## A.C. G. dos SANTOS v. AGNES COLLINS

It would appear that Appellant at the same time had sought to get an order of ejectment against the Respondent but no such order was made by the Court, whether because of the withdrawal of the application or its dismissal by the Rent Assessor does not clearly appear from the Magistrate's notes of evidence taken in the action under appeal. However, be that as it may, after Mrs. Skelekie had quitted Respondent did remain in occupation of her front portion with full enjoyment as heretofore of the use of the kitchen, bath and backstairs with access thereto by way of the passage or back room in the back portion.

In view of an agreement entered into between Appellant and Respondent after the quitting by Mrs. Skelekie, whereby it was agreed that Respondent should continue to be in occupation of the front portion at the same rental, it becomes unnecessary to consider whether Respondent, on the determination of Mrs. Skelekie's head tenancy acquired the right to be the tenant of Appellant by virtue of the provisions of section 10 (3) of the Rent Restriction Ordinance 1941, (No. 23 of 1941) which accords to a sub-tenant, where premises have been lawfully sublet, the right to retain possession of his sub-tenancy as the tenant of the head landlord. Consequently the Court is not required in this case to decide the interesting question raised by Counsel for Appellant, namely, in what circumstances is the letting of a part of a house for dwelling purposes, with the right of the tenant to share with others living therein the use of certain parts of the same house, to be deemed not a letting of a separate dwelling and thus to be excluded from the control afforded by the Rent Restriction Ordinance? Even assuming as was contended by Counsel for Appellant that the inclusion in this sub-tenancy of a right to share in common a kitchen and bath would be a feature rendering the renting not to be that of a separate dwelling within the meaning of the Rent Restriction Ordinance and thus depriving the sub-tenancy of the privileges accorded subtenancies under that Ordinance, Respondent did in fact according to the evidence become the tenant of the Appellant by virtue of an agreement between Respondent and Appellant on the quitting of Mrs. Skelekie. It was round about the 17th April that this agreement was made. It was an oral agreement. After collecting from Respondent a certain sum due by her for arrears of rent — which had apparently not been paid because of the possession proceedings which had been pending — Appellant agreed with Respondent that she should in future be his tenant of the front portion at the same rental of \$6.50 per month and to get receipts in her own name. On the same day he received payment in advance for rent for one month ending the 7th. May 1944 — he apparently then demanded that rent in future should be payable in advance to which however the Respondent would not consent.

The Appellant's contention is that whatever may have been the terms of the sub-tenancy, Respondent's tenancy, under this new agreement was limited to the occupation of the front portion, and in support of this contention Counsel for Appellant points to

the receipt accepted by Respondent as referring to one month's rent for two rooms without anything more.

In the Court's view the omission from the receipt of any reference to the use of the kitchen and bath is no more conclusive than the absence of any reference to the right to the use of the front staircase would conclusively establish that the use of the front staircase was excluded from the tenancy. Moreover in no receipt for rent during the sub-tenancy of Mrs. Skelekie was there any reference to the right to use the kitchen and bath, and yet it is clear that Respondent did enjoy those privileges as of right, this being a condition of her tenancy as the learned Magistrate found as stated in his Reasons for Decision. Besides as the rent that the Respondent had to pay to Appellant under the new agreement was the same sum of \$6.50 per month, it is reasonable to infer that it was understood by both parties that for this same rental Respondent was to continue to enjoy all the incidents of her tenancy as before. If Appellant seeks to establish otherwise, he would have to show that he had at the time of the agreement, by an express and unequivocal term, curtailed the full enjoyments of the tenancy — and there is no evidence that any reference was made to any such curtailment of privileges. It was urged on behalf of the Appellant that Appellant could never have agreed that Respondent should have access to the kitchen and bath through the back portion as that would hamper the Appellant in getting a tenant for the back portion, who would be unlikely to rent the place under such conditions. But it must be remembered that Appellant did not obtain an order for possession against Respondent, and he no doubt considered that the best course was to let Respondent remain there as before, hoping that a new tenant of the back portion would agree to take the place subject to the rights of the tenant in the front.

When however Appellant got a prospective tenant by name Persaud willing to pay him \$10.00 for the back portion but objecting to any association with a person of Respondent's colour, Appellant then declared to Respondent that he intended to shut her out from the use of the kitchen upstairs and suggested accommodating her with a kitchen downstairs. Respondent at once protested. She may have, as Appellant stated in his evidence, declared on her part not to allow the tenant at the back to make use of the front staircase, but this as stated above never was an easement in law held by the occupier of the back over the front portion but a mere gratuitous licence which Respondent was entitled to revoke at any time.

In his evidence reference was made by the Appellant to certain proceedings in the Rent Assessor's Court taken by Respondent to get the Assessor to fix the rent of her front portion after Mrs. Skelekie had left. The Rent Assessor fixed the rent at \$6.79 per month based upon factors upon which the law empowers an increase of rent. The notes of evidence taken in the Rent Assessor's Court were not tendered in evidence at the trial of this action,

## A.C. G. dos SANTOS v. AGNES COLLINS

but there is nothing to support the statement of Appellant that Respondent had accepted this increased rental fixed by the Rent Assessor on the basis that she would have no right to the kitchen and bath. On the contrary the inference to be drawn is that the Rent Assessor granted the increase on the assumption that Respondent's rights as tenant would be the same as before.

Appellant in his evidence before the Magistrate did not deny putting up a barrier shutting out Respondent from access to the kitchen, and, as the Magistrate found, when Respondent went in search of a policeman, Appellant removed Respondent's kitchen utensils from the kitchen and placed them in the drawing room; and this obstruction continued for some period right up to the time of bringing the action. The conduct of Appellant was no doubt induced by the consideration that if he got a tenant like Persaud to pay him \$10.00 for the back portion, the aggregate rent he would be receiving for the entire upper floor would be \$16.79 instead of \$11: as formerly.

In doing what he did Appellant acted in violation of the rights to which Respondent was entitled under the sub-tenancy and which were accepted, by Appellant if not expressly, certainly by implication, in the new agreement. In the circumstances the learned Magistrate very correctly awarded damages to Respondent assessed by him at the sum of \$50.00.

The appeal will be dismissed with costs.

*Appeal dismissed.*

Solicitor for appellant : *J. Gonsalves*, O.B.E.

FELICIANO VIEIRA,  
Appellant (Defendant),  
v.  
STANLEY CHIN, P.C. No. 4346,  
Respondent (Complainant).

1946. No. 75.—DEMERARA.

BEFORE FULL COURT: LUCKHOO, C.J. (ACTING), BOLAND, J.

AND DUKE, J. (ACTING).

1946. MARCH 29; APRIL 26.

*Sale of goods—Unascertained goods—Contract to sell—Promise to sell—Not a complete sale—Unless delivery or appropriation of specific goods to contract—With assent express or implied of both seller and purchaser.*

*Defence Regulations—Price-controlled article—Flour sold by the half-bag—Does not cease to be price-controlled—Where actual weight of half-bag exceeds or is less than 98 pounds.*

A contract to sell unascertained goods is not a complete sale, but a promise to sell. There must be added to it some act which completes the sale, such as delivery or the appropriation of specific goods to the contract by the assent, express or implied, of both buyer and seller.

## FELICIANO VIEIRA v. STANLEY CHIN

*Badische Anilin and Soda Fabrik v. Hickson* (1906) A.C. 419, 421, applied.

Flour sold by the bag is a price-controlled article under Item 14 in List A in the First Schedule to the Control of Prices (No. 2) Order, 1944, even though the bag contains more or less than 98 pounds of flour.

*Robeiro v. Hughes* (1943) L.R.B.G. 217, distinguished.

APPEAL by the defendant Feliciano Vieira from the decision of a Magistrate of the Georgetown Judicial District convicting him of selling a price-controlled article at a price exceeding that permitted by the Control of Prices (No. 2) Order, 1944.

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

*A. V. Crane*, acting Solicitor-General, for the respondent.

*Cur. adv. vult.*

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

In a critical and somewhat metaphysical examination of the evidence Counsel for the appellant sought to convince us that the decision of the learned Magistrate was wrong and that the conviction recorded by him against the appellant should be quashed because it was not proved that price-controlled articles were sold, nor two bags of extra flour of the weight of 196 pounds were sold for \$8 :—, nor was there proof of the sale as alleged in the charge.

The charge was laid under the provisions of Order No. 845 made on the 22nd day of June, 1944, under Regulation 44 of the Defence Regulations, 1939, for selling by wholesale to Eustace Williams a baker 2 bags of extra flour. 196 pounds in weight for \$8:—, or at the rate of \$4:— per bag of 98 pounds, such price being in excess of the maximum wholesale price of this article in List "A" of the First Schedule to the said Order.

On reference to the schedule we find that item 14 fixes the maximum wholesale price at \$2.60 per bag of 98 pounds for both extra and super flour.

It is not contended by the appellant that if the evidence established that the article was extra flour, in bags of 98 pounds he could not be convicted of the offence, but his learned Counsel submitted that at most there was only proof of one bag commonly called a half-bag which contained extra flour, and the learned Magistrate could not infer from the evidence of Eustace Williams and the respondent that any one of the remaining half-bags in the appellant's shop if allocated to the contract of sale contained extra flour, or of a weight which when added to that from which a quantity was removed by Williams aggregated 196 pounds.

He further contended that there was no proof that anyone of the half-bags in a pile or heap of 25 bags (meaning half-bags) passed under the alleged sale by the appellant to Williams.

This latter contention is in our opinion not sound in law, for Williams' evidence is to this effect:

"I use flour for making bread and cakes which I sell to the public. I use extra flour for bread and super flour for cakes. I bought flour twice before the 5th day of July, 1944 (the date of the charge). I bought 2 half-bags on each of the previous occasions — half bag is 98 pounds. I told him I wanted the flour for baking purposes. He said he would sell me provided I carried

## FELICIANO VIEIRA v. STANLEY CHIN

“them away by the quarter bag. He lent me a knife. There was a pile of flour “on the customer's side of the shop. I cut the mouth of the bag and I emptied “about half of the bag into the flour bag which I also put into the jute bag. I “tied that bag also the other portion which I left behind”.

To the respondent, Williams pointed out the remaining portion of flour as to which appellant's Counsel admitted that the learned Magistrate drew a reasonable conclusion that it was extra flour there being hardly any dispute that the portion Williams took was not extra flour.

These two portions and one half bag taken at random from the pile in appellant's shop were removed by the respondent and subsequently weighed by Martin Spencer a sworn weigher attached to the District Commissioner's Office in Georgetown.

The weights were as follows — that first taken away by Williams 55 lbs. 12 ozs., the portion remaining in the half bag 43 lbs. 4 ozs., a total weight of 99 lbs, and the half bag taken by respondent from the pile 98 lbs. 5 ozs., 8 drams — a total weight of 197 lbs. 5 ozs. and 8 drams.

Williams in the concluding part of his examination-in-chief with the exhibits above referred to before him stated: —

“From my experience as a baker I know one of the half bags contains 98 lbs. of flour and the weight of all these bags would be 198lbs. of *extra flour*. Had I got the flour I would have used it to bake bread to sell to the public.”

We are satisfied from the evidence that a strong prima facie case was made out by the prosecution not only as to the weight of each half bag (for it is only a half bag of 98 lbs. is controlled) but the amount stated in the charge. There was no evidence to the contrary that Williams purchased or the appellant sold any other flour than “extra” when he directed Williams to remove his purchase by a quarter of a bag at a time, half of which quantity was proved to be extra flour.

We were somewhat amazed when as a last expedient learned Counsel for the appellant submitted that as the two portions together and the half bag of flour produced in Court weighed 99 and 98 lbs. 5 ozs. and 8 drams respectively, (the contents of the former in two containers) the flour sold was therefore not a controlled article *strictissimi juris* as it must weigh exactly 98 lbs. each and quoted the case of *Robeiro v. Hughes* (1943) L.R. B.G., p. 217, where it was held that there was no proof that the tin of milk sold came from a case of 48 tins which was the only quantity in a receptacle controlled. That case can easily be distinguished from the instant one where the sale is not one of a few pounds from a bag containing 98 lbs. but the whole quantity.

Whilst we agree that in the *Robeiro* case strict proof was required in the particular circumstances yet *de minimis non curat lex* is applicable to learned Counsel's submission in this case, for if it were otherwise it would lie in the power of any dishonest trader to add to or subtract from any fixed quantity commodity in order to attempt to decontrol the same.

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The appellant's defence which the learned Magistrate did not accept was that he sold 41 lbs. of flour for \$1.23, not that he did not sell extra flour, and whilst it is true it was not necessary for him to negative that fact, yet he led no evidence which displaced the strong prima facie case for the prosecution.

Learned Counsel for him at one stage was somewhat unrelaxing in his effort to persuade us that there was no proof of the sale as alleged in the charge because no particular half bag was indicated by the appellant either from the pile of half bags in his shop or elsewhere and looked with some amount of dubiety for justification of the respondent's action in removing the half bag of flour from the pile, but it is clear to us that there was a sale and delivery *brevi manu* when Williams was given a knife to take delivery in quantities of a quarter bag at a time.

Whatever form the transaction took it is amply covered by authority: see *Peter Ho and J. P. Luck v. Octive* (1942) L.R. B.G., p. 384 and other authorities cited therein.

Lord Loreburn in *Badische Anilin und Soda Fabrik v. Hickson* (1906) A.C. 419 at p. 421, said "a contract to sell unascertained goods is not a complete sale, but a promise to sell. There must be added to it some act which completes the sale, such as delivery or the appropriation of specific goods to the contract by the assent, express or implied, of both buyer and seller."

There was in our opinion not only some act by the appellant which completed the sale of the two bags of extra flour but there was assent on the part of both appellant and respondent that the appropriation to the contract should be from the pile of half bags in the shop.

We have arrived therefore at the conclusion that the charge as laid was established by the evidence and the appellant properly convicted. The appeal must be dismissed with costs.

*Appeal dismissed.*

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THE BRITISH GUIANA PAWN BROKING AND TRADING  
CO., LTD.,

Appellant,

v.

THE COMMISSIONER,

Respondent.

1945. No. 504—DEMERARA.

BEFORE LUCKHOO, C.J. (ACTING):

1946. MARCH 25; APRIL 27.

*Excess profits tax—Computation of profits—Directors' remuneration—Meaning of—Excess Profits Tax Ordinance, 1941 (No. 1), First Schedule, paragraph 8.*

*Words—Directors' remuneration—Meaning of—Excess Profits Tax Ordinance, 1941 (No. 1). First Schedule, paragraph 8.*

The expression "directors' remuneration" in paragraph 8 (1) of the First Schedule to the Excess Profits Tax Ordinance, 1941 (No. 1) is not to be limited to what is regarded in commercial circles as remuneration voted from the funds of a company at a general meeting to be distributed among the directors. It includes any remuneration payable to the directors by way of salary, fees, bonus, or commission, or for services to the company as managing director.

APPEAL by the British Guiana Pawnbroking and Trading Company Limited from an assessment under the Excess Profits Tax Ordinance, 1941.

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

*A. V. Crane*, acting Solicitor-General, for respondent.

*Cur. adv. vult.*

LUCKHOO, C.J. (ACTING) :

The main ground raised in this appeal is the interpretation to be placed on the words "directors' remuneration" occurring in paragraph 8 of the First Schedule to the Excess Profits Tax Ordinance 1941. Sub-paragraph 1 of that paragraph reads as follows: —

"In the case of a trade or business carried on, in any accounting period "which constitutes or includes a chargeable accounting period, by a "company the directors whereof have, throughout that accounting "period, a controlling interest therein, —

"(a) in computing the profits for that accounting period and (b) if the "standard profits of the trade or business are computed by reference to "the profits of a standard period, also in computing, in relation to any "such chargeable accounting period, the profits for the standard period, "no deduction shall be made in respect of directors' remuneration".

This sub-paragraph is identical in language with paragraph 10 (1) of Part 1 of Schedule VII of the Finance (No. 2) Act, 1939, as amended by section 33 (5) of the Finance Act, 1940.

But for the exception in the nature of a proviso which follows in both of the abovementioned schedules to the sub-paragraph the term "directors' remuneration" would have been all embracing. That proviso reads

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"In this sub-paragraph the expression "directors' remuneration" does not include the *remuneration* of *any director* who is required to devote substantially the whole of his time to the *service* of the company in a managerial or technical capacity, and is not the beneficial owner of, or able either directly or through the medium of other companies or by any other indirect means, to control more than five per cent. of the ordinary share capital of the company."

The appellants are a private company incorporated under the Companies (Consolidation) Ordinance, Chapter 178 and carried on business prior to the year 1938. For Excess Profits Tax purposes they, acting under the provisions of section 5 (3) of the Excess Profits Tax Ordinance 1941. (hereinafter referred to as the Ordinance) selected the year 1938 as their standard period.

At all material times Andrew James was a director of the company and it is in respect of the respondent's disallowance of the remuneration paid to this director by the company as manager of their business in computing the profits of the chargeable accounting periods ending 31st day of December, 1939 to 1944 inclusive, that this appeal has been brought, the appellants contending that the Commissioner in making assessments Nos. 58 |40, 53|41, 41|42, 32|43 and 2|44 acted erroneously in refusing to make a deduction in each instance of the sum of \$4,800: salary which they purported to have paid to Andrew James as manager of the appellants' business during the said chargeable accounting periods, and which was not in the nature of directors' remuneration.

It will be necessary to set down how it came about that Andrew James was paid the sum of \$400:— per month by the company. On the 6th January, 1940, on a motion by Henry James *seconded* by *Andrew James* the wages of the staff were fixed. Andrew James' remuneration was increased to \$100:— per month.

On the 18th day of January 1941, at a meeting of the Directors at which the following directors were present, Hon. H. C. Humphrys, K.C, Henry James and Andrew James, Henry James moved a motion that Andrew James' salary be *increased* from \$100:— to \$400:— per month, and that the difference for the year 1940 be given to him. H. C Humphrys *seconded*.

Up to the 8th day of December, 1944 Andrew James continued to hold the office of a director of the company, and after Mr. Humphrys retired from the directorate on the 8th day of May, 1943, and did not offer himself for re-election, the two directors who managed the affairs of the company—the minimum who could do so—were Henry James and the said Andrew James.

It is admitted that the directors of the company throughout each of the chargeable accounting periods had a controlling interest and that Andrew James was during the said periods the beneficial owner of and was directly able to control more than five per cent. of the ordinary share capital of the company and therefore precluded the company from obtaining the benefit of a deduction of directors' remuneration given by the proviso to subparagraph 8 (1) of the First Schedule to the Ordinance.

Mr. Humphrys, however, contends that the whole of the sum of \$400:— per month was paid to the said Andrew James for his

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services as manager of the appellants' business, and no part or portion thereof was paid or agreed to be paid or was in fact paid in respect of any duties performed by him as a director of the company, and that the only remuneration paid to said Andrew James as a director was the sum of \$180:— per annum voted by the company in general meeting in each of the said chargeable accounting periods, his duties as a director being merely of a formal character.

In support of that contention he urged that a distinction is to be drawn between a case where a director was paid a salary as manager of a business and where he was appointed managing director and remunerated. In the former he performs services *qua* manager for the company and in the latter his post is still that of a director.

It is not disputed by counsel for the respondent that the articles of the company provide for the employment of a director as a manager of the company, and no doubt for that reason the Commissioner did not and could not properly challenge the right of the company by resolution to pay to the director-manager a salary of \$400:— per month.

In elaboration of his argument learned Counsel for the appellants went into a minute analysis of the sub-paragraph and drew a distinction between a person who is a director and in his capacity as such director performs service in a managerial capacity and owns or controls more than 5% of the ordinary share capital when he would be caught within the ambit of the sub-paragraph, and a director who is appointed substantively as a manager and performs service in connection with such management which places him outside the compass of the enactment.

In order to give full appreciation to a difference, if any, between the two aspects of the argument reference to certain articles of company is necessary.

*Article 88* deals with the payment out of the funds of the company to directors by way of remuneration for their services. This sum is to be determined by a *general meeting* and divided among the directors in such proportions and manner as they may determine.

*Article 97.* If *any director* being willing shall be called upon to *perform extra services* or to make any special exertions in going or residing abroad or otherwise *for any purposes of the company*, the *company shall remunerate* the director so doing either *by a fixed sum* or by percentage of profits or otherwise, *as may be determined by the directors*, and such remuneration may be either *in addition to* or in substitution for any other remuneration payable to him.

It is clear on a careful examination of the language used in these two articles that their applicability is compatible with a reference to a person bearing the same status, that of a director. In the former instance the monies of the company to be utilised for the purpose therein stated are determined by a general meeting. In the latter, that same character (a director) willing to

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perform extra services, other than those usually performed by directors of a company, for any purposes of the company, e.g. managerial duties, shall be remunerated either by a fixed sum, in the instant case \$400:— per month to be determined by the directors — and this may be in addition to any other remuneration payable to him, to wit that voted to be divided between him and the other directors at a general meeting.

It was at a meeting of the directors held on the 18th day of January, 1941, that the salary of Andrew James was increased from \$100:— per month to \$400:— per month and that increase related back to the 1st day of January, 1940.

It was not, in my opinion, a motion by the company under *article 98* appointing him a manager or fixing his salary as such, and which reads

"subject to the restrictions herein contained, the Directors shall have power to do all acts and things which they may consider proper or advantageous for accomplishing the objects and carrying on the business of the company and to employ a secretary and all managers, clerks, servants, and agents for that purpose and at their will and discretion to dismiss such secretary, managers, clerks, servants or agents."

In my view the posts there referred to are of a subordinate nature. They are mere servants. They are to do what they are told to do. A director on the other hand is not a servant, but a manager. He is a person who is doing business for the company but not upon ordinary terms. Under *article 98*, the directors employ and dismiss at their will and discretion. This must refer to a person outside of the directorate.

The appointment of Andrew James to manage the affairs of the company could hardly be terminated under the provisions of this article. If it could not then his appointment as manager would have been motivated by reason of the provisions of either *article 97* already dilated upon or *article 101* where after the termination of the original management the directors may from time to time *appoint* (not employ as in the cases under *article 98*) one or more of their body or other persons to be a managing director of the company either for a fixed term or *without any limitation*. as to the period for which he is to hold such office and may, subject to any contract between him and the company from time to time *remove* (not dismiss) him from office and appoint another in his place.

A director performing services by reason of an appointment under either *articles 97* or *101* is in a responsible position. His duties on behalf of the company are of a very important character, and it was not unnatural for the seconder in supporting the increase of remuneration now quadrupled in amount to make these observations

"that while at first sight the increase might seem to be a large one, he felt that Andrew James held a responsible position as manager of the business and has shown himself very capable in the discharge of his duties."

At the same meeting the secretary who held a subordinate position in the company was given a fractional increase from

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\$58:— to \$60:— per month, and commencing as from that month when the meeting was held.

It is not unreasonable to conclude that the directors of the company were all cognisant of the articles of association of the company and their legal effect. More so, when it must have been patent that the directorate for some time was reduced to its minimum, Andrew James being one of them, and the exercise of the power of dismissal under article 98 would have been rendered ineffective.

Learned Counsel for the respondent in support of and in justification for the action of the Commissioner to disallow any deduction of the amounts paid as salary to Andrew James for the above-mentioned periods argued that under the general company law a director cannot be appointed to an office of profit except the memorandum and articles of association authorised such employment and that in the instant case the articles do provide for the appointment of a managing director in which case it is conceded by the appellants if Andrew James was so appointed that there is no escape from the operation of the sub-paragraph against them. It was urged on behalf of the respondent to this effect that a director having been appointed by the other directors to manage the business of the company does not divest himself for that purpose of his character as a director and assume a dual personality — but by reason of such appointment is a managing director and relies upon articles 101 to 104 in support of such submission. He also submitted that a director appointed manager is a managing director and that the words are identical and co-extensive in sense and usage and that the substance and not the form of the transaction must be looked at; in which case whatever amounts Andrew James was paid were director's remuneration within the meaning of the sub-paragraph. Alternatively that the appellants are a company where the directors have a controlling interest and that the scheme of the Excess Profits Tax Ordinance was to reach the profits in any chargeable accounting period in excess of the standard period (chosen by the appellants as the year 1939) and that they are likened unto partners who are not allowed to deduct anything as remuneration for themselves before the levy of the tax except in a case covered by the proviso to sub-paragraph 1. In any case. Andrew James being a director and having received remuneration from the company the appellants are caught within the network of the provisions of the law unless they could find their way through its meshes.

Section 12 (2) of the Ordinance makes provisions for an appeal from assessments by the Commissioner to a Judge in chambers, and is in the nature of a re-hearing both on the facts and on the law. The onus of proving that the assessment complained of is excessive shall be on the appellant

I have given careful consideration to the written evidence tendered in this case and to the legal implications which each counsel has asked me to make and I have come to the definite conclusion that the appellants have not brought the appointment

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of Andrew James within the provisions of Article 98 or under Article 122 (d) the onus being on them to establish that the remuneration paid to him was outside the pale of His office as director.

There can be no doubt that if he occupied the position as managing director of the company during the periods above-mentioned what he received must have been director's remuneration and therefore not deductible.

The question, however, remains to be considered as to how far the payment made to him for the extra services he performed as manager of the company other than the usual duties of director could be regarded as director's remuneration and therefore not deductible from the profits over and above the standard profits for the chargeable accounting periods.

Learned counsel for the appellants stated that there has not yet been any judicial interpretation of what the term "directors' remuneration" embraces and that in his opinion there is no decided case for guidance in this respect but only the ruling of Commissioners since the Finance (No. 2) Act of 1939 and the matter is therefore *res integra*.

The case of *INLAND REVENUE COMMISSIONERS* against *ASH BROTHERS AND HEATON LIMITED* (1943) 169 L.T. p.337 decided by *Macnaghten* J. of the King's Bench Division who has dealt with more Income Tax Appeals in England than any other single Judge within recent times and quoted by Mr. Crane has in my view only touched on the point in issue here but has not decided what is covered by that term.

Mr. Mustoe in his admirable book on Excess Profits Tax published in 1942 mentioned that the meaning of "directors' remuneration" was not clear.

"It may mean all remuneration which is received by a person who is a director, whether he receives it in that capacity or otherwise. On the other hand, it may mean only the remuneration which is paid to a director as such, and does not include anything which is paid to him for services in some other capacity."

Writing later in the *Taxation Magazine* of the 3rd February, 1945, Mr. Mustoe under the subject Excess Profits Tax Concessions stated,

"this phrase 'directors' remuneration' is interpreted by the Inland Revenue to mean remuneration of every kind which is received from the company by the individuals who are its directors, whatever the office or employment in respect of which any remuneration is paid to them. "The question", continued Mr. Mustoe "has not yet been before the Courts, and it is, therefore, still an open one."

In a Command Paper printed in October, 1944, and presented to Parliament by the then Chancellor of the Exchequer dealing with a list of Extra-Statutory Wartime Concessions given in the Administration of Inland Revenue Duties, it was there asserted that the expression "directors' remuneration" was interpreted to mean the whole of any remuneration payable to the directors by way of salary, fees, bonus or commission, including any remuneration for services to the company which are of a secretarial, managerial, advisory or technical nature. Then follow certain

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exceptions which are made but none germane to the matter under present consideration.

I am now called upon to determine judicially the meaning of those words as they appear in the sub-paragraph.

Whilst it is true that one has no right to construe legislative enactments by the practice which has taken place under them, it is equally true that one is entitled to construe those enactments, not only upon the actual words used, but with reference to that practice.

It is not inappropriate, however, to pay some respect to the interpretation placed on those words by the high authority which prepared that Command Paper to Parliament.

It is a golden rule, and a sound maxim of law that every word ought, prima facie, to be construed in its primary and natural sense, unless an extended or limited meaning is intended by the use of exceptions, provisos and the like, and the common acceptance of a word may be extended or limited to carry out the intention of the legislature.

The word "include" is very generally used in order to enlarge or extend the meaning of words occurring in the main part of the enactment, and when it is so used the words must be considered as comprehending, not only such things as they signify in their natural import, but those things which it is intended they should include. The legislature often does restrict or limit the meaning of words by the use of a proviso. When one finds a proviso to the section, the natural presumption is that but for the proviso the enacting part of the section would have included the subject matter of the proviso.

One may also have a case in which but for the proviso the enacting part would never have been considered so all embracing as to include what is saved by the proviso. The meaning of a word is relative to the circumstances and occasion and it falls for consideration whether or not the words "directors' remuneration" used in the sub-paragraph are to be limited only by what is regarded in commercial circles as remuneration voted from the funds of a company at a general meeting to be distributed among the directors.

I am satisfied that they were meant to convey more than that having regard to the circumstances and occasion which brought about their use. This conclusion is strengthened by the proviso to the sub-paragraph which excludes from their operation the case of a director who is not the beneficial owner of or able to control more than five per cent. of the ordinary share capital of the company, and is called upon or required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity. The word "director" as defined in the interpretation section of the Ordinance further lends support to that view. It would have been easier to construe had the sub-paragraph read

"no deductions shall be made in respect of any remuneration paid to directors however employed;"

and then for the proviso to follow.

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I find that Andrew James whilst occupying the office of a director of the company, and being the beneficial owner of more than five per cent. of the ordinary share capital of the company was paid during the chargeable accounting periods mentioned above the sum of \$4,800:— for every such period for performing services in a managerial capacity for the company and that the Commissioner was justified and correctly interpreted the provisions of the law as to meaning of the words "directors' remuneration" when he declined to make any deduction, in computing the respective amounts on which Excess Tax was to be based, of the salary paid to Andrew James.

It is not necessary for me to express any opinion in this instance whether or not the remuneration for services to a company by a director covering such a wide range of duties as expressed in the Command Paper would be "directors' remuneration": suffice it to say that in the present case any salary, fees, bonus or commission, could be trapped as coming within the boundaries of the law.

This appeal has been argued very fully and very ably. Many interesting points have been discussed, most of which, I consider are not all necessary for the determination of the matter in hand. It was strongly urged by Mr. Crane that when Andrew James became manager, his appointment was that of a managing director in conformity with the provisions contained in the articles of the company. Mr. Humphrys' counter argument was that the true position in law of Andrew James in the company was not that of a managing director when he was appointed manager, but a manager at a salary and had nothing to do with his office as director. In any event having entered upon his duties as manager he thereby vacated his seat on the directorate by reason of article 91. At first blush this contention seemed alluring, but on a careful perusal of the several relevant articles and the memorandum of association it is one of considerable demerit on the part of the appellants.

It is an inflexible rule of a Court of Equity that a person in a fiduciary position, and a director of a company is in that position towards its shareholders, is not, unless otherwise expressly provided, where he is by the articles of association capable of being appointed a managing director, *entitled* to make a profit; he is not allowed to accept a position where his interest and duty conflict.

If Andrew James was not so appointed, then whatever has been paid to him during all the years he functioned as a director would be re-payable by him to the company, in which case it will form part of the profits of the said company, and liable to the incidence of taxation under the Excess Profits Tax Ordinance.

It must be presumed, however, having regard to the course of conduct on part of the directors of the company, including Andrew James himself that his appointment was that of managing director—"Omnia Praesumuntur rite esse acta" will apply. Article 91 reads as follows:—

"The office of a director shall ipso facto, be vacated (a) if he accepts or holds any *other office* or place of *profit* under the company, except that of managing director."

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Mr. Humphrys defensively maintained that having vacated his office as a director, Andrew James was entitled to receive and retain for his services as manager, qua manager, whatever was paid him by way of salary and that the Commissioners were not justified in adding back to the profits of the company for the purpose of calculating the tax the amount so paid to him, and that the case was altogether outside that rule of equity and that the amounts paid by the company were not of a character for which they were liable to account.

In ordinary circumstances the point would not have been of much difficulty but the situation in this case has some unusual features. The remuneration has no relation to his services as a director qua director of the company for in the year 1940, to be precise on the 6th day of January, on a motion by Henry James, seconded by Andrew James, the wages of the staff were fixed, and among the members of the staff he Andrew James supported an increase of his own salary to \$100:— per month. On the 18th day of January, 1941, at a meeting of the directors of the company at which the Hon. H. C. Humphrys, K.C., Henry James and the said Andrew James were present, Henry James moved a motion that Andrew James' salary be *increased* from \$100:— per month to \$400:— and that the difference from the year 1940 be given him. This motion was seconded by Mr. H. C. Humphrys. In other words the increase related back to January 1940.

It would seem that a request was made some time in March 1941 by the Royal Bank of Canada, where the company had a current account for a list of the names of the directors and secretary of the company, for on the 29th day of March, 1941, in accordance with the request of the said Bank, the Chairman of the company (H. C. Humphrys) moved the following resolution.

Be it resolved.....That the Bank be furnished with a list of the names of *directors* and secretary of the company and other persons authorised to sign for it.....and the Bank be notified in writing of any change of such directors, secretary or persons.

This resolution was carried.

It must be taken for granted that the directors are cognisant of and familiar with the terms of every article of the company and of their effect and when they acted as above stated they did not act ultra vires of the article of association, and the question which arises is whether on the true construction of article 97 they were not empowered to vote the remuneration which they did to one of their directors. They are entitled by reason of article 101 to appoint from time to time one of their body to manage the business for such period and at such remuneration as they think fit, for the duties of a managing director are to attend to the commercial part of the business of the company. There is nothing that I can find in the articles of a prohibitory nature for any director to be required to devote substantially the whole of his time to the service of the company in a managerial capacity to be paid more than the other directors. It is within the powers

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of the company to discriminate between directors as was said by *Peterson J.* in the case of *FOSTER v. FOSTER* (1916) 1 Ch. 532 at p. 545.

"Then the plaintiff in his statement of claim makes the further allegation that it is not within the powers of the company to discriminate between directors. I am unable to follow that argument. The *provision* is that *the remuneration* of directors shall from time to time be fixed by the company. I do not find any provision express or implied, that the remuneration of the directors when fixed by the company must be the same for each director."

There the learned Judge was referring to an article similar in its provisions to Articles 101 and 103 of the appellants.

It may not be out of place to refer to the half-yearly general meeting of the shareholders of the company held on the 8th day of May, 1943, at which Andrew James moved a motion that a dividend of 6% less Income Tax be paid to the shareholders for the half year ending December, 1942, at which meeting Mr. Humphrys retired from the directorate and stated he was unable to offer himself for re-election. Thereafter until the 8th day of December the only directors of the company were Henry James and the said Andrew James — a bare minimum.

Apart from any prohibition in the memorandum of association of which I can find no trace, it must be competent for the company to make a bargain with one of its directors, to pay to him for any extra services he may render. He is not to be regarded in my opinion as a servant so as to render vacant his office as a director under article 91 of the articles of association in the present case, and the remaining directors at the time of the motion increasing his remuneration so held.

When, however, on the 8th day of December, 1944 the company decided that Andrew James should be appointed secretary of the company in the place of H. de Silva whose services were terminated, a third director was elected whereupon Andrew James then resigned his office as a director. At the said meeting the said Andrew James was appointed secretary of the company and he was instructed by the directors to inform their Bankers and the Post Office Savings Bank of British Guiana of the change in the Directorate and the appointment of a new secretary thereby conforming with the provisions contained in their articles and conduct of business of the company.

Throughout the periods under review Andrew James took an active part in the administration of the affairs of the company and exercised the authorities, powers and discretions under the articles vested in and exercisable by directors generally, and if for any cause he became disqualified all his acts are saved by reason of Article 116.

"all acts done by any meeting of the directors or by a committee of directors, or by any person acting as Chairman or as Director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified be as valid as if such person had been duly appointed and was qualified to be a director."

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COMMISSIONER

This article is in the same language to *article* 108 in the case of *BRITISH ASBESTOS CO. LTD. v. BOYD* (1903) 2 Ch. 439 where *Farwell* J. said

"I have to determine in this case the meaning of article 108 and section 67 of the Companies' Act 1862.....In my opinion, the words 'notwithstanding that it shall afterwards be discovered that *there is some defect*' and so on, do not mean, as Mr. Upjohn has contended that the facts are afterwards discovered, but that the defect is afterwards discovered. As it is put in Buckley on the Companies' Acts, 8th Edition page 230, the object of an article like this and the 67th Section of the General Act is to make the *honest* acts of de facto directors as good as the honest acts of de jure directors and although down to the decision in *Dawson's* case the article and sections were generally supposed to apply only as between members of the company and outsiders, and not as between members of the company inter se or members of the company and the company, *Dawson's* case has now decided that that view of the law is incorrect, and that the section and the article are of general importance."

In my view the *doctrine of estoppel* would apply in the present case, and the appellants would be unable to take advantage of their own wrong, if wrong it be, *nullus commodum capere potest de injuria sua propria*.

As a last recourse although not raised in the grounds of appeal, Mr. Humphrys directed my attention to paragraph 8 (2) of the First Schedule to the Ordinance which gives the Commissioner a discretion to alleviate the rigours of the tax, and he apprehends that this was a fit case in which a discretion should have been exercised and some deduction made.

I have examined the sub-paragraph most carefully. It is a complicated piece of legislation and not easy to apply in certain instances, but I am of the opinion that the case under review falls within sub-paragraph 1. Even in a case coming within subparagraph 2 there is no exemption for whole-time service directors. In the circumstances, I confirm the assessments by the Commissioner and dismiss the appeal, with costs.

I may add that since this appeal was argued, a Bill to give a certain amount of relief in Excess Profits Tax matters has been published in the *Gazette* and will soon be discussed in the Legislature.

It may not altogether be an unfavourable conjuncture to give some relief even in cases falling under sub-paragraph 1 where the Commissioner is satisfied that a director has rendered *bona fide* service and the transaction in respect of which the deduction is claimed has not been entered for the specific purpose of artificially reducing the profits.

*Appeal dismissed.*

Solicitors: *H. C. B. Humphrys; Vivian C. Dias*, acting Crown Solicitor.

BIBI A. KHAN v. K. NISA and M. S. H. RAHAMAN

BIBI ASIYAH KHAN, Plaintiff,

v.

KUDRATUN NISA and MUHAMUD SHARIEF HASSAN  
RAHAMAN, Defendants.

[1942. No. 387.— DEMERARA.]

BEFORE DUKE, J. (Acting):

1946. APRIL 2, 3, 4, 5, 8, 9, 10, 11, 12; MAY 6.

*Contract—Consideration for—But no consideration moving from plaintiff—Contract made expressly for her benefit—Plaintiff cannot sue thereunder—Unless contract creates a trust.*

*Trust—Deceased person promises to abstain from altering his will—Beneficiary promises to transport certain immovable property, not devised to her under will, to another person—Deceased person dies without altering his will—Contract—Beneficiary refuses to carry out her promise to testator—Distinct personal fraud committed by her—Intervention of court of equity—Promise declared to be a trust—Enforceable even though not in writing.*

*Statute of Frauds—Not to be used as an instrument of fraud—Trust of immovable property—Declaration or creation of—Civil Law of British Guiana Ordinance, cap. 7, section 3, proviso (d).*

A bargain agreement understanding or transaction was made, or entered into, between M.A.R. and the defendant whereunder, in consideration of M.A.R. abstaining from changing his will of the 19th September, 1938. under which the defendant and her two sons were devised and bequeathed the greater part of his property, the defendant agreed to transport to the plaintiff lot 21 Peters Hall, East Bank, Demerara, with the buildings thereon (acquired by the defendant as a gift *inter vires* from her father M.A.R. by transport dated the 12th May, 1930). Such bargain agreement understanding or transaction was made, or entered into, in February and March 1939, with the knowledge and approval, and in the presence, of the plaintiff who was in fact a party to the bargain agreement understanding or transaction. M. A. R. died on the 17th March 1939, without altering his will. The defendant refused to transport lot 21, Peter's Hall to the plaintiff.

*Held* (1) that as no consideration moved from the plaintiff to the defendant and as the plaintiff was a stranger to the consideration which passed between the deceased and the defendant, if the bargain agreement understanding or transaction was a contract and nothing but a contract, then the plaintiff could not sue upon the contract even though it was made expressly for her benefit.

*Tweddle v. Atkinson* (1861) 121 E.R. 762; 1 B & S. 393, applied; (2) that the refusal by the defendant to perform the promise which, for valuable consideration, she made to her father, during the last few days of his life, to transport lot 21, Peter's Hall with the buildings thereon to the plaintiff was a distinct personal fraud committed by the defendant, that a court of equity will intervene in favour of the plaintiff, that the bargain agreement understanding or transaction must be declared to be a trust in favour of the plaintiff and will be enforced accordingly, even though it is not in writing.

*Norris v. Frazer* (1873) L.R. 15 Equity Cases 318; and *McCormick v. Grogan* (1869) L.R. 4 H.L. 97, applied.

A Court of Equity will not allow proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, Chapter 7, to be used as an instrument of fraud.

## BIBI A. KHAN v. K. NISA and M. S. H. RAHAMAN

ACTION by the plaintiff Bibi Asiyah Khan against the defendants Kudratun Nisa and Muhamud Sharief Hassan Rahaman claiming, *inter alia*, a declaration that the defendant Kudratun Nisa is a trustee for the plaintiff in respect of lot 21 Peter's Hall, east bank Demerara. The facts and arguments appear from the judgment.

*H. C. Humphrys*, K.C., and *J. A. Luckhoo*, junior, for the plaintiff.

*S. L. vanBatenburg-Stafford*, K.C. (*L. M. F. Cabral* with him), for the defendants.

*Cur. adv. vult.*

DUKE, J. (Acting): In this action the plaintiff BIBI ASIYAH KHAN, the wife of MOHAMED ZAINOOL KHAN, claims from the defendant KUDRATUN NISA: (a) a declaration that she is a trustee for the plaintiff of lot 21 Peters Hall, east bank Demerara with the buildings thereon the said lot 21 being more particularly described in transport dated the 12th May, 1930 No. 531 passed in favour of KUDRATUN; (b) an order directing her to execute a proper conveyance of the said property to the plaintiff, failing which that the Registrar be empowered to convey the said property to the plaintiff at the expense of KUDRATUN NISA; (c) the payment to the plaintiff by KUDRATUN NISA of the nett income from the said property since the 17th day of March 1939 to the date of judgment with interest at the rate of six per centum per annum; (d) any other order as the Court may deem fit, and (e) costs. In the alternative, the plaintiff claims relief from the defendants KUDRATUN NISA and MUHAMUD SHARIEF HASSAN RAHAMAN as follows: (a) a decree that the undivided half of Plantation Hamburg as bequeathed to them under the will of MEER ABDOOL RAHAMAN deceased, and as transported to them on the 3rd June, 1940 No. 807 by the executor of MEER ABDOOL RAHAMAN deceased, is held in trust for and stands charged with the payment to the plaintiff by the defendant KUDRATUN NISA of the sum of \$3,000 the value of lot 21 Peters Hall as aforesaid with the buildings and erections thereon, and also for the payment to the plaintiff by the defendant KUDRATUN NISA of the nett income from the said property since the 17th March, 1939 to the date of judgment with interest thereon at the rate of six per centum per annum; or (b) that the bequest by the testator, or alternatively that the bequest in so far as it concerns the defendant KUDRATUN NISA, of the undivided half of Plantation Hamburg cum annexis as transported to the defendants on the 3rd June, 1940 No. 807, be declared void, and accordingly that the transport passed therefor be declared null and void by reason of the fraud upon the trust declared by the testator MEER ABDOOL RAHAMAN deceased in favour of the plaintiff, by which the defendant KUDRATUN NISA was made bound in respect of lot 21 Peters Hall as aforesaid, and that the said undivided half of Plantation Hamburg cum annexis be deemed to fall into intestacy under the estate of the said MEER ABDOOL RAHAMAN deceased; and (c) any other order as the Court may deem fit; and (d) costs.

## BIBI A. KHAN v. K. NISA and M. S. H. RAHAMAN

MEER ABDOOL RAHAMAN was once married, and then to WAZIRAN in community of goods. There were four children of the marriage: (1) the defendant KUDRATUN NISA born in or about the year 1892, (2) MUNTAZ ALI born in 1898; (3) AMJAD ALI born in 1904; and (4) the plaintiff BIBI ASIYAH KHAN born in or about the year 1910.

WAZIRAN died on the 17th February, 1927 leaving a last will and testament dated the 8th June, 1925 in which she devised and bequeathed to her husband her one-half of the common property between her husband and herself. MEER ABDOOL RAHAMAN was appointed sole executor.

After the death of his wife, MEER ABDOOL RAHAMAN made, in different ways, gifts to his children. MUNTAZ ALI claims that he was directly responsible for the accumulation of 85 per centum of the wealth of his father: nevertheless, or perhaps because of this, the gifts which MEER ABDOOL RAHAMAN from time to time made to AMJAD ALI were far more liberal than those which he made to MUNTAZ ALI. The plaintiff received sub-lot 7 of lot D, Houston with the buildings and erections thereon: she obtained title for the sub-lot by transport dated the 22nd February, 1936 No. 211. KUDRATUN NISA received lot 21 Peters Hall, east bank Demerara, and obtained title therefor by transport dated the 12th May, 1930 No. 531. The plaintiff says that, shortly after the death of WAZIRAN, KUDRATUN NISA, like each of her brothers, received the sum of \$4,000 in cash; KUDRATUN NISA says that although each of her brothers received the sum of \$4,000 in cash, she did not receive any such sum. Be that as it may, a joint Savings Bank account was opened, on a date which was not disclosed to the Court, in the names of MEER ABDOOL RAHAMAN and/or KUDRATUN NISA. KUDRATUN NISA was married about the year 1910 but, after the marriage, she continued to form part of the household of MEER ABDOOL RAHAMAN. Her husband died in or about the year 1925, and there were two children of the marriage, SYAD MOHAMED ABDUL HAMID (hereinafter in this judgment referred to as ABDUL HAMID) and MUHAMUD SHARIEF HASSAN RAHAMAN (hereinafter in this judgment referred to as HASSAN RAHAMAN). After the death of WAZIRAN, KUDRATUN NISA exercised sole control over the household of MEER ABDOOL RAHAMAN until his death on the 17th March, 1939, that is to say, for a period of 12 years. The plaintiff was married in the year 1926, before the death of her mother; and on her marriage she ceased to form part of the household of MEER ABDOOL RAHAMAN. ABDUL HAMID assisted his grandfather in the management of Hamburg but he was not paid a salary: on the other hand, MEER ABDOOL RAHAMAN contributed towards the education, in Trinidad and in England, of his grandson HASSAN RAHAMAN. The plaintiff's husband is a Government dispenser, and he never assisted MEER ABDOOL RAHAMAN in the management of any of his property.

MEER ABDOOL RAHAMAN, at one time, promised to leave, in his will, Hibernia or Fairfield (the two plantations adjoin each

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other) to the plaintiff. It is clear from the evidence that MEER ABDOOL RAHAMAN made several wills from time to time. On one occasion MEER ABDOOL RAHAMAN told the plaintiff's husband that he had made a will leaving Hibernia to the plaintiff. This was before MEER ABDOOL RAHAMAN left for Trinidad. The plaintiff's husband was not shown the will, but he was shown around the place which was to be his wife's. He was asked to resign from the Government service and go to Hibernia. No offer was made to transport Hibernia in favour of his wife. The plaintiff's husband declined to go to Hibernia. The will referred to by the plaintiff's husband was made in 1932 or 1933. MUNTAZ ALI saw a will made by his father in which Hibernia was left to one sister and Fairfield was left to his other sister. This will was made just before MEER ABDOOL RAHAMAN left for Trinidad. MUNTAZ ALI stated that the will was made for his father by Mr. J. A. Veerasawmy, and that it was made in 1932. Counsel for the defendants has submitted that the evidence of MUNTAZ ALI is false because, firstly, in 1932 Hibernia and Fairfield were in the names of MUNTAZ ALI and AMJAD ALI and they were not re-transported to MEER ABDOOL RAHAMAN until the 9th January, 1933, and, secondly, Mr. J. A. Veerasawmy gave evidence that he did not, in the year 1932 or at any time subsequent to May 1930, make a will for MEER ABDOOL RAHAMAN. With respect to the first submission, there is no material difference between 1932 and 1933; MUNTAZ ALI was speaking, entirely from recollection, many years after the event; and the transport of the 9th January 1933 No. 32 was advertised in December 1932. Further, the whole of the evidence of MUNTAZ ALI must be looked at. He stated that, in the will, Hamburg *cum annexis* (which was in the name of MEER ABDOOL RAHAMAN) was devised to MUNTAZ ALI and AMJAD ALI, and that Hibernia and Fairfield (which were in the names of MUNTAZ ALI and AMJAD ALI, up to the 9th January 1933) were devised to KUDRATUN NISA and the plaintiff: if the will were made before the 9th January, 1933 the equitable doctrine of election would have operated. With respect to the second submission, the evidence of Mr. J. A. Veerasawmy is, in great measure, based upon the circumstance that, from May 1930 to 1945 when he resigned his office as a Magistrate, he could not have practised his profession of a barrister-at-law. It is beyond question, however, that a barrister-at-law who is a magistrate may, without fee or reward, make a will for another person. Mr. Veerasawmy made such a will in 1943. In 1936 MEER ABDOOL RAHAMAN paid a visit to the residence of Mr. Veerasawmy and tried to leave a present. What personal favour had Mr. Veerasawmy done for MEER ABDOOL RAHAMAN? Mr. R. G. Sharples, solicitor, made a will in 1936 for MEER ABDOOL RAHAMAN. At the time there was produced to Mr. Sharples a copy of a previous will made by MEER ABDOOL RAHAMAN: Mr. Sharples, however, cannot recollect the contents of that will or whether he paid any attention to the date. In 1932 or 1933 the plaintiff, unlike KUDRATUN NISA, MUNTAZ ALI and AMJAD ALI, had received no portion of the common property in the name of MEER ABDOOL

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RAHAMAN at the time of the death of his wife WAZIRAN. I was favourably impressed with MUNTAZ ALI and I believe him to be a credible witness. I am satisfied that in 1932 or 1933 he did see a will of MEER ABDOOL RAHAMAN in which either Hibernia or Fairfield was devised to KUDRATUN NISA and either Fairfield or Hibernia was devised to the plaintiff, even though the will may not have been actually made by Mr. Veerasawmy.

It was in these circumstances that MEER ABDOOL RAHAMAN made his last will and testament on the 19th September 1938 in which he left the sum of \$500 to the plaintiff, and directed that it be paid out of Hamburg by the devisees thereof in three equal yearly instalments, the first instalment being payable one year after possession of Plantation Hamburg was delivered by the executor of the will to the devisees of Hamburg.

The testator made the following bequests and devises:

- (a) to KUDRATUN NISA, the amount at credit on the joint Savings Bank account at Barclays Bank in the joint names of the testator and KUDRATUN NISA;
- (b) to ABDUL HAMID, one undivided half of the estates known as Plantation Hamburg and the appurtenances thereof, and to KUDRATUN NISA for her life and after her death to her son HASSAN RAHAMAN, the other undivided half of the said estates and appurtenances, provided that ABDUL HAMID and KUDRATUN NISA and HASSAN RAHAMAN shall be bound to pay in equal shares out of the said Plantation Hamburg hereby bequeathed to them the sum of \$500 to MUNTAZ ALI and the sum of \$500 to BIBI ASIYAH KHAN;
- (c) to MUNTAZ ALI, the sum of \$500 to be paid out of Plantation Hamburg by the devisees thereof;
- (d) to BIBI ASIYAH KHAN, the sum of \$500 to be paid out of Plantation Hamburg by the devisees thereof;
- (e) to AMJAD ALI Plantations Fairfield and Hibernia and the appurtenances thereof;
- (f) (f) to AMJAD ALI, one-half of the residuary estate and to KUDRATUN NISA and ABDUL HAMID in equal shares the other one-half of the residuary estate.

The testator made the following declaration in his will:

No gift made by me during my lifetime to any of the legatees hereunder shall be taken to have been advanced on account of any legacy nor shall any such gift operate either partially or wholly as an ademption of any such legacy.

Plantation Hamburg was valued, very conservatively, at \$12,000 in the inventory of the estate of the deceased. The values, as they appear in the inventory, of the bequests and devises were as follows:—

(a)	KUDRATUN NISA and HASSAN RAHAMAN	..	..	..	..	\$ 6,350
(b)	KUDRATUN NISA	..	..	..	..	\$ 1,307
(c)	AMJAD ALI	..	..	..	..	\$ 10,735
(d)	ABDUL HAMID	..	..	..	..	\$ 7,657
(e)	MUNTAZ ALI	..	..	..	..	\$ 500
(f)	BIBI ASIYAH KHAN	..	..	..	..	\$ 500

The value of lot 21 Peters Hall, east bank Demerara was \$3,000.

KUDRATUN NISA knew of the contents of the will of the 19th September, 1938 shortly after it was made.

On the 20th December, 1938 KUDRATUN NISA closed the joint Savings Bank account which was in the names of MEER

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ABDOOL RAHAMAN and/or herself by withdrawing therefrom the sum of \$1,104.98. The withdrawal slip was signed by KUDRATUN NISA. On the said day she deposited the said sum, along with the sum of \$60, to the credit of her Savings Bank account.

In February 1939 MEER ABDOOL RAHAMAN communicated to MUNTAZ ALI the contents of his will of the 19th September, 1938: he had not done so at any other time since the will was made. MUNTAZ ALI went to the house of the plaintiff and spoke to her, and the plaintiff spoke to her father MEER ABDOOL RAHAMAN.

The witnesses examined on behalf of the plaintiff as to what took place after MUNTAZ ALI was informed of the contents of the will of the 19th September, 1938 were (1) Mrs. Beatrice Payne, (2) ABDOOL RAYMAN, (3) MUNTAZ ALI (4) the plaintiff's husband, and (5) the plaintiff. The witnesses examined on behalf of the defendants in relation thereto were (1) HUSSAIN BAKSH GAJRAJ and (2) the defendant KUDRATUN NISA. Mrs. Payne nursed MEER ABDOOL RAHAMAN from January 1939 until he died. Her hours were from 4 o'clock in the afternoon until 9 o'clock the following morning. She is a Christian of the African race, while all the other witnesses referred to are Muslims and East Indians. Mrs. Payne is an entirely disinterested witness, and I accept her evidence as true. I was favourably impressed with the evidence of ABDOOL RAYMAN, MUNTAZ ALI, the plaintiff's husband and the plaintiff. HUSSAIN BAKSH GAJRAJ deposed to events which took place at a certain conference. Neither the plaintiff nor her husband was present but the last mentioned witness thought that they were present. Further, this witness stated that, at the conference, nothing was said about lot 21 Peters Hall, known as Peters Hall property: the defendant KUDRATUN NISA admitted, under cross-examination, that Peters Hall property was in fact mentioned at the conference. I am unable to accept, as accurate, the recollection of HUSSAIN BAKSH GAJRAJ as to the proceedings at the conference, where such recollection differs from the evidence of ABDOOL RAYMAN and MUNTAZ ALI. Further, HUSSAIN BAKSH GAJRAJ was not present when the conference commenced. I was not favourably impressed by the evidence given by the defendant KUDRATUN NISA, or by her demeanour in the witness box. It was obvious that she was hiding something from the Court, and that what she was hiding was at all times struggling to escape from her lips. Every now and then, while she was being cross-examined, she was about to answer a question in the affirmative, but before she could complete her answer she would stop, and then calmly answer a question which was not asked. I do not accept her evidence where it is in conflict, or appears to be in conflict, with the evidence given on behalf of the plaintiff. In her letter to the plaintiff dated the 1st January, 1941, which letter the defendant HASSAN RAHAMAN wrote on her behalf, KUDRATUN NISA stated that she was a widow brought up in seclusion. Be that as it may, KUDRATUN NISA is nevertheless or perhaps because of that, a very shrewd woman. I find the facts to be as follows:

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MEER ABDOOL RAHAMAN told KUDRATUN NISA, in the presence of Mrs. Payne, that the plaintiff was annoyed over the 3500 (meaning thereby the sum of \$500 given to the plaintiff in the will of the 19th September, 1938 and which was charged on Hamburg); that she said it was not enough and that she didn't want it; that she KUDRATUN NISA must give up to the plaintiff Peters Hall property (meaning thereby lot 21 Peters Hall, east bank Demerara with the buildings thereon acquired by KUDRATUN NISA by transport dated the 12th May 1930 No. 531) along with the \$500 and that she must look after the plaintiff. KUDRATUN NISA replied that she would see, whereupon MEER ABDOOL RAHAMAN stated that KUDRATUN NISA must say now, otherwise he would change his will. KUDRATUN NISA then said that it was alright, that she would give up Peters Hall property, along with the \$500, to the plaintiff.

MEER ABDOOL RAHAMAN told the plaintiff, in the presence of KUDRATUN NISA and Mrs. Payne, that he had wanted to change his will, but that he had been unable so to do as KUDRATUN NISA had prevented him from changing it. He then told KUDRATUN NISA, in the presence of the plaintiff and of Mrs. Payne, that she must give Peters Hall property, along with the legacy of 3500, to the plaintiff. KUDRATUN NISA agreed *to do*.

MEER ABDOOL RAHAMAN told the plaintiff's husband, in the presence of KUDRATUN NISA and KARIM now deceased and Mrs. Payne, that he had made a will under which \$500 was left for the plaintiff; that he had arranged with KUDRATUN NISA for her to transport Peters Hall property to the plaintiff; and, that the plaintiff and his wife must accept that as he could not do any better. KUDRATUN NISA then looked up at the plaintiff's husband MOHAMED ZAINOOL KHAN, smiled and nodded her head: whereupon the plaintiff's husband told MEER ABDOOL RAHAMAN that it was alright, and that the plaintiff and her husband would take it.

On the following day, a conference was held at the residence of AMJAD ALI at Rahaman's Park (lot D, Houston) where MEER ABDOOL RAHAMAN was staying. KUDRATUN NISA. MUNTAZ ALI, AMJAD ALI and ABDOOL RAYMAN were present at the commencement of the conference. HUSSAIN BAKSH GAJRAJ who, like ABDOOL RAYMAN, was specially invited to attend the conference, arrived late. Neither the plaintiff nor her husband was invited to attend, or was present at, the conference. The plaintiff's grievance had been amicably adjusted by a bargain arrangement or understanding between MEER ABDOOL RAHAMAN, KUDRATUN NISA and the plaintiff. At the conference MEER ABDOOL RAHAMAN stated that he was going to give MUNTAZ ALI \$3,000. This sum of money was to be advanced by HUSSAIN BAKSH GAJRAJ and charged to Hamburg account. "MUNTAZ ALI refused to accept the sum of \$3,000 saying that he was entitled to one-fourth share of the estate of his father and that, if he didn't get that, he didn't want anything at all. He further stated that, if he received \$3,000 only, he would give it, in his father's name, to found schools and mosques. MEER

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ABDOOL RAHAMAN replied that if MUNTAZ ALI did not want the \$3,000 he could please himself. MEER ABDOOL RAHAMAN then turned to KUDRATUN NISA and said: "Big Babe (meaning KUDRATUN NISA), you *must* transport Peters Hall property, you *must* transport Peters Hall property, to Little Babe (meaning the plaintiff.)" KUDRATUN NISA bowed. At no time during the conference and at no time prior thereto, did KUDRATUN NISA say that if AMJAD ALI gave up Hibernia or Fairfield to MUNTAZ ALI she would give up Peters Hall property to the plaintiff. MEER ABDOOL RAHAMAN did not, at the conference, say that AMJAD ALI was to give up Hibernia, or Fairfield, to MUNTAZ ALI. AMJAD ALI did not, at the conference, refuse to give up Hibernia, or Fairfield, to MUNTAZ ALI: no question whatever was raised at the conference as to the giving up by AMJAD ALI of Hibernia, or of Fairfield.

KUDRATUN NISA did not, at any time before the death of MEER ABDOOL RAHAMAN, tell her father that she was not going to transport Peters Hall property to the plaintiff or that she would transport Peters Hall property to the plaintiff in substitution for the legacy of \$500 to her under the will, or that she would transport Peters Hall property to the plaintiff if AMJAD ALI gave Hibernia or Fairfield to MUNTAZ ALL

The conveyance of Peters Hail property by the defendant KUDRATAN NISA to the plaintiff was to be in addition to, and not in substitution for, the legacy in favour of the plaintiff of \$500 charged on Hamburg which was devised to KUDRATUN NISA and her two sons. When cross-examined, KUDRATUN NISA stated: "My father didn't say anything about my sister giving up legacy: legacy not mentioned at all".

MEER ABDOOL RAHAMAN died in AMJAD ALI'S house at lot D, Houston on the 17th March, 1939. The plaintiff spent a few days after the death in AMJAD ALI'S house. AMJAD ALI spoke to the plaintiff while KUDRATUN NISA was in the next room. Later, KUDRATUN NISA asked the plaintiff what their brother had said. The plaintiff did so. AMJAD ALI had told the plaintiff: "Sis, father leave a will, appoints me executor, leave you \$500, he left me instructions to let my sister (meaning KUDRATUN NISA) transport Peters Hall property to you." KUDRATUN NISA did not say anything when the plaintiff repeated to her what their brother AMJAD ALI had said.

A few days after the plaintiff had left AMJAD ALI'S house, KUDRATUN NISA left for Hamburg. She told the plaintiff that AMJAD ALI was treating her badly in the house.

KUDRATUN NISA returned from Hamburg in July 1939. She stayed with the plaintiff and when her son, the second named defendant, returned from England he likewise stayed with the plaintiff. After that, her sister or her son or her son's family, when in Georgetown, would always stay with the plaintiff.

KUDRATUN NISA always told the plaintiff that she would carry out her father's wish after she had got her transport passed to her.

In April 1940 the plaintiff underwent an operation. The day before the operation, KUDRATUN NISA told her that if she (the

plaintiff) died, she KUDRATUN NISA would transport Peters Hall property to the plaintiff's children.

On the 3rd June 1940 KUDRATUN NISA and her two sons obtained transport of Hamburg. Some time after, she told the plaintiff that she would transport the Peters Hall property to her, that the plaintiff must not be afraid, and that the plaintiff must give her a few months.

On a subsequent occasion, KUDRATUN NISA told the plaintiff that it was in her mind to transport the Peters Hall property as soon as she could do so after buying a house in Georgetown, and that she would not expect the plaintiff to claim the legacy of \$500. This was the first intimation which the plaintiff had that her sister was going to assert that the transport to the plaintiff of the Peters Hall property by KUDRATUN NISA was to be conditional on the renunciation by the plaintiff of the legacy of \$500 which her sister and the two sons of her sister were liable to pay. The plaintiff is shy and retiring, and she merely listened to what her sister was saying. The plaintiff states that her sister left her thinking.

On the 22nd November, 1940 the plaintiff wrote the defendant KUDRATUN NISA a letter reminding her of the promise made by her to her father to transport Peters Hall property to the plaintiff, and requesting her so to do. On the 20th December, 1940 KUDRATUN NISA caused her then solicitor, Mr. W. D. Dinally, to reply that she "promised to give the East Bank property of her own volition and out of her sisterly affection for (the plaintiff) only on the condition that (the plaintiff) on (her) part relinquish the legacy" of \$500 charged on Hamburg, and warning her that if she accepts payment of the legacy "the above promise made out of pure generosity will no longer hold good."

On or about the 29th April, 1942 the plaintiff accepted payment of the legacy of \$500 charged on Hamburg.

The defendant KUDRATUN NISA has not, since the death of her father, resided at lot 21 Peters Hall, even though she did not purchase a property in the city of Georgetown until the year 1943. She has never, since the death of her father, formed the intention to reside at lot 21 Peters Hall.

The defendant KUDRATUN NISA has refused, before the writ in this action was filed, to transport to the plaintiff lot 21 Peters Hall, east bank, Demerara with the buildings thereon.

A bargain agreement understanding or transaction was made, or entered into, between MEER ABDOOL RAHAMAN and the defendant KUDRATUN NISA whereunder, in consideration of MEER ABDOOL RAHAMAN abstaining from changing his will of the 19th September 1938 under which KUDRATUN NISA and her two sons were devised and bequeathed the greater part of his property, KUDRATUN NISA agreed to transport to the plaintiff lot 21 Peters Hall, east bank, Demerara with the buildings thereon (acquired by KUDRATUN NISA, as a *gift inter vivos* from her father, by transport dated the 12th May, 1930). Such bargain agreement understanding or transaction was made, or entered into, with the knowledge and approval, and In the presence, of the plaintiff who was in fact a party to the bargain agreement understanding or transaction.

## BIBI A. KHAN v. K. NISA and M. S. H. RAHAMAN

No consideration moved from the plaintiff to KUDRATUN NISA, and the plaintiff was a stranger to the consideration which passed between MEER ABDOOL RAHAMAN and KUDRATUN NISA. If, therefore, the bargain agreement understanding or transaction was a contract and nothing but a contract, then on the authority of TWEDDLE v. ATKINSON (1861) 121 E.R. 762; 1 B & S. 393 the plaintiff could not sue upon the contract even though it was made expressly for her benefit. If, however, by the bargain agreement understanding or transaction there was created a trust whereunder KUDRATUN NISA holds lot 21 Peters Hall east bank Demerara in trust for the plaintiff, then the plaintiff would be entitled to sue KUDRATUN NISA for the purpose of enforcing the performance of the trust unless she is, as is submitted by counsel for the defendants, precluded from so doing by reason of the fact that the trust is not evidenced by writing.

In NORRIS v. FRAZER (1873) L.R. 15 Equity Cases 313 the testator made his will on the 17th January, 1861 and he died on the 26th April, 1861. In his will the testator devised and bequeathed to Mrs. Frazer and her husband all, or the bulk, of his property. After the execution of his will the testator, on his death-bed, communicated to Mr. & Mrs. Frazer that he had left them all, or the bulk of his property; and he either exacted a promise or expressed a wish and desire that an annuity of £300 should be provided for Miss Norris. A bill was filed by Miss Norris praying for a declaration that the income of the residuary estate of the testator, and of the investments thereof, for the time being payable to Mrs. Frazer, or to Mr. Frazer in right of his wife, "was and is subject to a trust" for paying to the plaintiff Miss Norris the annual sum of £300 during Mrs. Frazer's life if the plaintiff should so long live. It was submitted by the plaintiff that the defendants Mr. and Mrs. Frazer accepted the benefits conferred on them by the testator's will, upon a bargain made by them with the testator under the circumstances hereinbefore stated that they should make up to the plaintiff a provision of £300 a year; that such benefits were left unrevoked on the faith of such bargain: and that, if such bargain had not been made and relied on by the testator, he would have executed a legal disposition in the plaintiff's favour to the effect of the above trust.

In the course of his judgment Sir James Bacon, Vice-Chancellor said:

If a promise was made at all, it was made at a time when the testator was speaking of his own estate and his own intentions, and when he was imposing a condition—upon Mrs. Frazer at least—that she should perform that promise, or whatever it might be called, that £300 a year should be paid to the plaintiff. The fund out of which it was to be paid is a matter of indifference.... If the statement made by Mrs. Frazer be true, then a more direct, a more distinct personal fraud could not be committed than for Mrs. Frazer to refuse to perform that promise which she made to the testator upon his death-bed.

The learned Vice-Chancellor found that Mrs. Frazer, at the request of the testator on his death-bed, made the promise as alleged, and that Mr. Frazer in his own right and in right of his

wife (they were married on the 12th October 1854) assented to it; and he made the declaration asked for.

The bargain made, or the transaction entered into, between the devisees and the testator was made expressly for the benefit of Miss Norris. She was, however, not a party to the bargain or transaction. Nevertheless, she was permitted to sue in her own name. Further, the case of *NORRIS v. FRAZER* shows that the bargain or transaction between the devisees and the testator was declared to be a trust, and that where there is breach of confidence amounting to personal fraud the question of consideration does not arise.

If therefore the bargain made, or the transaction entered into, between MEER ABDOOL RAHAMAN and KUDRATUN NISA a devisee and legatee under his will of the 19th September, 1938, is a bargain or transaction within the meaning of *NORRIS v. FRAZER*, the bargain or transaction would create a trust and the plaintiff would be entitled to sue thereon.

The value of lot 21 Peters Hall east bank Demerara with the buildings thereon is \$3,000. If the agreement in this case was that \$3,000, the value of that property, was to be paid by KUDRATUN NISA to the plaintiff, that sum of money could have been paid by KUDRATUN NISA out of the bequest to her, or from whatever other source she thought fit; and the defendants could hardly have contended that a trust was not created in favour of the plaintiff in respect of the \$3,000. It has, however, been strenuously urged that no trust was created by the bargain agreement understanding or transaction inasmuch as the property sought to be charged with the trust (namely, lot 21 Peters Hall with the buildings thereon) was the property of KUDRATUN NISA at the time of the bargain or other transaction, and was not the subject matter of a devise to her by the testator MEER ABDOOL RAHAMAN. The jurisdiction which is, however, invoked in this case is founded altogether on the personal fraud of the defendant KUDRATUN NISA, and in the exercise of this jurisdiction, as Lord Westbury said in *McCORMICK v. GROGAN* (1869) L.R. 4 H.L. 97, "a Court of equity proceeding on the ground of fraud converts the party "who has committed it into a trustee for the party who is injured by the fraud". The refusal by KUDRATUN NISA to perform the promise which, for valuable consideration, she made to her father, during the last few days of his life, to transport lot 21 Peters Hall with the buildings thereon to the plaintiff was a distinct personal fraud committed by KUDRATUN NISA.

If a testator abstains from altering his will on the understanding that a devisee (to whom the request has been communicated by the testator) under the will, will pay certain money to a third person, the devisee has undertaken a trust and he will be required, at the suit of such third person, to execute the trust according to its terms. There is no reason, in principle, why, if a testator abstains from altering his will on the understanding that a devisee (to whom the request has been communicated by the testator) under the will, will transport to a third person certain immovable property then belonging to the devisee, it should be

## BIBI A. KHAN v. K. NISA and M. S. H. RAHAMAN

considered that the devisee has not undertaken a trust. In each case, if the devisee refuses, after the death of the testator, to do what he the devisee had promised to do, there is a breach of confidence, and it is on account of that breach of confidence that a court of equity will intervene. The testator is dead, and when the devisee refuses to do what he had promised to do, the will can no longer be changed.

It has been said that a Court of equity has a long arm, and in my view that arm is long enough to reach out and catch the defendant KUDRATUN NISA. It will tell her that she has violated the promise which she made to her father during the last few days of his life; that as a result of that promise her father did not change his will; that she has received benefits under that will which she would not have received if she had not made that solemn promise to her father; that her conscience is not clear; that her conscience would not be clear unless and until she fulfils her promise and transports to her sister lot 21 Peters Hall east bank Demerara with the buildings thereon; that she holds lot 21 Peters Hall east bank Demerara with the buildings thereon in trust for her sister the plaintiff; that she so held it from the date of the testator's death; and that she ought to have handed over possession of, and transported, lot 21 Peters Hall east bank Demerara with the buildings thereon, to the plaintiff as soon as possible after the death of the testator MEER ABDOOL RAHAMAN: and see LEWIN on Trusts, 13th edition. Part 1, section 5, paragraphs 1, 19, and 22, pages 92, 104 and 106. The plaintiff was content to wait until the defendant and her sons had obtained transport of Hamburg. Such transport was passed on the 3rd June, 1940, and KUDRATUN NISA should have passed transport in favour of the plaintiff not later than the 30th June, 1940.

Counsel for the defendants has finally submitted that by proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, Chapter 7, no action shall be brought whereby to charge any one upon any declaration or creation of any trust relating to 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, and that the trust is unenforceable by action as it is not evidenced by writing signed by KUDRATUN NISA or any person lawfully authorised by her. It is now well-settled that a Court of Equity will not allow the Statute of Frauds to be used as an instrument of fraud. If the Court were to accede to this submission it would be sanctioning the perpetration by KUDRATUN NISA, to use the words of Vice-Chancellor in *NORRIS v. FRAZER*, supra, of a distinct personal fraud. The submission therefore fails.

Had I acceded to any of the legal submissions of counsel for the defendants, I would, in view of the fraud of KUDRATUN NISA and the other circumstances of this case, not have allowed any costs to the defendants.

There will be judgment for the plaintiff —

- (a) for a declaration that the defendant KUDRATUN NISA is a trustee for the plaintiff of "lot number 21 (twenty-one)

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Peter's Hall, in the Peter's Hall Country District, situate on the east bank of the Demerara River in the county of Demerara and Colony of British Guiana as shown on a diagram by C. Chalmers, Sworn Land Surveyor, dated January, 1867, and deposited in the office of the Registrar at Georgetown on the 26th September, 1867, with the buildings thereon" and that the plaintiff is entitled, at her cost and expense, to conveyance thereof from the defendant KUDRATUN NISA;

- (b) for an order directing the defendant KUDRATUN NISA to advertise, within two weeks after the date of this order transport of the aforesaid lot number 21 (twenty-one J Peter's Hall to and in favour of the plaintiff, and to pass transport, within two weeks after the transport is certified by the Registrar of Deeds, of the aforesaid lot number 21 (twenty-one) Peter's Hall, to and in favour of the plaintiff;
- (c) for an order empowering, authorising and requiring the Registrar of the Supreme Court, upon failure by the defendant to perform the acts, or either of the acts, specified in paragraph (b) within the time therein mentioned, to perform, on the application of the plaintiff the acts or either of the acts as the case may be for and on behalf of the defendant KUDRATUN NISA;
- (d) for an account of the rents and profits from lot number 21 (twenty-one) Peter's Hall as aforesaid with the buildings thereon, from the 1st July, 1940, until possession thereof is delivered by the defendant KUDRATUN NISA to the plaintiff, and for payment by the defendant KUDRATUN NISA to the plaintiff of the sum found to be due on the taking of such account;
- (e) an order that the plaintiff recover possession from the defendant KUDRATUN NISA of Lot number 21 Peter's Hall as aforesaid with the buildings thereon; and
- (f) for her costs of and incidental to this action against the defendant KUDRATUN NISA. I certify that, in respect of the trial of the action, it was fit and proper for the plaintiff to brief two counsel.

The main relief claimed by the plaintiff affected the defendant KUDRATUN NISA only, while the alternative claims for relief affected both defendants. The Court has given judgment for the plaintiff against the defendant KUDRATUN NISA for the main relief claimed by the plaintiff, and the alternative claims for relief cannot therefore be considered. As a result, the claim of the plaintiff against the second named defendant MUHAMUD SHARIEF HASSAN RAHAMAN will be dismissed and judgment entered in his favour, but, in the circumstances of this case, without costs.

*Judgment for plaintiff.*

Solicitors: *D. P. Debidin; R. G. Sharples.*

## CHIN-TING-KEE, v. FELIX AUSTIN

CHIN-TING-KEE,  
Appellant (Defendant),  
v.  
FELIX AUSTIN, Lcpl. of Police No. 4356,  
Respondent (Complainant).

[1946. No. 110.—DEMERARA.]

Before Full Court: LUCKHOO. C.J. (Acting), BOLAND, J.

and DUKE, J. (Acting) :

1946. APRIL 26; MAY 10.

*Criminal law and procedure—Ingredient of offence charged, proved but omitted from conviction—Conviction amended—To include missing ingredient.*

*Sale of food—Not being of the nature substance and quality demanded by the purchaser—To the prejudice of the purchaser—Sample taken of article sold—Analyst's certificate—Sale of Food and Drugs (Consolidation) Ordinance, cap. 102, sections 2, 6 (1), 11, 22, 23 (1) and paragraph 3 of First Schedule.*

*Criminal law and procedure—Enactment creating offence—Proviso thereto—Burden of proof of—On defendant—Sale of Food and Drugs (Consolidation) Ordinance, cap. 102, section 6 (1).*

The burden of establishing that a case comes within the proviso to section 6 (1) of the Sale of Food and Drugs (Consolidation) Ordinance, Chapter 102, is upon the defendant who is charged with the commission of an offence under the subsection.

The appellant was convicted of selling to the respondent a certain article of food to wit butter not being of the nature substance and quality demanded by the purchaser, contrary to section 6 (1) of the Sale of Food and Drugs (Consolidation) Ordinance, Chapter 102. Section 6 (1) contains the following proviso: "Provided that an offence shall not be deemed to be committed under this section where the standard of purity does not fall below that of the cases set forth in the first schedule hereto." Paragraph 3 of the first schedule, in so far as it relates to butter, is as follows: "Where water, or salt, or water and salt, is or are added to butter, but not so as to reduce the proportion of fat below seventy-five per centum."

The respondent had asked the appellant to sell to him a half-pound of butter, and the appellant sold and delivered to the respondent a substance resembling butter, which she (the appellant) described as butter. The respondent was shown two tins, each containing what the appellant described as butter. The respondent wanted butter, and he asked that he be sold butter from the tin indicated by him.

A sample of the substance sold was subsequently analysed by the assistant Government analyst who issued the following certificate of analysis: "I am of opinion that the said sample is adulterated and contains ingredients as under. The sample is a mixture of butter and margarine. The sample contains 50% margarine, which is prepared from vegetable fats, in imitation of butter fat."

*Held* (1) that the analyst's certificate showed that, the sample contains less than 75 per centum of butter fat, and fell below the standard of purity for butter specified in the proviso to section 6 (1) of, and in paragraph 3 of the first schedule to, Chapter 102;

(2) that the article sold as butter came within the definition of "margarine" in section 2 of the Sale of Food and Drugs (Consolidation) Ordinance, Chapter 102, and was not of the nature substance and quality demanded by the purchaser;

## CHIN-TING-KEE v. FELIX AUSTIN

(3) that the sale was certainly to the prejudice of the respondent, as the article sold to him was not butter, as defined by the Sale of Food and Drugs (Consolidation) Ordinance, Chapter 102, to which he was entitled on his purchase.

A conviction made under section 6 (1) of the Sale of Food and Drugs (Consolidation) Ordinance, Chapter 102, should contain the averment that the sale was to the prejudice of the purchaser. Where such a conviction did not contain the averment as aforesaid, but the magistrate had found that the sale was to the prejudice of the purchaser, the conviction was amended accordingly.

APPEAL by the defendant Chin-Ting-Kee from a conviction under section 6 (1) of the Sale of Food and Drugs (Consolidation) Ordinance, Chapter 102.

*Ronald H. Luckhoo*, for the appellant.

*A. V. Crane*, acting Solicitor-General, for the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by DUKE, J. (Acting) as follows:—

This is an appeal by the defendant CHIN-TING-KEE from the decision of a Magistrate of the Georgetown Judicial District convicting her of selling a certain article of food to wit butter not being of the nature substance and quality demanded by the purchaser, namely, the complainant Lance Corporal 4356 Felix Austin, contrary to section 6 (1) of the Sale of Food and Drugs (Consolidation) Ordinance, Chapter 102.

The respondent asked the appellant to sell to him a half-pound of butter, and the appellant sold and delivered to the respondent a substance resembling butter, which she described as butter. A sample of this substance was subsequently analysed by the assistant Government analyst who issued the following certificate of analysis:—

"I am of opinion that the said sample is adulterated and contains ingredients as under:—

The sample is a mixture of butter and margarine. The sample contains 50% margarine, which is prepared from vegetable fats, in imitation of butter fat.

No change had taken place in the constitution of the article which would interfere with the analysis."

Section 6 (1) of Chapter 102 contains a proviso which is as follows:

Provided that an offence shall not be deemed to be committed under this section where the standard of purity does not fall below that of the cases set forth in the first schedule hereto.

Paragraph 3 of the first schedule relates both to butter and to margarine, but the marginal note to the said paragraph is misleading as it mentions butter only. That paragraph is as follows:

**STANDARD OF PURITY**

3. Where water, or salt, or water and salt is or are added to butter or margarine, but not so as to reduce the proportion of fat below seventy-five per centum.

By section 2 of Chapter 102 "butter" means the substance usually known as butter made from milk or cream, or from both milk and cream, with or without salt or other preservative, and with or without the addition of colouring matter. The word "fat" in paragraph 3 must, in relation to butter, therefore necessarily mean butter fat only, that is to say, fat associated with milk or cream,

or with milk and cream, and cannot include, for instance, vegetable fats.

Mr. RONALD H. LUCKHOO, counsel for the appellant, submitted that the analyst's certificate did not sufficiently disclose the component parts of the butter, and of the margarine, contained in the sample; that the analyst set out his conclusion without stating the reasons upon which his conclusion was founded; that the certificate did not show that the sample contained less than 75 per centum of fat within the meaning of paragraph 3 of the first schedule to Chapter 102, or that the substance of which the sample formed part was not entitled to the benefits of the proviso to section 6 (1) of Chapter 102; and that therefore the analyst's certificate was neither in form nor in terms sufficient evidence of a contravention of section 6 (1) of Chapter 102 on the part of the appellant to warrant the conviction.

We agree with the learned Solicitor-General's submission as to the interpretation of the proviso to section 6 (1). He contended that, in accordance with section 9 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 14, the burden of establishing that a case comes within the proviso is upon the defendant. It was open to the appellant to establish, either by independent evidence or by cross-examination of the analyst (and a defendant may, by section 23 (1) of Chapter 102, require that the analyst be called as a witness), that the sample did contain not less than 75 per centum of fat. Moreover, we would point out that paragraph 3 of the first schedule to Chapter 102 applies only when water, or salt, or water and salt is or are added to butter; and that it does not apply when any other substance is added.

The analyst's certificate shows that the article sold as butter is a mixture of butter and of margarine, and that the mixture consists of butter in the proportion of 50 per centum and of margarine in the proportion of 50 per centum: in other words, the article sold as butter had a foreign ingredient, to wit margarine, to the extent of 50 per centum. When the analyst used the term "butter" in his certificate issued under section 22 of Chapter 102 in the form contained in the second schedule thereto, he was referring to butter as defined by section 2 of Chapter 102. The expression "margarine", as defined by the said section, means, among other things, all substances prepared *in imitation of butter* and whether mixed with butter or not. The analyst, however, made it clear that the margarine referred to by him in his certificate is margarine which is prepared from vegetable fats in imitation of butter fat: he has not said that the margarine referred to by him in his certificate consists, in part, of butter. A mixture consisting, in equal quantities, of butter and of margarine which is prepared from vegetable fats in imitation of butter fat cannot possibly contain more than 50 per centum of butter fat: and such a mixture would contain 50 per centum of butter fat only if the butter forming part of the mixture contained 100 per centum of butter fat. Therefore, although, as stated, proof that there was no offence because the article sold fulfilled the conditions mentioned in the proviso to section 6 (1), lies upon a defendant, the analyst's certificate tendered in evi-

dence by the prosecution shows that the sample contained less than 75 per centum of butter fat.

On this certificate the learned Magistrate correctly found that the article sold as butter was not of the nature substance and quality demanded by the purchaser. The mixed substance sold would, in our view, come within the definition of "margarine" in section 2 of Chapter 102, and should have been sold as such with its designation clearly shown as required by section 11.

Counsel for the appellant finally submitted that the article sold was not sold to the prejudice of the purchaser. The respondent was shown two tins, each containing what the appellant described as butter. The respondent wanted butter and he asked that he be sold butter from the tin indicated by him. This sale was certainly to the prejudice of the respondent, as the article sold to him was not butter, as defined by the Ordinance to which he was entitled on his purchase.

Although the learned Magistrate found, as stated in his reasons of decision, that the sale was to the prejudice of the purchaser, a statement to this effect does not appear in the formal conviction. The conviction should contain such an averment, and we shall therefore amend the conviction by inserting therein, between the word "sold" and the words "a certain article of food", the words, "to the prejudice of the purchaser,".

The appeal is dismissed with costs, and the conviction as amended is affirmed.

*Appeal dismissed.*

BOOKERS DEMERARA SUGAR ESTATES, LTD  
v. REGISTRAR OF DEEDS.

BOOKERS DEMERARA SUGAR ESTATES, LTD,  
Appellant

v.

REGISTRAR OF DEEDS,

1946. No. 212 — DEMERARA.

Respondent

1946. APRIL 29; MAY 4, 13.

BEFORE DUKE, J. (Acting).

*Public health—Housing and district planning—If the owner of any land desires to sell, lease or grant the same in separate lots to any person or persons for any purpose whatever—"For any purpose whatever"—To be construed as having their ordinary and natural meaning—If the owner of any land desires to lay it out for building purposes—"Lay it out for building purposes"—To be construed as meaning "lay it out in separate lots for building purposes"—If the owner of any land desires"—Meaning of—Public Health Ordinance, 1934 (No. 15), section 135 (1).*

*Construction—Statutes—Cross headings in—To be referred to in case of doubt as to construction of sections falling within.*

*Words—"For any purpose whatever"—Public Health Ordinance, 1934 (No. 15), section 135 (1).*

*Words—"Lay it out for building purposes"—Public Health Ordinance,*

*Words—"If the owner of any land desires"—Public Health Ordinance, 1934 (No. 15), section 135 (1).*

The words "lay it out for building purposes" in section 135 (1) of the Public Health Ordinance, 1934 (No. 15) must be construed as meaning "lay it out in separate lots for building purposes."

The words "for any purpose whatever" in section 135 (1) of the Public Health Ordinance, 1934 (No. 15) must be construed as having their ordinary and natural meaning.

*Beckford v. Wade* (1805) 17 Vesey 91. and *de France v. Rai*, 1944 No. 118, 29th May 1944, considered.

Land does not come within the meaning or the spirit of section 135 (1) of the Public Health Ordinance, 1934 (No. 15) unless—

- (a) the owner of the land desires to sell, lease or rent it, in separate lots; or
- (b) the owner of the land desires to lay it out, in separate lots, for building purposes.

Mere suspicion of such a desire on the part of the owner of the land is not enough. There must be evidence from which the desire can fairly and reasonably be presumed.

Where there exists any doubt as to the construction to be placed upon any section falling within the scope of a cross-heading in a statute, the words of the heading may be looked at in order to determine the effect of the section.

APPEAL by Bookers Demerara Sugar Estates Limited from a decision of the Registrar of Deeds. The facts and arguments sufficiently appear from the judgment,

*J. E. de Freitas*, solicitor, for the appellant.

*V. C. Dias*, acting Crown Solicitor, for the Central Board of Health.

*Cur. adv. vult.*

BOOKERS DEMERARA SUGAR ESTATES. LTD.  
v. REGISTRAR OF DEEDS.

DUKE, J. (Acting): The appeal has been brought, under section 3 of the Deeds Registry Ordinance, 1931 (No. 2), by BOOKERS DEMERARA SUGAR ESTATES LIMITED from the decision of the Registrar of Deeds refusing to certify, under Rule 9(2) of the Deeds Registry Rules 1920, a lease by the appellant for the term of 99 years in favour of METHODIST MISSIONARY TRUST ASSOCIATION of "All that piece or parcel of land having an area of 0.264 of an acre part of Plantation Uitvlugt, situate on the west sea coast of the county of Demerara and colony of British Guiana, the said piece or parcel of land being laid down and defined on a plan thereof by D. C. S. Moses, Sworn Land Surveyor, dated the 20th March, 1943 and recorded in the Department of Lands and Mines on the 29th March, 1943 as No. 4557 and annexed to the lease."

METHODIST MISSIONARY TRUST ASSOCIATION has already erected a Church on the said parcel of land; and the appellant has agreed to grant a lease of the said parcel of land to the said Association for a period of 99 years commencing on the 1st July, 1943.

On the 7th December, 1944 the appellant lodged with the Registrar of Deeds instructions to advertise in the *Gazette* notice of the intention to pass the lease as aforesaid. The Registrar of Deeds advertised in the *Gazette* notice of such intention, but the solicitors for the intending lessor were informed by the Transport Clerk that the advertisement was subject to the plan by D. C. S. Moses being approved by the Central Board of Health.

The plan by D. C. S. Moses has, however, not been laid by the intending lessor before the Central Board of Health. On the 13th April, 1946 the solicitors for the intending lessor wrote the Registrar of Deeds a letter in which they submitted that section 135 of the Public Health Ordinance, 1934 (No. 15) did not apply to the lease of the parcel of land as aforesaid. On the 15th April, 1946 the Registrar of Deeds replied that he did not propose to certify the lease for passing unless the plan by D. C. S. Moses is approved by the Central Board of Health in accordance with section 135 of the Public Health Ordinance, 1934.

On the 17th April, 1946 the appellant filed the notice of appeal in this matter, and asked that it be declared that the provisions of section 135 of Ordinance No. 15 of 1934 do not apply to the lease in question, and that it is competent for the Registrar of Deeds to certify the above mentioned lease for passing, without the plan of the land to be leased being approved by the Central Board of Health.

On the 29th April, 1946 I made an order directing the Registrar of Deeds to forward to the Central Board of Health copies of all the papers filed in this matter with the intimation that the Central Board of Health may, if so advised, be represented at the hearing of the appeal on the 4th May, 1946.

On the latter day, Mr. Vivian C. Dias, acting Crown Solid appeared on behalf of the Central Board of Health, and stated that the plan by D. C. S. Moses, if laid before the Central Board of

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Health, would be approved by the Board and the necessary certificate issued by the Secretary under section 135. Mr. J. Edward de Freitas, solicitor for the appellant, however submitted that the intending lessor was under no obligation to lay the plan before the Central Board of Health; he stated that section 135 had never been judicially construed, and that the object of the appeal was to obtain a judicial interpretation of the meaning of section 135. The Crown Solicitor stated that a judicial interpretation of section 135 (1) would be of benefit not only to the Board but also to members of the public; and he expressed the hope that the determination of the appeal would be founded on the interpretation of section 135(1), and not on a ground which would render it unnecessary to construe that subsection.

The Public Health Ordinance, 1934 (No. 15) is divided into 14 Parts. By section 16 of the Interpretation Ordinance, cap. 5, where an Ordinance is divided into parts, titles or other divisions, the fact and particulars of the division shall be noticed in all courts. Part XII comprises sections 135 to 142 inclusive, and these sections are immediately preceded by the following:—

"PART XII

HOUSING AND DISTRICT PLANNING.

*Land laid out for building purposes."*

Section 135(1) is in the following terms: —

"If the owner of any land—

- (a) desires to sell, lease, rent or grant the same in separate lots to any person or persons for any purpose whatever: or
- (b) desires to lay it out for building purposes.—he must cause a plan thereof to be prepared which, if the Board in any particular case so directs shall be prepared by a sworn land surveyor and laid before the Board, showing—
  - (i) the mode in which it is proposed to sub-divide the land.
  - (ii) the streets, roads and means of access to each lot, and
  - (iii) the provision for the drainage thereof.

The Board may require any alteration to be made in the plan appearing to it expedient or necessary, and the Board shall issue a certificate signed by the Secretary when the plan is finally approved."

It will be observed that, by section 135(1), if the owner of any land desires to lay it out for building purposes, he is required to prepare and lay before the Central Board of Health a plan which must show, among other things, the mode in which it is proposed to subdivide the land. The desire of the owner must therefore be not only to lay out the land for building purposes, but also to lay it out in separate lots. The words "lay it out for building purposes" in section 135(1) must therefore be construed as meaning "lay it out in separate lots for building purposes."

Prior to the coming into force of the Public Health Ordinance, 1934, the promotion of public health was regulated by the Local Government Ordinance, Chapter 84. The Public Health Ordinance, 1934 created the Central Board of Health with complete

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jurisdiction over matters of public health and repealed such provisions of Chapter 84 as related to public health.

Section 135 of the Public Health Ordinance, 1934 (No. 15) was formerly section 27 of Chapter 84. Sub-section (1) of which was as follows:—

"When the owner of any land—

- (a) desires to sell it, or any parts or portions of it, in separate lots to more than one purchaser for any purpose whatever: or
- (b) desires to build on it; or
- (c) desires to sell it for building purposes; or
- (d) desires to lease it for building purposes; or
- (e) desires to lay it out for building purposes, — he must cause a plan thereof to be prepared, which if the Board in any particular case so directs, shall be prepared by a sworn land surveyor and laid before the Board, showing —
  - (i) the mode in which it is proposed to sub-divide the land.
  - (ii) the streets, roads, and means of access to each lot. And
  - (iii) the provision for the drainage thereof.

The Board may require any alteration to be made in the plan appearing to it expedient or necessary."

It will be observed that while there is no change made in the law in respect to what the plan must show, there has been considerable change made in the law in respect of the circumstances under which the obligation arises to lay such plan before the Board. For instance, section 27 of Chapter 84 applied, in relation to a lease, where the owner of land desired to lease it for building purposes: whereas section 135 of Ordinance No. 15 of 1934 applies, in relation to a lease, where the owner of land desires to lease it, in separate lots, "for any purpose whatever." Further, section 27 of Chapter 84 applied, in relation to a sale, where the owner of land desired to sell it for building purposes, and also where the owner of land desired to sell it, or any parts or portions of it, in separate lots, to more than one purchaser "for any purpose whatever:" whereas section 135 of Ordinance No. 15 of 1934 applies, in relation to a sale, where the owner of land desires to sell the same, in separate lots, to any person or persons "for any purpose whatever." Again, there is no special provision in section 135 of Ordinance No. 15 of 1934, as formerly existed under section 27 of Chapter 84, that a plan is required to be laid before the Board where the owner of any land desires to build on it.

The words "for any purpose whatever" in section 27 of Chapter 84 meant, for any purpose whatever: when the Legislature meant a desire to sell land, or to lease land, for building purposes only, the Legislature so expressed itself in the section. In 1934 the Legislature re-drafted the section, and used the words "for any purpose whatever" in relation to the desire to lease, as well as to sell, land in separate lots. *Prima facie*, therefore, the words "for any purpose whatever" in section 135 (1) of the Public Health Ordinance, 1934 (No. 15) should be construed in their ordinary and natural meaning.

The solicitor for the appellant, however, has submitted that the words "for any purpose whatever" in section 135(1) of the Public Health Ordinance, 1934 are to be construed in relation to

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the headings to Part XII of that Ordinance and should be given a reasonable construction, In support of his argument he referred to BEAL on Cardinal Rules of Legal Interpretation, 3rd edition, page 297 and cases therein referred to; and to BECKFORD v. WADE (1805) 17 Vesey 91. The passage referred to in BEAL is as follows:—

Headings may be referred to determine the sense of any doubtful expression in a section ranged under a particular heading; but cannot control unambiguous expressions.

The Intoxicating Liquor Licensing Ordinance, Chapter 107, is not divided into parts or titles, but there are cross-headings immediately preceding two or more sections. In DE FRANCE v. RAI, 1944 No. 118, 26th May, 1944, the Full Court held that the cross-heading "Powers of Police and District Commissioners with respect to unlicensed premises" appearing immediately before section 73A (inserted by section 3 of Ordinance No. 26 of 1944) and 74 to 83 inclusive, were relevant in the interpretation of sections 75 and 83 (a), and that, in the particular circumstances of that case, showed that the power of entry and search conferred by section 75 and referred to in section 83 (a), applied to unlicensed premises only, and did not extend to a store shop or business premises which is or are licensed premises under the Ordinance. In delivering the judgment of the Full Court, VERITY, C.J. said:

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.

BECKFORD v. WADE was an appeal to the Privy Council from a judgment of the Supreme Court of Jamaica. In delivering the judgment of the Lords of the Council, Sir William Grant, Master of the Rolls, said:

General words in a Statute must receive a general construction; unless you can find in the Statute itself some ground for limiting and restraining their meaning by reasonable construction, and not by arbitrary addition or retrenchment.

The words "for any purpose whatever" are clear, precise and unambiguous. I can find no ground in the Ordinance for limiting" or restraining their meaning. If the meaning is limited or restrained, it would be "by arbitrary addition or retrenchment" and not "by reasonable construction." The words "for any purpose whatever" being clear, precise and unambiguous, and there being on ground in the Ordinance for limiting or restraining their meaning, the interpretation of the words cannot be limited by reason of the headings to Part XII of the Ordinance. The object of the opening words of section 135 (1) is to ensure that where an owner of land desires to sell or lease or rent land, in separate lots, a plan of the proposed mode of subdivision is laid before the Central Board of Health for approval. The purpose of the sale or lease or rental is immaterial. What is material is that such sale or lease or rental is to be in separate lots. It is essential, from the public health

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view point, that whenever it is proposed to sell or lease or rent land, in separate lots, the approval of the Central Board of Health should be obtained to —

- (a) the mode of subdivision into the separate lots,
- (b) the means of access to each lot, and
- (c) the provision for drainage.

District planning does not relate to buildings only. By section 140 (3) (b), a planning scheme may provide for division of an area into residential, industrial and agricultural areas.

I am therefore of the opinion that the words "for any purpose whatever" in section 135(1) of the Public Health Ordinance, 1934 must be construed as having their ordinary and natural meaning.

I may here point out that by section 161 A of the Public Health Ordinance, 1934 (No. 15), as enacted by section 3 of Ordinance No. 17 of 1938, power is conferred on the Governor in Council to exclude from operation, among other provisions, section 135 (1) or any part thereof in respect of any area defined in the Order. Any hardship which, in relation to any area of land, may in practice result from observance of the requirements of section 135 (1) can therefore be ameliorated.

The words "if the owner of any land desires" in subsection (1) of section 135 of the Public Health Ordinance govern the application of the subsection. The Central Board of Health, or the Registrar of Deeds, may consider, and rightly consider. —

- (a) that certain land may be very suitable for sale lease or rental, in separate lots; or
- (b) that certain land might be applicable for building purposes or may be very suitable for those purposes, or may be laid out for those purposes,—

but such land does not come within the meaning or the spirit of the subsection (see *LONDON & SOUTH WESTERN RAILWAY CO. v. BLACKMORE* (1870) L.R.4 H.L.610, 616, 617, *per* Lord Hatherley, L.C.) unless —

- (i) in the former case, the owner of the land desires to sell lease or rent it, in separate lots; and
- (ii) in the latter case, the owner of the land desires to lay it out, in separate lots, for building purposes. There must, in either case, be evidence of the desire. Mere suspicion is not enough.

There must be evidence from which the desire can fairly and reasonably be presumed.

The following questions arise for determination in this appeal:—

- (a) whether there is any evidence that the appellant, the owner of Plantation Uitvlugt, desires to sell, lease, rent or grant land there situate, including therein the parcel of land proposed to be leased to Methodist Missionary Association, in separate lots; and
- (b) whether there is any evidence that the appellant, the owner of Plantation Uitvlugt, desires to lay out land there situate, including therein the parcel of land proposed to be leased to Methodist Missionary Association, for building purposes, in separate lots.

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To each of these questions, the answer is clearly in the negative. There is, for instance, not a title of evidence that the transaction, which purports to be an isolated transaction of a proposed lease for Church purposes, is otherwise than it purports to be, or that it is part of a larger transaction involving other lots. The words "separate lots" are dominant words in the interpretation of section 135(1) of the Public Health Ordinance, 1934.

For the above reasons the appeal is allowed, and it is hereby declared that the provisions of section 135 of the Public Health Ordinance, 1934 (No.15) do not apply to the lease which is the subject matter of this appeal and that it is competent for the Registrar of Deeds to certify the abovementioned lease for passing, without the plan of the land to be leased being approved by the Central Board of Health.

*Appeal allowed.*

CHARLES RAMKISSOON JACOB,

Plaintiff

v.

AYUBE MOHAMED EDUN and JOSEPH N. BUTLER,

Defendants.

1945. No. 1.—DEMERARA.

BEFORE DUKE, J. (ACTING) IN CHAMBERS:

1946. APRIL 15, 24 ; MAY 18.

*Practice and procedure—Interrogatories—Action of libel—Defence—Fair comment in rolled-up form of plea—Interrogatories cannot be directed—To compel defendant to specify which of the words complained of are expressions of fact, or which are expressions of opinion.*

*Practice and procedure—Interrogatories—Action of libel—Defence—Qualified privilege—Interrogatories may be directed—As to steps and inquiries taken or made by defendant, before publication of words complained of, to ascertain whether they are true or not.*

*Practice and procedure—Interrogatories—Action of libel—Defence—Fair comment in rolled-up form of plea, and qualified privilege—Interrogatories not ordered—As to steps and inquiries taken or made, before publication of words complained of, to ascertain whether they are true or not.*

A defendant who pleads fair comment in the rolled-up form of plea to an action of libel in relation to a publication in a newspaper cannot be compelled, by way of interrogatories, to specify, before the trial of the action, which of the words complained of are expressions of fact, or which of them are expressions of opinion.

Where the defence of qualified privilege is pleaded to an action of libel, it is competent for the Court to require the defendant to answer interrogatories containing questions as to the steps and inquiries taken or made by him, before publication of the words complained of, to ascertain whether such words are true or not.

Where, however, the defence of fair comment in the rolled-up form of plea, as well as the defence of qualified privilege, are pleaded to an action of libel, the Court refused to make such an order.

SUMMONS by the plaintiff Charles Ramkissoon Jacob to test the validity of the objections raised by the defendants Ayube

Mohamed Edun and Joseph N. Butler to answering certain interrogatories delivered to them for answer.

*J. A. Luckhoo*, junior, for the plaintiff, the applicant herein.

*A. M. Edun*, for the defendants, the respondents herein.

*Cur. adv. vult.*

DUKE, J. (Acting): The writ in this action was filed on the 2nd January 1945 by the plaintiff CHARLES RAMKISSOON JACOB for damages for libel alleged to be contained in issues of the Labour Advocate newspaper of the 24th September 1944 and the 12th November 1944, and in previous issues of the newspaper. The defendants to the writ of summons were: (1) The Man Power Citizens Association a trade union registered under the Trades Unions Ordinance, Chapter 57; (2) AYUBE MOHAMED EDUN, General President, AMOS A. RANGELA, Treasurer, and JEENARINE SINGH, Executive Member, of the said Man Power Citizens Association, as Trustees of the said Man Power Citizens Association; (3) AYUBE MOHAMED EDUN; and (4) JOSEPH N. BUTLER.

By Order of the Court dated the 9th October 1945 the plaintiff was given leave to discontinue his action against the defendant The Man Power Citizens Association; and by order of the Court made on the 15th April 1946 the plaintiff was given leave to discontinue the action against AYUBE MOHAMED EDUN, General President, AMOS A. RANGELA, Treasurer and JEENARINE SINGH, Executive Member, of The Man Power Citizens Association as Trustees of the said Man Power Citizens Association.

The plaintiff's action is now against AYUBE MOHAMED EDUN and JOSEPH N. BUTLER only. The defendant EDUN is sued because he is the Editor of "The Labour Advocate", and the defendant BUTLER is sued because he is the printer and publisher of the said newspaper. The defendants admit that they printed and published, in the Labour Advocate newspaper of the 24th September 1944 and the 12th November 1944, the words complained of by the plaintiff.

The Statement of Claim was filed on the 21st February 1945, the Defence on the 22nd October 1945, and the Reply on the 26th October, 1945.

The defendants have pleaded fair comment in the form of the rolled-up plea, as well as qualified privilege.

In his reply the plaintiff has pleaded that, in making the publications, the defendants were actuated by express malice.

On the 8th December 1945 a judge in Chambers gave leave to the plaintiff to deliver to the defendant EDUN certain interrogatories numbered 1 to 26 and to the defendant BUTLER certain interrogatories numbered 1 to 13, and directed that the interrogatories so delivered be answered by the respective defendants by affidavit. The interrogatories were delivered on the 10th December 1945. On the 13th December 1945 the defendants, by way of an affidavit sworn to by their solicitor, filed an answer to the interrogatories.

The defendants object to answering interrogatories numbered 1 to 10 on the ground that they were irrelevant and not bona-

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fide for the purposes of this action, and further that they are not material to any of the matters in question in this action.

The defendants object to answering interrogatories numbered 11, 12 and 13 on the ground that the "interrogatories required are in the nature of particulars to which the plaintiff is not entitled".

With respect to interrogatories numbered 14 and 15 the solicitor stated that he, was advised by counsel and verily believed, that the answers thereto are contained in an agreement between the plaintiff and the defendant EDUN dated 28th December 1939 the original of which agreement is in the possession of the plain-tiff. With respect to interrogatory numbered 16 the solicitor stated that the answer thereto was in the affirmative.

The defendant EDUN objects to answering interrogatories numbered 17 to 26 on the ground that they are not relevant and not bona fide for the purpose of this action.

On the 6th April, 1946 the plaintiff, with the leave of the Court, filed this summons to test the validity of the objections raised by the defendants.

On the hearing of this summons counsel for the plaintiff pointed out that the answer was sworn to by the solicitor for the defendants, and not by the defendants themselves. The answer to interrogatory numbered 16 is in the affirmative, and as a solicitor can make an admission of facts by notice in writing, there seems to be no good reason why he cannot make such admission in writing by affidavit. In respect to interrogatories numbered 1 to 15, and 17 to 26, legal submissions have been made. In the particular circumstances of this case I think that it was competent for the defendants' solicitor to make the answer on their behalf.

Interrogatories 1 to 13 relate to the defence of fair comment; and interrogatories 1 to 10 relate to the defence of qualified privilege. Interrogatories 11 to 13 relate to the steps and inquiries taken or made by the defendants, before publication of the words complained of, in so far as those words are expressions of opinion. Interrogatories 1 to 10 are the complement of interrogatories 11 to 13, and they relate to the steps and the inquiries taken or made by the defendants, before the publication of the words complained of, in so far as those words are expressions of fact. In order to answer interrogations 1 to 13, the defendants would first have to separate the expressions of opinion from the expressions of fact, in the words complained of. It is, however, a well-settled rule of procedure that a defendant, who pleads fair comment in the rolled-up form of plea, as the defendants have done in this case, cannot be compelled, before the trial of the action, to specify which of the words complained of are expressions of fact, or which are expressions of opinion. In these circumstances in so far as interrogatories 1 to 13 relate to the defence of fair comment, no order will be made requiring the defendants to answer them, or any of them.

It is well-settled that where the defence of qualified privilege is pleaded to an action of libel, it is competent for the Court to

require the defendant to answer interrogatories containing questions as to the steps and inquiries taken or made by him. before publication of the words complained of, to ascertain whether such words are true or not. Precedents of such interrogatories, which are similar to interrogatories 1 to 10 herein, are to be found in GATLEY on Libel and Slander, 1938, 3rd edition, pages 844,845.

Mr. J. A. LUCKHOO, junior, counsel for the plaintiff, has submitted that the right of the plaintiff to require that the defendants be ordered to answer interrogatories 1 to 10 which relate to the defence of qualified privilege, cannot be defeated by the defendants pleading, in addition thereto, fair comment in the rolled-up form of plea.

On the other hand, Mr. AMINEEN M. EDUN, counsel for the defendants, has submitted that if the defendants were required to answer interrogatories 1 to 10 they would first have to separate expressions of fact from expressions of opinion in the words complained of; that the plaintiff cannot deprive the defendants of the benefits of pleading fair comment in the rolled-up form of plea, merely because the defendants have also pleaded qualified privilege; and that, in any event, the Court has a discretion which, he submitted, should be exercised in favour of the defendants.

It cannot be suggested that the defence of fair comment, as pleaded in this action, is a sham, or is otherwise an abuse of the process of the Court.

At the trial of the action, it would be for the trial judge to determine, on the conclusion of the case, which of the words complained of are, in relation to the defence of fair comment, expressions of fact, and which of them are expressions of opinion.

The trial judge may be embarrassed, or the defendants may be prejudiced, by reason of the circumstance that the findings of the trial judge as to what are the expressions of fact in the words complained of, do not coincide with, or are entirely different from, what the defendants, when answering interrogatories 1 to 10 in relation to the plea of qualified privilege, considered to be expressions of fact.

Assuming (but not deciding) that the submission of counsel for the plaintiff is well-founded, I do not think, in view of the circumstances above stated, that it would be proper for an order to be made requiring the defendants, in relation to their plea of qualified privilege, to answer interrogatories 1 to 10.

Counsel for the plaintiff has submitted that the defendants should be ordered to make a further and better answer to interrogatories numbered 14 and 15. The plaintiff has, however, not alleged that he is not in possession of the agreement referred to by the defendants in their answer. The best evidence of the contents of an agreement in writing is the agreement itself.

If the answers to the interrogatories are relevant, the plaintiff can lead evidence in relation thereto by producing the original agreement. The plaintiff does not allege that the answer to the interrogatories 14 and 15 cannot be ascertained from a perusal of the agreement. I am not convinced that time or costs will be saved by requiring the defendant to answer those interrogatories.

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A further and better answer to them is therefore not required.

Interrogatory 16 has already been answered in the affirmative, and a further and better answer thereto will not be ordered.

If the answer to interrogatory 17 is relevant, it can be proved by the production of a copy of the newspaper referred to. No time or costs will be saved by requiring the defendant EDUN to answer this interrogatory; He will therefore not be required to answer it.

Interrogatory 18 is unnecessary. If the defendant EDUN answers this interrogatory in the negative, the plaintiff would, not thereby be deterred from cross-examining him at the trial, if he goes into the witness box. No time or costs will be saved if the defendant EDUN is required to answer this interrogatory and an order to that effect will not be made.

I am not convinced that either time or costs will be saved by requiring the defendant EDUN to answer interrogatory 19. If he goes into the witness-box, he will be cross-examined on this point, whatever be his answer to the interrogatory. If he does not so go, the plaintiff will ask the trial judge to draw the inference which he the plaintiff thinks should be drawn. No order will be made requiring the defendant EDUN to answer this interrogatory. The Man Power Citizens Association, and the trustees of the said Association, are no longer defendants. It is not every question that may be asked on cross-examination that may be the subject of an interrogatory. No order will be made requiring the defendant EDUN to answer interrogatories 20, 21 and 22. The plaintiff alleged in his indorsement of claim that the libels complained of were published in the Labour Advocate newspaper of the 24th September 1944 and the 12th November 1944 and in previous issues of the said newspaper. In his statement of claim the plaintiff pleaded, in paragraphs 8 and 9, the publications of the 24th September 1944, and the 12th November 1944; and, after pleading what the words meant and were understood to mean, he alleged in paragraph 15 that "the defendants have, for some years past, published and continue to publish the said libels concerning the plaintiff". The plaintiff did not specify any of the issues of the Labour Advocate newspaper in which the libels were published prior to the 24th September 1944. The defendants admitted the publication of the alleged libel on the 24th September 1944 and the 12th November 1944.

The plaintiff now wishes to rely on a particular publication on the 3rd June 1940, and to require the defendant to answer an interrogatory on it. The plaintiff does not allege in his statement of claim that the defendant EDUN is, or ever was, the owner of the Labour Advocate newspaper: he alleges in paragraph 4 of his statement of claim that the Man Power Citizens Association is, and was at all material times, the proprietor of the Labour Advocate newspaper. The Man Power Citizens' Association, and the trustees of that Association, are no longer defendants to this action. If changes in the ownership of the aforesaid newspaper are relevant, they can easily be proved in the manner and form provided by the Newspapers Ordinance, chapter 81, section 7 (2).

No order will be made requiring the defendant EDUN to answer interrogatories 23 and 24.

Interrogatory 25, as drafted, would be difficult to answer. In any event, if it were answered in the negative, the plaintiff would still cross-examine the defendant on the point if he went into the witness-box. No order will be made requiring the defendant EDUN to answer interrogatory 25.

If interrogatory 26 is relevant, the plaintiff can lead evidence on that point at the trial, or the defendant EDUN can be cross-examined thereon if he goes in the witness-box. The plaintiff had expressly pleaded that at all material time. The Man Power Citizens' Association was the owner of the Labour Advocate Newspaper, but he seeks to have the defendant EDUN answer interrogatories in which there is an implication that at some material time the newspaper was not so owned. No order will be made requiring the defendant EDUN to answer interrogatory 26.

For the above reasons, the plaintiff's summons, in so far as it relates to interrogatories, is dismissed with costs, and I certify for counsel.

*Summons dismissed.*

Solicitors: *Carlos Gomes*, for the applicant (plaintiff); *.H. A. Bruton*, for the respondents (defendants).

J. WAJIDALLY v. J. N. BUTLER & ANR.  
 JAMES WAJIDALLY, Plaintiff,

v.

JOSEPH N. BUTLER and THE MAN POWER CITIZENS'  
 ASSOCIATION, a registered trade union by their trustees  
 A. M. EDUN, A. A. RANGELA, and S. M. SHAKOOR,  
 Defendants.

[1944. No. 425.—DEMERARA.]

BEFORE BOLAND, J. in Chambers:

1945. September 27, 28; 1946. January 7.

*Trade unions—Actions against—In registered name—May be brought.*

*Trade unions—Torts—Non-liability for—Trades Unions Ordinance, cap. 57, section 7 (1).*

*Practice and procedure—Statement of claim—Action of libel against trade union—Libel printed and published in newspaper the property of trade union—No reasonable cause of action disclosed—Application to strike out statement of claim—Not made until after action advertised for hearing—Statement of claim struck out—Action dismissed—Rules of Court, 1900, Order 17, rule 30.*

A registered trade union may be sued in its registered name, and there is no necessity for an action against a registered trade union to take the form of a representative action, that is to say, an action against certain specified members or officers of the union for and on behalf of all the members of the union, nor is it necessary to join the trustees so as to be enabled to get satisfaction of a judgment out of the funds of the trade union.

*Taff Vale Railway Company v. The Amalgamated Society of Railway Servants* (1901) A.C. 426, applied.

An action does not lie against a trade union in respect of a libel printed and published in a newspaper which is the property of the trade union.

*Vacher & Sons Ltd. v. London Society of Compositors* (1913) A.C. 107, 126, 127, and *Rickards v. Bartram* (1908) 25 T.L.R. 181 applied.

Where such an action was brought, it was dismissed on application made by the trade union by way of summons under Order 17, rule 30 of the Rules of Court, 1900. It is immaterial that such a summons is not taken out until after the action is advertised for hearing.

SUMMONS by THE MAN POWER CITIZENS' ASSOCIATION for an order dismissing the said Association, a trade union registered under the Trades Unions Ordinance (Chapter 57), from the action.

*A. J. Parkes*, for the applicant.

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

*Cur. adv. vult.*

BOLAND, J.: This is a summons taken out by one of the defendants applying for dismissal from the action.

The proceedings were commenced by a Writ of Summons issued on the 1st November 1944 and are intituled — "James Wajidally, Plaintiff and Joseph Butler, Printer and Publisher of the "Labour Advocate", and the Man Power Citizens' Association,

a Trade Union registered under the Trades Unions Ordinance, Chapter 57, by their Trustees Ayube M. Edun, President, Amos A. Rangela, General Secretary, and Sheik M. Shakoor, Treasurer, whose registered office and place of business is at lot 61 Hadfield Street, Georgetown, Proprietors of the 'Labour Advocate', Defendants". The endorsement on the writ claims damages for an alleged libel published in the "Labour Advocate" on the 20th August 1944.

By the decision in *Taff Vale Railway Company v. The Amalgamated Society of Railway Servants* (1901) A.C. 426 it was definitely settled that a registered trade union may be sued in its registered name, and that there is no necessity for an action against the trade union to take the form of a representative action — that is an action against certain specified members or officers of the union for and on behalf of all the members of the Union — nor is it necessary to join the trustees so as to be enabled to get satisfaction of a judgment out of the union's funds.

It is clear from the title of this action that the Writ was directed against two defendants only — namely Joseph N. Butler, and the Man Power Citizens' Association the Editor and the Proprietors respectively of the "Labour Advocate", the names of the trustees being added as representatives of the Trade | union apparently under the mistaken belief that only thereby could the trade union be sued and the funds of the union be made available for satisfying any judgment recovered against the Trade Union. That the trustees were not intended to be joined as parties is also manifest by the absence of any statement on the Writ that they are sued as such trustees in keeping with the directions in that behalf by Order 3, Rule 4, (which is Order 4, r. 4 in our local Rules of Court). Consequently, although as shown by his endorsement of service on the writ returned by him into Court, the Marshal purported to effect service on each of the three trustees at Lot 61 Hadfield Street, which is the address of the registered office of the Trade Union, and not on the trade union itself, the duly authorised solicitor for the trade union who is also the solicitor for the defendant Butler, very correctly, in addition to entering an appearance for the defendant Butler, entered an appearance for the Man Power Citizens' Association, the secondnamed defendant — and not for the trustees. No appearance has ever been filed by the trustees or on their behalf.

I have been at some pains to indicate the true position of the trustees in this action because of a submission, as I understood it, of counsel for the plaintiff, to which reference is made by me later and which was based on the contention that the trustees are joined also as defendants, I may say at once that I definitely hold that the trustees are not parties to the action, their inclusion being unnecessary and mere surplusage.

After the entry of appearance by defendants in the manner mentioned above, the plaintiff on the 21st November 1944 filed his statement of claim wherein it is alleged that the defendant Butler is the editor and the second named defendants are a trade

## J. WAJIDALLY v. J. N. BUTLER &amp; ANR

union and the owners of the "Labour Advocate" in which a certain defamatory letter was published — the letter is set out verbatim. No statement of defence having been filed, the plaintiff on the 18th January 1945, filed his request with the Registrar that the matter should be set down on the Hearing List in default of defence and the Registrar by Notice published in the *Official Gazette* on the 18th August, 1945, fixed the hearing for the 24th September, 1945.

It was only on the 20th September last, just four days prior to the date fixed for hearing — that the Summons now before me was taken out by the solicitor for the defendants, in which application is made that "the second named defendants and their trustees should be dismissed from the action". There is an application also that the defendants do have fourteen days to file their defence and for costs.

In the affidavit filed in support of the application for dismissal, it is alleged merely that "as against the second named defendant and their trustees the Statement of Claim discloses no cause of action such as can be entertained by the Court, and that the Court is without jurisdiction to hear and determine such action". The ground for such application is not therein mentioned, but at the hearing in reply to enquiry from me, counsel for the Defence declared the ground to be, — and counsel for the plaintiff frankly admitted that he had understood that was to be the contention that a registered trade union is by virtue of Section 7 of the Trades Unions Ordinance Chapter 57 to be held immune from all actions for tort.

Section 7 (1) of Chapter 57, which reproduces verbatim Section 4 (1) of the Trades Disputes Act 1906 in England enacts as follows —

"An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the union, in respect of any tortious act alleged to have been committed by or on behalf of that Union shall not be entertained by any Court";

And Section 7 (2) reads "Nothing in this section shall affect the "liability of the trustees of the trade union to be sued in the events "provided by section fifteen of this Ordinance except in respect of any "tortious act committed by or on behalf of the Union in contemplation or "furtherance of a Trade dispute". This subsection is the same as subsection 2 of Section 4 of the Trades Disputes Act 1906, the exception provided by section 15 of the Ordinance being referred to in the English Act as Section 9 of the Trades Unions Act of 1871 from which Section 15 of our Ordinance was taken.

*In limine* at the hearing of the Summons counsel for the plaintiff raised the objection that the application to dismiss was not made within a reasonable time and should therefore be disallowed. It was pointed out also that the trade union defendant had entered an unconditional appearance to the Writ which had clearly set out that the cause of action was for the tort of libel. The plaintiff, it was urged, would suffer an irreparable hardship by the dismissal of the defendant trade union at this late hour,

since he would be unable to pursue his Claim against any person responsible in the place of the defendant trade union in view of a period of more than one year having elapsed since the date of the publication of the libel- in accordance with the provisions of Section 9 of the Limitations Ordinance, Chapter 184. In support of this submission counsel for plaintiff referred to Order 70 rule 2 (Order 51 rule 2 in our Local Rules of Court) and to the case of *In Re Orr-Ewing* (1883) 22 CD. 456, which is cited by the Annual Practice as a case, where the question of jurisdiction was not allowed to be raised at the trial after an entry of unconditional appearance, by the defendant. But this application, I may remark, is not one coming under Order 70 Rule 2 which provides for cases where it is sought to set aside a proceeding for irregularity merely. In cases of mere irregularity of procedure, it is insisted by this Rule of Court that the application to set aside must be made within a reasonable time and not after any fresh step is taken after knowledge of the irregularity. Rather this application is made by virtue of Order 25 Rule 4 (Order 17 Rule 30 in our Local Rules of Court) which provides "The Court or a Judge may order any pleading to "be struck out, on the ground that it discloses no reasonable cause of "action or answer, and in any such case or in the case of the action or "defence being shown to be frivolous or vexatious, the Court or Judge "may order the action to be stayed or dismissed or judgment to be entered "accordingly as may be just".

If this defendant's contention is correct that the case comes within the ambit of Section 7 (1) of Chapter 57, it seems immaterial when the objection is taken, as the court is imperatively directed by the Ordinance not to entertain any such action. As Lord Moulton said in *Vacher & Sons Limited v. London Society of Compositors* (1913) A.C. 107 at p. 127 "It "amounts to a statutory "prohibition to all Courts against entertaining an "action of tort against a trade union. This renders it obligatory upon the "Court to stay such an action so soon as it is aware of its existence. To "allow it to come to trial would in my opinion be entertaining it". Also per Lord Shaw of Dumferline at p. 126 — "Nor is the imperative doubtful. No "Court is to entertain such an action. Apart altogether from the pleadings "it is *pars judicis* to stop the case whenever its true nature is revealed. To "entertain the action would be to disobey the Legislature, and would on "the part of "the Judiciary constitute a usurpation". And so Darling J. in the course of the argument in *Rickards v. Bartram and others* (1908) 25 Times L.R. p. 181 when it was submitted that as the Statute was not pleaded the court should not hear the contention, exclaimed, of course not intending his reference to the penalty to the defaulting judge to be taken seriously — "But I am bound to take notice of it, otherwise I would be held "liable to the penalties of a *praemunire*". As to the case of *Re Orr-Ewing* cited by counsel for plaintiff, this was not a case where the Court refused to consider the question of jurisdiction although by Statute debarred from jurisdiction. In that case the Court in England held that it had jurisdiction to make an administration order as against joint executors who had proved a will in Scotland and

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had sealed probate as affecting assets in England. Some executors were resident in England but the bulk of the assets was in Scotland. As the Scottish defendants had submitted to the jurisdiction by an unconditional appearance the question whether it would not be more convenient to have the matter disposed of by the Court in Scotland was not allowed to be raised. I therefore rule against this objection *in limine* holding that a Court is bound to consider whether it can entertain the action notwithstanding the delay on the part of the defendant in taking out the summons to set aside the proceedings.

In support of the claim to immunity from all actions for tort the defendant trade union has invoked the authority of the case of *Vacher & Sons Limited v. London Society of Compositors* (supra) — a decision of the House of Lords affirming the judgment of the Court of Appeal that Section 4 subsection 1 of the Trades Disputes Act 1906 is general in its application and is not limited to tortious acts committed in contemplation or in furtherance of a trade dispute, and that any such action will be summarily dismissed upon an application under Order 25 Rule 4.

Counsel for plaintiff whilst conceding that it is not necessary for a trade dispute to exist contends however, that a trade union cannot successfully claim the privilege of immunity where the tort committed is an act not coming within the scope of the business of the trade union. As an instance of such a tort counsel made reference to a possible case of a wrong by a trade union in the nature of a private nuisance arising out of facts that are not concerned with the business of a trade union.

For example, would a nuisance caused by frequent noisy social gatherings on trade union premises come within the immunity? It is to be noted that Danckwerts K.C. in his submissions for the appellant before the House of Lords in *Vacher & Sons Limited v. London Society of Compositors* (supra) as reported at page 110, had submitted that "some limitation must be placed upon the generality of the words of sub section (1) of Section 4 of the Trades Disputes Act in order that a reasonable interpretation should be put on the subsection, and he put this query similar to that of counsel for plaintiff in this case. "Suppose", he asked, that premises in the occupation of a trade union had been allowed to get into disrepair and that as a consequence of that disrepair a brick had fallen from the building into the street and injured a passerby, or that as such occupier the trade union committed a nuisance whereby a third party were injured. Can it be said that the trade union is under no liability to the injured party in any of those cases?" True the contention for the appellant before the House of Lords in that case was that the Legislature exempted trade unions from liability only when the tort was committed "in furtherance of a trade dispute" — a feature absent in that case, but it is significant that their Lordships who in their respective opinions all insisted that there was no such qualified immunity as claimed, never even hinted at the possibility of there being any derogation from absolute immunity by reason of any circumstances such as are contemplated in the hypotheses instanced by Danckwerts, K.C.

In this case, however, there can be no difficulty as to the alleged tort being committed, if the plaintiff's statement of claim be accepted, in relation to a matter coming within the scope of the business of the defendant trade union. The publication of a newspaper for the ventilation and redress of grievances of workmen throughout British Guiana would certainly be one of its legitimate functions. It surely makes no difference whether representations as to alleged wrongs suffered by workmen at Plantation Blairmont by the alleged neglect or incompetence of the hospital dispenser take the form of a letter published in that newspaper, as is the case in this matter, or is the subject of editorial comment.

Accordingly I am clearly of the opinion that this claim against the trade union for libel comes within the absolute protection afforded by Section 7 (1) of Chapter 57 and in the circumstances I hold that the Court is not competent to entertain the action against the trade union defendant.

There remains the submission of counsel for plaintiff already referred to when discussing the nature of the place occupied by the trustees in these proceedings. Counsel contended that the trustees are themselves defendants and that they do not come within the protection afforded the trade union by Section 7 (1) of Chapter 57. I have already declared my view that the trustees are not parties to the action — and that it seems that they were included only in a representative capacity in the belief that only thus the plaintiff would be afforded the opportunity of satisfying any judgment he may recover out of the union's funds in their hands without the necessity of instituting fresh proceedings against them for this purpose. I do not agree with the submission of counsel for plaintiff that the application in this summons that "the second named defendants and their trustees be dismissed from this action" is an acknowledgment by the defence that the trustees hold a position separate and distinct from the trade union. Having regard to the view I take that the trustees are not parties in these proceedings there would be no need to consider whether subsection 2 of Section 57 would debar the trustees from an action for tort.

What is the right construction of subsection 2 of section 4 of the Trades Disputes Act of 1906 has apparently not been definitely settled by judicial decision, although there have been judicial pronouncements by way of *obiter dicta*. It would seem certain however that the statutory immunity conferred on trades unions by Section 4 (1) was not meant to be circumvented by allowing recourse against trade union funds through the medium of actions against their trustees for torts if not arising out of a trade dispute. It has been decided that officers and servants of trades unions committing torts while acting for and on behalf of trade unions cannot claim for themselves personally the immunity which the unions themselves enjoy.

As I stated above the trustees are not parties to this action and consequently although there is no trade dispute with which the libel is associated their liability cannot be considered in this

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action whatever be the correct interpretation of Section 7 subsection 2 of Chapter 57.

I shall therefore order that the action be dismissed as relating to the second named defendant — the Man Power Citizens Association sued, as the Writ states, by their trustees, Ayube M. Edun, President, Amos A. Rangela, General Secretary and Sheik M. Shakoor, Treasurer.

As regards the defendant Joseph Butler, fourteen days from the date hereof are allowed him for filing his Statement of Defence with leave to plaintiff to file a Reply if necessary within the usual time in such cases.

Concerning the question of costs, I felt inclined at first not to allow the defendant trade union its costs, in view of the fact that there has been so much delay on its part in bringing to the notice of the Court that there is no jurisdiction to entertain such an action against the Union, with the result that plaintiff may have incurred costs in the preparation of his case for trial. But on further consideration of the matter I feel that if the defendant trade union had made the submission of no jurisdiction at the trial itself, plaintiff would not have been able to resist the claim that costs should follow the event.

In the circumstances there will be costs for the defendant trade union against the plaintiff and I certify that as to this issue the matter is fit for counsel.

In allowing the defendant Butler 14 days to file his defence, I order him to pay plaintiff's costs of the summons but limited to the costs of one day's hearing and I do not certify that this is fit for counsel.

*Action dismissed.*

Solicitors: W. D. Dinally, for applicant (defendant Man Power Citizens Association); E. A. Luckhoo, O.B.E., for plaintiff.

JOSEPHINE CHRISTINA COLLINS.  
 Plaintiff,  
 v.  
 WAJID ALLY.  
 Defendant.

1945. No. 278.—DEMERARA.

BEFORE LUCKHOO, C.J. (ACTING): 1946. JANUARY 22; APRIL 13;  
 MAY 14, 16, 27.

*Negligence—Of defendant—Incapacitating him from taking care to avoid consequences of plaintiff's negligence—May be ultimate negligence—For which defendant is liable—Notwithstanding contributory negligence of plaintiff.*

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, applied.

ACTION brought by the plaintiff Josephine Christina Collins as widow of Alfred Willis Collins and for the benefit of herself and of the daughter and mother of the said Alfred Willis Collins against the defendant Wajid Ally for damages for negligence under Part I of the Accidental Deaths and Workmen's Injuries

## J. C. COLLINS v. WAJID ALLY

(Compensation) Ordinance, Chapter 265.

*C. Shankland*, for the plaintiff.

*C. V. Wight*, for the defendant.

*Cur. adv. vult.*

LUCKHOO, C.J.: The collision to which this action relates occurred on the 18th day of July, 1944, in Water Street, in the city of Georgetown, on a road surface 35 feet in width shortly after 11 o'clock in the forenoon, resulting in the death of Alfred Willis Collins, a tally clerk, forty-six years of age.

The deceased had shortly before met one Albert Archer, a clerk employed at Sandbach Parker and Company Limited, outside of the premises of that firm, and together they started to ride on their bicycles north in Water Street from that point when rain began to fall and caused them to seek shelter in the store of the Meat Company nearby. Soon after they proceeded on foot along the western pavement wheeling their bicycles and as they got to the premises of Rodrigues and Rodrigues not far from the corner of Holmes and Water Streets they decided to cross the road to the eastern side, but before doing so satisfied themselves that it was safe for that purpose. The deceased then mounted his bicycle and began the crossing, Archer walked twelve feet further north before he followed suit and when he was about the centre of the width of the roadway, he espied in motion a motor Bus (afterwards identified to be motor Bus No. 3275 owned by the defendant) coming northwards 40 feet to the south of the deceased who was then over the centre of the roadway.

That 'bus Archer described was travelling at a very fast rate of speed, the driver of which only blew the horn when it was about to collide with the bicycle of the deceased. The right front fender then came in contact with the back wheel (right side) of Collins' bicycle, the impact throwing Collins on to the roadway causing him to sustain injuries from which he became unconscious and died at 9.55 p.m. on the said day at the Public Hospital, Georgetown, from cerebral hemorrhage consequent on the rupture of the arteries of the brain.

The plaintiff is the widow of the deceased and has brought this action under the provisions of the Accidental Deaths and Workmen's (Compensation) Ordinance for the benefit of herself, her daughter Patricia Angela Collins, and Helen Young the aged mother of the deceased.

She alleges in her claim that the driver of the 'bus was guilty of negligent driving which brought about the collision in that he drove the said 'bus at a fast speed on the wrong side of the road, neglected to keep a proper look-out and failed to sound his horn. She also alleges that rain was falling at the time and the 'bus had no wind-shield wiper. The result was that the driver was unable to see clearly for any distance in front of him.

The defendant in his defence denies the negligence attributed to his driver and himself and alleges that the deceased was solely to blame for what occurred in that he suddenly and without any notice or warning whilst cycling along Water Street on the western side in a northerly direction swung across from that side

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towards the eastern side in front of the 'bus which was then travelling on the western side of the roadway and came in contact with the right front fender of the 'bus and was thrown from his bicycle. The defendant pleaded in the alternative that the deceased contributed to the accident by his negligence.

Learned counsel for the defendant in his address submitted that there was no evidence led on behalf of the plaintiff which on a close examination establishes negligence on the part of the driver of the bus sufficient to satisfy the burden of proof which rests on a plaintiff in collision cases, and that the defendant's version was more consistent with the description of the accident as given even by the plaintiff's witnesses, unless the Court found that the driver was not keeping a proper lookout, or that the wind-shield by reason of becoming covered with moisture due to weather conditions then prevailing intercepted a clear vision through it.

In all collision cases there can never be two cases alike on facts. They differ in a variety of ways and not infrequently the application of what is judicially considered as well settled principles becomes increasingly difficult when a judge is set the task of separating the wheat from the chaff and to assess the true value of that which has no legal spuriousness.

I have kept steadfastly before me in approaching consideration of the evidence which I accept and set down in the form of a narrative of what occurred on the day when the plaintiff's husband met his death, the first guiding principle which should be ever present in the mind of a tribunal that there must exist sufficient affirmative proof of negligence on part of the defendant.

The accident occurred in the light of day at a time when the road was clear of traffic. There were three vehicles on a wide roadway of 35 feet, two cyclists, the deceased and Archer, and the motor bus driven by the defendant's servant Mohamed Khan. The bus was a 12 seater Ford, 15 h.p. and was being driven before the accident at a speed exceeding 10 miles per hour, and at a fast rate.

This bus plied for hire between the Stabroek Market and Kitty, and Water Street was part of the route over which it ran. Save that it had no wind-shield wiper the bus was in all respects equipped for the carriage of passengers.

It had a right-hand drive and there was a seat next to the driver and on his left. The length of the bus measured 12 feet, and was 4 feet in width. The side blinds, presumably made of canvas, were down; the plate glass wind-shield was closed. Rain drizzled. There were at times light and heavy showers. The wind-shield in those circumstances required a wiper whether automatic or manual to remove the moisture which must inevitably accumulate on it thereby impeding the vision of the driver of the bus a reasonable distance ahead.

For some distance from the point of collision the bus was driven more on the eastern side (or wrong side) of the road without any attempt on part of the driver to wipe the windshield which limited his vision to a distance of from 6 to 8 feet ahead.

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The deceased had traversed about 24 feet across the roadway and the bus was approximately 40 feet to the south of him at the time and travelling fast when the right front fender came in contact with the right side of the back wheel of the bicycle the force of which caused the deceased to be thrown on to the roadway. The horn was not sounded until the bus was about to collide with the bicycle. The brakes were then applied and the bus travelled for a distance of 82 feet before it was brought standstill.

The deceased was thereafter lifted from off the roadway to the eastern pavement from where he was placed in another bus which came from the south shortly after the accident and taken to the Public Hospital, Georgetown.

There he was admitted by Dr. Chickerie who examined him externally and discovered bruises *on* the side of his face and upper hip (left side). He was then semi-conscious and died later that day. The *post mortem* examination disclosed that the body was that of a well-built, well-nourished black adult male, age 46 years. His organs were all healthy and normal. The bone of the skull was unusually thick and the cause of death already described was consistent with his head coming in contact with a hard substance, the road in Water Street where the deceased fell as a result of the collision aforesaid.

From the foregoing based on my finding of facts I have come to the conclusion that the driver of the defendant's bus was guilty of negligence in the driving and management of it at the time of the collision and that he was solely to blame for what occurred.

He should have taken care when leaving the Stabroek Market for his journey to Kitty in weather conditions such as I have described if he had no wind-shield wiper, to clean the moisture from the glass of the same at intervals in order that he might see a reasonable distance ahead, and greater care when he persisted for some considerable distance up to the point of the collision to drive on his wrong side of the road. I find that he neglected to keep a proper lookout and drove at a rate of speed inconsistent with the safety of other users of the road in view of the limited vision he had in the circumstances described above. His negligence was the sole and effective cause of what occurred.

Had he been keeping a proper lookout and had deviated his course to his correct side there being more than ample room for him to have done so. the two vehicles would never have come in contact with each other.

There came into existence in my opinion a self-created in-capacity on the part of the defendant's driver when he did not take steps to clean the wind-shield and drove on his wrong side which, although strictly relevant when dealing with the question of the alleged contributory negligence on the part of the plaintiff, produced a chain of causation resulting in the negligence of the defendant sufficient to support the cause of action.

As to the plea of contributory negligence raised in paragraph 5 of the defence I do not from the evidence find the facts as stated therein, nor is the driver's evidence consistent therewith. There

is in my view nothing to warrant such an inference of negligence on the part of the deceased when he attempted to cross the road the defendant's vehicle being then a safe distance away. The deceased was entitled to assume that the driver would keep a proper lookout, or adopt means by which he could do so, for any person or vehicle using the roadway either coming towards him or crossing in front of him, and that he would deviate to his correct side in case of any emergency.

Assuming, however, that the deceased was guilty of contributory negligence in attempting to cross the road, he had already traversed more than 24 feet of it when he was struck at a point where he could not reasonably have expected the bus to continue in its course. In the case of *Guevara v. Robert Woodburn* decided by the Judicial Committee of the Privy Council and reported in (1943) L.R.B.G. 373, where on the assumption that the plaintiff was negligent in starting to cross the road and that his negligence must be deemed to be continuous, it was held that the plaintiff having at the time of the impact, arrived at what should to him have proved safe territory, he was only 4 feet from the opposite edge of the road he was crossing, the defendant's driver was responsible as he could at any moment of time before the actual impact by the slightest correction of his course towards his correct side, have avoided the collision, for he had 16 feet margin the other side.

In the instant case I accept the evidence of Archer that the deceased was struck down six feet from the edge of the road on the eastern side and that the defendant's driver by the slightest deviation to the left where he had over 20 feet of roadway could have avoided coming in contact with the deceased's bicycle.

Even if it could be said that the negligence of the deceased continued to the end, such negligence did not contribute to the collision which was entirely due to the defendant's driver continuing to drive on the wrong side of the road when it was apparent, or should have been apparent to him 40 feet away, that the deceased was crossing the roadway in front of him.

It was not a case of contemporaneous or synchronous negligence where the maxim *in pari delicto potior est conditio defendentis* would apply, and the plaintiff's case would fail.

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 causes — 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.”

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To drive on the wrong side of the road with moisture accumulating on your wind-shield which limits your view ahead is to create such an incapacity which would render any last minute effort on the part of the driver inefficacious.

If the bus was being driven, according to the driver, at the rate of 10 miles per hour, it is conceivable with the application of the brakes it could be brought to a standstill within a few feet which fact would hardly support the allegation contained in paragraphs (a) and (b) of the Defence on which contributory negligence on part of the plaintiff has been based. The plea of contributory negligence set up by the defendant in my opinion fails.

The principles on which damages are assessable under the Fatal Accidents Acts, 1846 and 1864 which correspond to that part of the Accidental Deaths and Workmen's (Compensation) Ordinance which pertains to actions are well settled. It must be proved that the person for whose benefit the action has been brought has suffered pecuniary loss by the death of the person injured such loss must be based on the amount of actual pecuniary benefit which the party might reasonably have expected to enjoy had the deceased person not been killed, either actual or expected.

The deceased was a man in the full vigour of health, forty-six years of age, and had earned for the first six months of 1944, a sum of \$388.81 as a tally clerk.

For the previous five years he was engaged as such with the firms of Booker Bros., Curtis Campbell and Sandbach Parker.

One can reasonably presume that he would have remained active until he had reached the age of 55, and would have been able to render gratuitous help which he gave to his mother for some time prior to his death.

His daughter Patricia Angela and the plaintiff (his widow) who lived with him were receiving and had every reasonable expectation, had he not died, of receiving pecuniary benefit from him sufficient to sustain their claims to damages. These facts have been proved to my satisfaction.

The plaintiff was married to the deceased on the 3rd day of January, 1925, and there is nothing to show that they did not live continuously all the years since then up to the time of his death, and that he did not contribute towards the upkeep of the house.

The evidence establishes that he made her a fortnightly allowance of at least \$20:—It is reasonable to assume that his daughter who was at his death and still is a pupil at the Charles-town Convent had reasonable expectation of receiving pecuniary benefits from him during his guardianship of her.

I assess damages in favour of Helen Young (mother) at \$80.64 on the basis that she would live at least to the biblical age of four-score. She was 76 when her son died, and has since attained the age of 78. He used to pay her rent of 7/- per month.

For Patricia Angela (daughter) who at the time of her father's death was 14 years of age I assess damages in the sum of \$300:— and for the plaintiff (widow) in the sum of \$540:—. She is also entitled to recover the amount of \$47.94 which she paid for the funeral expenses of the deceased.

## J. C. COLLINS v. WAJID ALLY

Judgment must therefore be entered against the defendant in favour of the plaintiff for the sum of \$1,028.58 to be apportioned as above. The plaintiff must have her costs of the action.

It may be felt that the amount of damages I have awarded is not sufficiently compensatory, but I ought to point out that under the Ordinance it is not a case of valuation in terms of money of a human life which has been lost, but to the injury resulting from the death to the parties for whom and for whose benefit the action is brought.

It is limited to the amount of the actual or expected pecuniary benefit which the party might reasonably have expected to enjoy.

Recent legislation in England the Law Reform (Miscellaneous Provisions) Act, 1934, has made provision, apart from damages which are awarded to the dependants of the deceased under the fatal Accidents Acts for a claim on behalf of the estate of a deceased person who has been killed in an accident to be brought for damages which a deceased person could have recovered if he had lived, for pain and suffering, for the injury itself and for the shortening of reasonable expectation of his life.

This Act has made a very considerable alteration in the law by stating that all causes of action subsisting at the death vested in deceased should survive for the benefit of the Estate.

*Judgment for plaintiff.*

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

BURGZORG v. HASSAN ALI

P. BURGZORG,

Appellant (Defendant).

v.

HASSAN ALI,

Respondent (Plaintiff).

1946 No. 56.—DEMERARA.

Before Full Court: LUCKHOO, C.J. (Acting), BOLAND, J.  
and DUKE, J. (Acting):

1946. APRIL 26; MAY 10, 15, 31.

*Appeal—From decision of Rent Assessor—Performing functions of a Magistrate—Lies to Full Court.*

*Rent restriction—Appeal from decision of Rent Assessor—Performing functions of Magistrate—Under Rent Restriction Ordinance, 1941 (No. 23) as modified by Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16)—Lies to Full Court—Defence (Georgetown Rent Control) Regulations, 1944 (No. 6), reg. 17—Does not apply to such decisions—Defence (Georgetown Premises Recovery Control) Regulations 1944, (No. 17).*

*Rent restriction—Recovery of possession—Ground on which claimed—That premises used by tenant or allowed by him to be used for an immoral purpose—Court not precluded from finding ground proved—Merely because no person convicted in respect of such use—Rent Restriction Ordinance, 1941 (No. 23), section 7 (1) (b); Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16), reg. 2.*

*Rent restriction—Recovery of possession—Tenant carrying on waterside brothel on premises let—Premises used by tenant or allowed by him to be used for an immoral purpose—Rent Restriction Ordinance, 1941 (No. 23), section 7 (1) (b).*

*Rent restriction—Recovery of possession—That premises used by tenant or allowed by him to be used for an immoral purpose—Immoral purpose—Interpretation of—Rent Restriction Ordinance, 1941 (No. 23), section 7 (1) (b).*

*Rent Restriction—Recovery of possession—Statutory grounds for—Notice to quit—Not necessary to state therein grounds on which recovery of possession is founded—Sufficient if they exist and are proved at hearing—Defendant entitled to adjournment if taken by surprise—Rent Restriction Ordinance, 1941 (No. 23), section 7 (1), (a), (b), (c), (d) and (e).*

*Rent restriction—Recovery of possession—Statutory grounds—Ground that tenant used premises or allowed them to be used for an immoral purpose—Not specified in notice to quit—May be proved at trial—Order for possession may be made on that ground—Tenant to be given ample time and opportunity to place his defence to this allegation properly before court—Rent Restriction Ordinance, 1941 (No. 23); Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16); Defence (Georgetown Rent Control) (Amendment No. 2) Regulations, 1945 (No. 44).*

*Rent restriction—Recovery of possession—Of business premises—Grounds for—Premises reasonably required by landlord for occupation as a residence for himself or for any member of his family, or for any person in good faith residing or to reside with him, or for some person in his actual whole-time employment—Premises reasonably required by*

## BURGZORG v. HASSAN ALI

*landlord for purposes of his own business—Rent Restriction Ordinance*. 1941 (No. 23), section 7 (1) (d); *Defence (Georgetown Rent Control) (Amendment) Regulations*. 1944 (No. 16), reg. 2; *Defence (Georgetown Rent Control) (Amendment No. 2) Regulations*, 1945 (No. 44).

Where, in pursuance of the Defence (Georgetown Premises Recovery Control) Regulations, 1944 (No. 17), the Rent Assessor performs the functions of a Magistrate under the Rent Restriction Ordinance, 1941 (No. 23) as modified by the Defence (Georgetown Rent Control) (Amendment) Regulations. 1944 (No. 16), an appeal from his decision lies to the Full Court and not to a Judge in Chambers.

Rule 17 of the Defence (Georgetown Rent Control) Regulations. 1944 (No. 6) does not apply to decisions of the Rent Assessor when functioning as a Magistrate in pursuance of the powers conferred by the Defence (Georgetown Premises Recovery Control) Regulations 1944 (No. 17).

Nowhere in the Rent Restriction Ordinance, 1941 (No. 23) nor in the Defence (Georgetown Rent Control) (Amendment) Regulations. 1944 (No. 16) is it enacted that a court is precluded from finding that a tenant has used the premises let or allowed them to be used for an immoral purpose unless some person has been convicted in respect of such use.

*Schneiders and Sons Limited v. Abrahams* (1925) 1 K.B. 301. distinguished.

Observations by Boland, J. on the interpretation of the words "immoral purpose".

per Boland, J. and Duke, J. (Acting): Where a tenant carries on a waterside brothel on the premises let to her, she is using the premises, or allowing them to be used, for an immoral purpose within the meaning of section 7 (1) (b) of the Rent Restriction Ordinance, 1941.

per Boland, J.: Where premises let are used by the tenant as a brothel, the premises are, at any rate so far as that tenant is concerned, decontrolled and free from the restrictions imposed on landlords by the Rent Restriction Ordinance. 1941, and the Defence Regulations amending the same.

per Luckhoo, C.J. (Acting) and Boland, J.: There is no necessity to state in the notice to quit upon which a claim to possession is founded under the Rent Restriction Ordinance, 1941 (No. 23), any one of the grounds specified in paragraphs (a), (b), (c), (d) or (e) of section 7 (1) of the Ordinance as amended by the Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16) and the Defence (Georgetown Rent Control) (Amendment No. 2) Regulations, 1945 (No. 44). It is sufficient if they exist and are proved at the hearing.

per Boland, J.: The defendant would, however, be entitled to an adjournment, if taken by surprise.

per Duke, J. (Acting): On a claim by a landlord for recovery of premises to which the Rent Restriction Ordinance, 1941 (No. 23) as amended by the Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16) and the Defence (Georgetown Rent Control) (Amendment No. 2) Regulations, 1945 (No. 44), applies, evidence may be led by the landlord, and an order for possession may be made against the tenant on the ground, that the tenant has used the premises or allowed them to be used, as a brothel, even though the notice to quit on which the claim for possession is founded does not specify that the premises are so used. The tenant should, however, be given ample time and opportunity to place his defence to this allegation properly before the Rent Assessor.

per Luckhoo, C.J. (Acting) and Boland, J.: By section 7 (1) (d) of the Rent Restriction Ordinance, 1941 (No. 23) as amended by regulation 2 of the Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16), it is competent for a magistrate to make

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an order for the recovery from a tenant of possession of business premises where the Magistrate is satisfied that the premises are reasonably required by the landlord for occupation as a residence for himself or for any member of his family or for any person in good faith residing or to reside with him. or for some person in his actual whole time employment.

*Tompkins v. Rogers* (1921) 90 L.J.K.B. 591, distinguished.

per Luckhoo, C.J. (Acting) and Boland, J.: By the Defence (Georgetown Rent Control) (Amendment) Regulations, 1945 (No. 44) it is competent for a Magistrate to make an order for the recovery from a tenant of possession of business premises where the Magistrate is satisfied that they are reasonably required by the landlord for purposes of his own business.

PRELIMINARY OBJECTION by the respondent Hassan Ali that the right of appeal from the decision of the Rent Assessor under fiction 7 of the Rent Restriction Ordinance, 1941 (No. 23), as amended by the Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16) and the Defence (Georgetown Rent Control) (Amendment No. 2) Regulations, 1945 (No. 44), lies to a judge in chambers and not to the Full Court.

*C. Vibart Wight*, for respondent.

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

*Cur. adv. vult.*

The judgment of the Court on the preliminary objection was delivered on the 10th May 1946 by the acting Chief Justice, as follows:—

At the very threshold of the argument by appellant's Counsel, Mr. Wight for the respondent raised the question of the right of the appellant to bring his appeal to this Court and referred us to regulation 17 of the Defence (Georgetown Rent Control) Regulations, 1944, (No. 6) which makes provision for an appeal from a decision of the Rent Assessor to a judge which under regulation 21 of the said Regulations shall be heard by a judge sitting in Chambers.

When the Rent Restriction Ordinance, 1941 (No. 23) was passed, the right to recover possession of dwelling-houses or of lands to which the Ordinance applies was restricted, at the time Jurisdiction was vested in a Magistrate under the Rent and Premises Recovery Ordinance, Chapter 92 to deal with such matters, subject to a right of appeal from a decision of the Magistrate on any claim or proceedings in respect thereof to the Full Court whose judgment or order shall be final.

By regulation 4 of the above-mentioned Regulations a Rent Assessor, referred to in those Regulations as "the Assessor", was appointed for the first time for the purpose of fixing the maximum rent of any premises to which the provisions of the Rent Restriction Ordinance are applicable. In performing the functions of his office under the Regulations the Assessor was to be regarded as a Magistrate. The right of appeal from his decision, however,

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was regulated by regulation 17, whereunder any landlord or tenant who is dissatisfied with his decision may appeal therefrom to a judge.

Up to 28th day of August, 1944, when the Defence (Georgetown Premises Recovery Control) Regulations 1944 (No. 17) were made, the Jurisdiction of the Assessor was limited to the assessment of rent. He had no jurisdiction to deal with any summons or application for the recovery of premises to which the Rent Restriction Ordinance, 1941, applies, but by these latter Regulations he is under his appointment to function not only as a rent Assessor but as a Magistrate and in his capacity as such Magistrate all summonses for the recovery of possession of premises to which the Ordinance or the Defence (Georgetown Rent Control) (Amendment) Regulations 1944 (No. 16) applied are returnable before him in his capacity as a Magistrate to be dealt with by him as such; to the exclusion of any other Magistrate who hitherto exercised jurisdiction in such matters under the Rent and Premises Recovery Ordinance, Chapter 92.

The present matter is in relation to an appeal from the Assessor in his capacity as a Magistrate and the question which has arisen is to what Court an appeal should be made.

We are of the opinion and so hold that the right to appeal from a Magistrate's decision in any matter lies to the Full Court of the Supreme Court, such right not having been abrogated in any way because the person (a Magistrate) from whose decision an appeal has been brought happens also to be the person who performs the duties of a Rent Assessor for the assessment of rent from which an appeal lies to a judge in chambers.

There is nothing in the Defence (Georgetown Premises Recovery Control) Regulations, 1944 which takes away the Statutory right given to a person in cases of recovery of possession of premises to appeal to the Full Court.

Such right could only be taken away or even suspended by clear and unambiguous words to that effect.

Accordingly we hold that the appeal has been properly brought before this Court.

The preliminary objection is therefore not sustained.

*Preliminary objection overruled.*

The Court proceeded to hear the appeal by the defendant P. Burgzorg from the decision of the Rent Assessor and Magistrate ordering possession of certain premises let by the plaintiff Hassan Ali to her to be surrendered to the plaintiff, on the ground that they were being used by the defendant as a waterside brothel. In the notice to quit on which the claim to possession was founded, the landlord stated that he required the premises for occupation as a residence for himself. On the first day of the hearing the plaintiff's solicitor stated in open court that he would adduce evidence that the premises let were used by the tenant as a common bawdy-house. Such evidence was led, the defendant led

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evidence in opposition, and the Magistrate found that the premises were being used by the defendant as a waterside brothel.

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

*C. Vibart Wight*, for respondent.

*Cur. adv. vult.*

LUCKHOO, C.J. (Acting): Three points of absorbing interest were advanced by Mr. Humphrys on behalf of the appellant in his arguments in this appeal from a decision of Mr. Stafford in his capacity as a Magistrate who made an order for possession in favour of the respondent with respect to premises situate at lot 12A Bentinck and Queen Streets, Georgetown.

The respondent had let these premises to the appellant as a boarding house at \$35:— per month, and on the 13th day of February, 1945, he gave her notice to quit and deliver up possession of them to him stating as his reason for determining the tenancy that he required the house for occupation as a residence for himself and his family.

It was not disputed at the hearing that under the Rent Restriction Ordinance, 1941, and the relevant regulations made under the Emergency Powers (Defence) Acts, 1939 and 1940 that the premises in question are business premises to which the Ordinance and Regulations apply, and that a landlord is precluded from obtaining recovery of possession of the same unless he could bring his case under one or more of the provisions contained in section 7(1) (a) to (f) of the Ordinance as amended by the Regulations.

These premises consist of three (3) bedrooms, a dining room, a sitting room, bath, lavatory and kitchen appropriately appointed to be used as a residence.

The three propositions propounded by counsel for the appellant may be summarised as follows:—

Whether under the law when the Order was made a landlord could recover possession of business premises for the use by him as a dwelling-house.

Whether it was competent and legal for the magistrate to make an order for possession on a ground other than that stated in the notice to quit, and

Whether the magistrate could on the evidence before him come to a conclusion that the appellant had used the premises for an immoral purpose without proof of a conviction of such an offence against the appellant in respect of the user of the said premises.

In order to adequately appreciate the reasons advanced in support of these propositions of law one must necessarily quarry into the provisions of the Ordinance and the Regulations made in 1944 and 1945, and to hammer out sufficient material to form the foundation on which the superstructure of a correct interpretation of the law could be built.

The rule by which a Court is to be guided in construing Legislative enactments is to construe them in their ordinary sense, unless such a construction would lead to absurdity or manifest

injustice. As was said by *Alderson B.* in the case of the *Attorney General v. Lockwood* (1842) 9 M&W 378 at p. 398 "Whether they be penal or "remedial to construe them according to the plain, literal, and grammatical "meaning of the words in which they are expressed, unless that "construction leads to a plain and clear contradiction of the apparent "purpose of the Act, or to some palpable and evident absurdity."

There can be no doubt that when the Rent Restriction Ordinance, 1941, was passed, it aimed at the protection of tenants of certain classes of dwelling-houses in certain specified areas and at a restriction of the right of the landlord to recover possession of those dwelling-houses. By section 3 it had no application to premises used for business, trade or professional purposes, but it did not exclude from its operation any house or part of a house by reason only that part of it is being used for business, trade or professional purposes.

Section 7 (1) of the Ordinance restricted the right to possession unless certain matters are proved to exist, pertinent to this case where the tenant or any person residing with him has been *guilty* of conduct which is a nuisance or annoyance to adjoining occupiers or to other tenants, or *allowed them to be used*, for an occupiers or to other tenants, or has used the premises, or *allowed them to be used*, for an immoral or illegal purpose; and where the dwelling-house is reasonably required by the landlord for occupation as a residence for himself or for any member of his family, or for any person in good faith residing or to reside with him, or for some person in his actual whole time employment.

It was not until the 28th day of August, 1944, that Regulations were made and published bringing under the preview of the Ordinance for the first time business premises the standard rent of which does not exceed \$720:— per annum. Those regulations are the Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16) and by regulation 2 it enacted that anything in section 3 of the Rent Restriction Ordinance, 1941, to the contrary notwithstanding, that Ordinance shall apply "to any "premises used for business, trade or professional purposes or for the "public service (hereinafter referred to as 'business premises) as it applies "to a dwelling-house, and as though references to 'dwelling-house', 'house' "and 'dwelling' included references to such premises."

In other words, it infixed business premises in the said Ordinance. Note the language employed "as though references to 'dwelling-house,' 'house' and 'dwelling' included references to such premises."

One exception it made and that is, it did not apply where the dwelling-house or business premises is or are let in good faith at a rent which includes payments in respect of board and attendance.

Reading the amending regulation into section 7 (1) (d) of the Ordinance the following is the result — "the premises (business) are "reasonably required by the landlord for occupation as a residence for "himself or for any member of his family, or for any person in good faith "residing or to reside with him or for some person in his actual whole time employment,"

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What Regulations No. 16 of 1944 did in effect was to incorporate the provisions of regulation 2, by reference, in the Ordinance. Mr. Humphrys' first attack upon any construction to be founded upon such a basis is the authority of *Tompkins v. Rogers* (1921) 90 L.J. K.B. 591 where under a similar provision, section 13, since repealed, of the Increase of Rent and Mortgage Restrictions Act of 1920, the Court of Appeal held that the order to recover business premises for the purpose of its occupation as a dwelling-house was not valid.

That section provided for certain modifications which are absent in Regulation 2 of No. 16 of 1944 and which in my view distinguishes the judgment arrived at by the learned Judges in *Tompkins v. Rogers* from the order which the learned Magistrate made in the present case.

That section 13 contained in addition these words "but this Act in its application to such premises shall have effect subject to the following modifications:—"

(b) "The following paragraph shall be *substituted* for paragraph (d) of subsection (1) of section five" (which corresponds with section 7 (1) (d) of the Ordinance: (d) "the premises are reasonably required by the landlord for business, trade or professional purposes, or for public service "

The recovery of business premises in England was thereby limited to the needs of the landlord alone, and then only for his business, not as in the case of dwelling-houses the possession of which he could recover in order to accommodate any person bona fide residing or to reside with him, or for some person in his whole time employment.

Regulation 2 provides for no such substitution.

As an alternative argument Mr. Humphrys contended that the Defence (Georgetown Rent Control) (Amendment No. 2) Regulations No. 44 of 1945 which is to be construed with Regulations No. 16 of 1944 should be looked at in order to interpret the meaning of regulation 2 of the latter regulations in relation to the recovery of possession of premises governed by section 7 of the Ordinance.

Regulation 2 of No. 44 of 1945 makes provision for the insertion of the words "Provided that section 7 of the Ordinance "shall have effect as if the words 'or for business premises' for 'the landlord' (before the proviso to paragraph (a) of regulation 2 of No. 16 of 1944) had followed after word "employment" in paragraph (d) of subsection (1) of the section.

Although those words are contained in the proviso to the regulation, they however in my opinion form a substantive part of (d) of section 1 of the section by incorporation.

The combined effect, Counsel for the appellant contended, is to interpret what regulation 2 of No. 16 of 1944 meant, and that *Tompkins v. Rogers* is applicable.

He asserts that prior to the making of regulations No. 44 of 1945 a landlord could never recover possession of premises let by him for business purposes for occupation by him as a dwelling, nor could he until the 30th day of October, 1945 recover possession of such premises for his own business.

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To agree with his first contention would be to abrogate the effect of regulation 2 of No. 16 of 1944 where business premises have been implanted in the Ordinance wherever reference is made to dwelling-houses.

There is nothing repugnant in the provision.

It has been repeatedly held that in dealing with cases of legislation by reference, the primary consideration to be kept in view is the general scope and object of the amending legislation.

Could it be said that the law intended that once premises are let for business purposes they must always remain as such, even where in the instant case the premises consist of all conveniences to be used as a dwelling-house? Clear words in my view should have been used in order to take away that right, and I can find none in the Regulations or in the Ordinance. Every legislative enactment must be approached with the conviction that its language is capable of a reasonable construction when carefully examined, and, when that language appears in an amending Ordinance or Regulation and is quite clearly directed to an alteration of the law, it is imprudent to say that the language used carries with it no meaning and that the law must be said to remain unaffected by it.

The effect of the later Regulations No. 44 of 1945 is to give to the landlord since business premises were controlled the right for the first time to recover possession of them, when he *wanted their use* for such a purpose.

The position as I see it is that a landlord of premises to which the Ordinance applies subject to certain conditions may recover possession of business premises for himself and others mentioned above for occupation as a dwelling, and for himself only for business purposes.

There is in my opinion no contrariety between the provisions contained in the two sets of regulations. Regulation 2 of No. 44 of 1945 enables a landlord to obtain possession of business premises for purposes of his own business which Regulation No. 16 of 1944 did not permit him to do.

It only enlarges the ambit of the conditions under which he could obtain possession.

The submission by Mr. Humphrys illustrates a tendency common in construing legislation which enlarges or adds to an existing right, that is to minimise or neutralise its operation by introducing notions taken from or inspired by similar legislation but modified by language which clearly intends to abrogate a common law right.

It may have been the intention of the framers of both sets of regulations to bring the law in relation to controlled houses and business premises in this Colony in line with the English Act, but in my opinion they have not done so.

The first of the three propositions must therefore be answered in the affirmative.

As to the second proposition, the respondent's cause of action is a claim to the possession of his premises against a tenant who has received due notice to quit.

That cause of action existed on the 17th day of March, 1945,

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The Rent Restriction Ordinance does not forbid the bringing of the action. It only prohibits the granting of the order or judgment for the recovery of possession to which the common law would entitle the respondent, unless certain conditions are proved to exist. The question whether those conditions exist must be determined when it is being considered whether the relief claimed may be granted, namely at the hearing of the action. In my opinion there is no necessity to state any one of the grounds in the notice to quit, sufficient they exist and are proved at the hearing — *vide* the remarks of *Mackinnon L. J.* in the case of *Benninga (Mitcham) Ltd. v. Bijstra* (1946) 1 K.B. at p.62.

The second proposition must also be answered in the affirmative.

Finally, Mr. Humphrys quite properly argued that nothing short of a conviction for using the premises for an immoral purpose would be operative in favour of the landlord in order to enable him to recover possession based on that ground. But the rule with regard to the construction of sections which create a criminal offence is not to be used to restrict the scope of a section as in the present case, where wide and comprehensive language is used, not in terms of art, but in terms of ordinary English, which are sufficiently broad in their meaning to cover the facts as found by the Magistrate.

In *Schneiders and Sons Ltd. v. Abrahams* (1925) 1 K.B. p.301 quoted by Mr. Humphrys section 4 of the Rent and Mortgage Interest Restrictions Act, 1923, contains these words "*or has been convicted* of using the premises "or allowing the premises to be used for an immoral purpose." There the Court of Appeal held that it was necessary to show that the tenant had taken advantage of his tenancy of the premises and of the opportunity they afford for committing the offence and had been convicted.

In section 7(1) (b) of the Ordinance the words "has been convicted of using" have been omitted leaving it to be determined as a matter of fact whether the tenant has used the premises or allowed them to be used for an immoral or illegal purpose. The object of this section is to deal with cases in which there is an improper user of the premises. It does not mean that a crime must necessarily be committed, for there may be cases where premises might be used for immoral purposes without a crime being committed.

The legislature has used wide and comprehensive language which must be construed according to the ordinary rules, and I can find no ground for limiting by any implication those words of the section in the Rent Restriction Ordinance to cases of conviction only.

The third proposition must in my view be also answered in the affirmative.

For these reasons I am of the opinion that this appeal fails, and must be dismissed with costs.

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BOLAND. J.: I have had the advantage of reading the considered judgment of the learned acting Chief Justice in this matter. But whilst I am in complete agreement with his views on the submissions advanced by counsel for appellant and although I concur that this appeal should be dismissed. I desire, nevertheless, to make just a few short observations of my own.

It may perhaps not be inappropriate, because it may be useful as a guide to Magistrates and others interested in the interpretation of the relevant Regulations modifying the provisions of the Rent Restriction Ordinance, for this Court to make the definite pronouncement as the learned acting Chief Justice has done, that it is competent for a magistrate to make an order for the possession of business premises in favour of a landlord who satisfies him that the premises are reasonably required for occupation as a residence for himself, or for any member of his family, or for any person residing or to reside with him, or for some person in his actual whole time employment and that since Regulation 44 of 1945 the landlord may also recover business premises which he may reasonably require for the accommodation of his own business.

But it is well to point out that in this case the learned magistrate stated in his decision that he would have hesitated to dispossess the tenant if carrying on a genuine boarding house business although the landlord's family had grown and the landlord could claim reasonably to require it for their accommodation. The learned Magistrate hinted too that he would have been the more unwilling to exercise his discretion against the tenant, if running a genuine business, because he was skeptical of the bona fides of the landlord who appeared to him to have been actuated to give the tenant notice because of the disclosure in assessment proceedings that the Standard Rent was very much less than the actual rent.

But in giving decision the Magistrate declared that the evidence convinced him that this boarding house was nothing but a "waterside brothel" and he made it clear that it was not on the ground that the tenant of a business should give way to a landlord who wanted the place for the accommodation of his family— but it was on the ground that this place was being used as a bawdy house that he made the eviction order—in other words, to use the language of section 7 (1) (b) of the Rent Restriction Ordinance (No.23 of 1941) it was because the place was being used for an immoral purpose.

I agree with the learned acting Chief Justice that the terms of our local Rent Restriction Ordinance do not require that proof of an actual conviction for keeping a brothel is necessary to found a claim that the tenant should be dispossessed for using the demised premises for an unlawful purpose. Except perhaps in certain special cases, the fact that occasionally immoral acts have taken place on the premises would hardly be sufficient to justify eviction of the tenant, but as regards the tenancy of premises let for the carrying on of a boarding house the landlord would generally have to establish that there has been such user of the premises as would support a conviction against the tenant

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for keeping a brothel or permitting the place to be used for habitual prostitution. By his description of the place as a water-side brothel, the learned Magistrate in effect found that the tenant's occupation was such as would support a conviction for this offence if she had been so charged. There was indeed ample evidence before the learned Magistrate to warrant his so finding.

I am also in the fullest agreement with the learned acting Chief Justice that by virtue of section 7 of the Rent Restriction Ordinance, No. 23 of 1941, it is open to the Magistrate to make an order for possession on any ground tendered in evidence by the landlord, subject, of course, to a tenant being given an adjournment if taken by surprise, although such ground was not specified to the tenant at the time of the notice.

I should like specially to add one final observation. Even assuming that the submission of counsel for appellant is correct that by the Regulations a landlord can recover business premises only if he requires them for his own "business," I hold that neither under our local legislation nor that of England, can any tenant of business premises transform a legitimate business into an enterprise maintained in breach of the Criminal law or against public morals, so as to expose the landlord also to the risk of prosecution for continuing knowingly to let the premises for such purpose; and then claim the protection of the Rent Restriction laws.

If this place was being run as a waterside brothel, the premises ceased to be "business premises" — and, at any rate so far as this tenant was concerned, were decontrolled and free from the restrictions imposed on landlords by the Rent Restriction Ordinance and the Regulations.

As I have stated, I agree that this appeal should be dismissed.

DUKE, J. (Acting): The respondent HASSAN ALI let to the appellant P. BURGZORG certain premises situate at lot 12A Bentinck and Queen Streets in the city of Georgetown for use as a boarding house. It is common ground between the respondent and the appellant that these premises are business premises. The monthly rental of the premises was \$35. By regulation 2 of the Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16) the Rent Restriction Ordinance 1941 (No. 23) applies to the aforesaid premises as it applies to a dwelling-house, subject, however, to the provisions of the Defence (Georgetown Rent Control) (Amendment No. 2) Regulations, 1945 (No. 44).

By section 7 (1) (b) of the Rent Restriction Ordinance, 1941, as applied to business premises by regulation 2 of Regulations No. 16 of 1944, an order may be made for the recovery of possession of the premises let by the respondent to the appellant if the tenant (the appellant) or any person residing with her has used the premises, or allowed them to be used, for an immoral purpose.

The respondent determined the tenancy by notice to quit, and made an application before the Rent Assessor, acting in his capacity as a Magistrate in pursuance of the Defence (Georgetown

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Premises Recovery Control) Regulations, 1944 (No, 17), for possession of the premises let by him to the appellant.

The Rent Assessor was convinced, on the evidence led before him, that the appellant was not carrying on a genuine boarding house and that she was carrying on a waterside brothel. And, having so found, the Rent Assessor, on the 7th December, 1945. ordered "possession to be surrendered on 1st February 1946 not to enable defendant to remove her business for that should be terminated as soon as possible, but in order to enable her to find alternative living accommodation for herself."

Whatever may be the precise meaning of the words "has used the premises or allowed them to be used for an immoral purpose" in section 7 (1) (b) of Ordinance No. 23 of 1941, there can be no doubt that where a tenant carries on a waterside brothel on the premises let to her, she is using the premises or allowing them to be used for an immoral purpose.

Counsel for the appellant has submitted that the order made by the Rent Assessor should be set aside because, firstly, there was no evidence that any person was convicted of any offence in relation to the use of the premises for any immoral purpose, and secondly, the notice to quit on which the application is founded alleged that the landlord required the premises for occupation as a residence for his family and himself and did not allege that the premises let were used or allowed to be used for an immoral purpose.

With respect to the first submission, it is sufficient to state that nowhere in the Rent Restriction Ordinance, 1941 (No. 23) nor in the Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16) is it enacted that a court is precluded from finding that a tenant has used the premises let or allowed them to be used for an immoral purpose unless some person has been convicted in respect of such use.

There was ample evidence upon which the Rent Assessor could properly find that the premises were used as a common bawdy house, and his finding that the tenant was carrying on a waterside brothel cannot be disturbed.

Counsel for the appellant has not cited any authority in support of his second submission. The Rent Restriction Ordinance 1941 (No. 23) was not passed, and the Defence (Georgetown Rent Control) (Amendment) Regulations 1944 (No. 16) were not made, with the object of restricting the right of a landlord to recover from his tenant possession of premises where the tenant keeps on them a common bawdy-house or a brothel, or with the object of protecting, from eviction by his landlord, a tenant who keeps a common bawdy-house or a brothel in the premises let to her. The trade of the keeper of a common bawdy-house or of a brothel is illegal, under the laws of this colony. As soon as a landlord knows that any premises let by him are being used by the tenant as a common bawdy-house or a brothel, it is his public duty to take immediate steps to evict the tenant. There is no authority in support of the second submission of counsel and there is no reason in principle for its adoption as a rule of law. In my judgment, it therefore fails.

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On the 10th August, 1945 while the respondent was giving evidence in chief, his solicitor orally gave notice in open Court to the Rent Assessor and to the appellant of the intention of the landlord to lead evidence that the premises let were used by the tenant as a common bawdy-house. Such evidence was given on the 20th August, 1945 and the 5th October, 1945. On the latter day the appellant gave evidence on her own behalf, and her evidence was concluded on the 8th November, 1945. On the latter day, and on the 7th December, 1945, evidence was led on behalf of the tenant in which it was sought to be established that the allegation of the landlord that the premises were used as a common bawdy-house was unfounded. The appellant therefore had ample time and opportunity to place her defence to the allegation, properly before the Rent Assessor.

For the above reasons the appeal should be dismissed and the order of the Rent Assessor acting in his capacity as Magistrate affirmed, with costs.

I decline to express any opinion on certain questions of law which were argued at the hearing of the appeal. None of those questions arises for determination in this appeal, and any opinion expressed by me would be merely *obiter dictum*. When any of those questions does indeed arise for determination in an appeal, this Court may not be constituted in the same manner as it is constituted today, and the Court as then constituted may be embarrassed by *obiter dicta* with which it may not agree.

*Appeal dismissed.*

Solicitors: *E. D. Clarke; A. G. King.*

CLAUDE ERNEST HUSBANDS,  
 Plaintiff,  
 v.  
 COMMERCIAL UNION ASSURANCE COMPANY, LIMITED,  
 Defendants.

[1945. No. 183.— DEMERARA.]

BEFORE DUKE, J. (Acting): 1946. MAY 16, 17, 25; JUNE 19.

*Judgment—Not delivered in writing—Contents of judgment—May be proved.*

*Motor vehicle insurance—Third party risks—Insurance against—Insurers notified by solicitor for injured person that proceedings threatened against insured—Repudiation of liability by insurers—Action brought by person injured against insured—Notice of the bringing of the proceedings—Had by the insurers—Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937 (No. 22), section 9 (2) (a).*

*Motor vehicles insurance—Third-party risks—Insurance against—Judgment in favour of injured person against insured—Unsatisfied—Action by injured person against insurers—Onus of proving—That loss falls within an exception specified in the policy of insurance—Lies upon*

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UNION ASSURANCE COMPANY, LTD.

*insurers—Unless by language of exception insured is expressly required to prove that in the circumstances the exception does not apply—Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937 (No. 22), section 9.*

*Motor vehicles insurance—Third-party risks—Insurance against—Judgment in favour of injured person against insured—Unsatisfied—Action by injured person against insurers—Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937 (No. 22), section 9—Does not in any way alter burden of proof in any particular case*

*Motor vehicles insurance—Third-party risks—Insurance against—Judgment in favour of injured person against insured—For damages in respect of liability specified in section 9 (1) of Ordinance No. 22 of 1937, and for other damages—Action on judgment by insured person against insurers—Not to be defeated because difficult to apportion judgment—Where judgment can be apportioned beyond reasonable doubt—Apportionment to be made, and relief given to injured person against insurers accordingly.*

Where the Court delivered an oral, and not a written judgment, evidence was allowed to be given as to what was said by the Court. *Want v. Moss* (1894) 70 Law Times 178, Privy Council. The insurers of a motor car who had issued a certificate of insurance under section 4 (4) of the Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937 (No. 22) to M.H. in respect of the car, were informed that proceedings in respect of bodily injury to the plaintiff caused by and arising out of the use of the motor car on a public road were being threatened by the plaintiff's solicitor against M.H., and the insurers repudiated any liability on their part to indemnify M.H. on the policy of insurance which he had effected with them. The plaintiff brought an action against M.H. for damages in respect of the bodily injury suffered by him, and obtained judgment.

Held that the insurers had "notice of the bringing of the proceedings" (that is to say, the action by the plaintiff against M.H.) within the meaning of section 9 (2) (a) of the Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937 (No. 22).

*Herbert v. Railway Passenger Assurance Company, Limited.* (1938) 158 Law Times 417, 419, and *Windsor v. Chalcraft* (1938) 159 Law Times 104, C.A., considered.

In an action under section 9 of the Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937 (No. 22) the onus of proving that the loss falls within an exception specified in the policy of insurance lies upon the insurers, unless by the language of the exception the insured is expressly required to prove that in the circumstances the exception does not apply.

Section 9 of the Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937 (No. 22) does not, in any way, operate so as to alter the burden of proof in any particular case.

A plaintiff is not to be deprived of the benefits of section 9 of the Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937 (No. 22) merely because it is difficult to apportion the judgment which he obtained against the insured person. If, after careful consideration, it is found that it is not possible to arrive at any apportionment beyond reasonable doubt, then the plaintiff will fail: but if, after such consideration, the Court is satisfied, beyond all reasonable doubt, that a specified portion of the judgment is in respect of bodily injury, the Court will give judgment accordingly for that portion against the defendants.

*Weber v. Birkett* (1925) 133 Law Times 598, C.A., considered.

ACTION by the plaintiff Claude Ernest Husbands against the

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defendant Commercial Union Assurance Company, Limited, claiming the sum of \$2,123.41 under section 9 of the Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937 (No. 22). The necessary facts and arguments sufficiently appear from the judge.

*L. M. F. Gabral* for the plaintiff.

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

*Cur. adv. vult.*

DUKE, J. (Acting): In this action the plaintiff CLAUDE ERNEST HUSBANDS claims from the defendants COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, the sum of \$2,123.41, being the amount of a judgment and costs obtained by the plaintiff on the 29th November, 1944, in action No. 82 of 1944 Demerara against MOHAMED HASSAN in respect of damage and bodily injuries suffered by the plaintiff as a result of being knocked down and injured by motor car No. H 5231 on the 17th July, 1943, which judgment and costs the plaintiff has failed to recover against MOHAMED HASSAN. It is also alleged in the statement of claim that MOHAMED HASSAN was on the 17th July, 1943, the holder of an insurance policy with the defendants covering his motor car No. H 5231 against third party risks, that the policy was in full force and effect at the time of the said accident, that notice of the intended action by the plaintiff against MOHAMED HASSAN was given to the defendants on the 20th January 1944, that the defendant MOHAMED HASSAN also gave notice to the defendants of the intended action, and that the plaintiff demanded from the defendants as insurers of motor car No. H 5231 on the 30th December 1944 payment of the judgment and costs but without avail. The plaintiff then concludes that "in terms of the policy of insurance" the defendants have now become liable to pay the amount of the judgment and costs. Nowhere in the statement of claim is it mentioned, or indicated, that the action is brought under section 9 of the Motor Vehicles Insurance (Third-party Risks) Ordinance, 1937, (No. 22). At the trial of the action, however, counsel for the plaintiff applied for, and was granted, an amendment the object of which was to show that a certificate of insurance under section 4 (4) of Ordinance No. 22 of 1937 had been issued in relation to the policy. Without such a certificate a policy is of no effect for the purposes of Ordinance No. 22 of 1937, and where such a certificate is not so issued no action can be brought under section 9. It was, however, made clear at the trial that the action is brought under section 9 of Ordinance No. 22 of 1937. The defendants were in no way prejudiced by the manner in which the statement of claim was drafted, as it is clear from their defence that they appreciated that the action was brought under Ordinance No. 22 of 1937.

The submissions made by counsel for the defendants at the trial of the action are fully set out in the defence. The submissions, and the grounds upon which they are based, are as, follows: —

- (1). The defendants specifically deny that notice of the intended action by the plaintiff against MOHAMED HASSAN was given to

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the defendants on the 20th January, 1944, or at all, as required by law; and they will therefore contend that the plaintiff is not entitled to bring this action against them.

2. (1) It was agreed upon between the defendants and Mohamed Hassan that the motor car No. H 5231 was to be used only in accordance with the Limitations as to Use specified in the Schedule to the policy of insurance issued by the defendants to Mohamed Hassan and in the certificate of insurance issued by the defendants to Mohamed Hassan under the Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937. (No. 22).

(2) The Limitations as to Use so agreed upon were as follows:

Use only for Private Hire which means the letting out for any period to the Hirer direct from a garage and use by Mr. M. Hassan for social, domestic and pleasure purposes.

(3) At the time of the occurrence when the plaintiff was knocked down and injured by motor car No. H 5231 on the 17th July 1943, Mohamed Hassan or his servant or agent was using the said car otherwise than in accordance with the aforesaid Limitations as to Use, namely, the car was not being used for Private Hire as defined in the Limitations as to Use, and it was not being used by Mohamed Hassan for social, domestic and pleasure purposes.

(4) By virtue of the foregoing facts, the said MOHAMED HASSAN was not covered by insurance under the Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937, in respect of the said car at the time the plaintiff was knocked down by the said car, and consequently, the plaintiff is not entitled to any recourse against the defendants in respect of the judgment referred to in the Statement of Claim or at all.

(5) The defendants will contend that as at the time the plaintiff was knocked down by motor car No. H 5231 the said car was being used otherwise than in accordance with the limitations as to use agreed on between the defendants and MOHAMED HASSAN and set out in the Policy and in the Certificate of Insurance issued by the defendants to him, the liability incurred by the said MOHAMED HASSAN to the plaintiff was not a liability covered by the terms of the policy issued by the defendants to him, and consequently the plaintiff has no recourse against the defendants in respect of the judgment referred to in the Statement of Claim or at all.

(3) The defendants will contend that as the judgment for \$1,514.06 obtained by the plaintiff is in respect, not only of bodily injuries and medical expenses incurred by the plaintiff in connection therewith, but also in respect of loss and expenses sustained by the plaintiff and not connected with the bodily injuries, and as no apportionment has been made in the said judgment it is indivisible and therefore it is not now competent for the plaintiff to claim payment of the said judgment nor is it competent for the plaintiff now to apportion the said judgment in order to claim thereon against the defendants in respect of damages for bodily injuries sustained by the plaintiff and medical expenses incurred by him in relation thereto.

(4) The defendants will contend that the Statement of Claim discloses no cause of action against them.

On the 29th March 1943 MOHAMED HASSAN the owner of motor car No. H 5231 effected with the defendants a policy of insurance insuring the car against third-party risks. The defend-

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ants issued, under section 4 (4) of Ordinance No. 22 of 1937, a certificate of insurance in which it was stated that the policy of insurance to which the certificate relates was issued in accordance with the provisions of the Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937.

The policy and the certificate of insurance were due to expire on the 28th September 1943. On the 17th July 1943 bodily and other injuries to the plaintiff were caused by and arose out of the use of motor car No. H 5231 on a public road. The bodily injuries suffered by the plaintiff included a Pott's fracture of the right leg: the plaintiff also suffered the loss of his spectacles and his wrist watch as well as severe damage to his bicycle. At the time of the accident the motor car was being driven by a person in the employ of MOHAMED HASSAN. The injuries to the plaintiff were directly caused by the negligence of the driver.

Mohamed Hassan reported the accident to the defendants, and on the 29th November 1943 they replied as follows:—

*MOTOR POLICY* No. 4160612—*CAR* No. H 5231

We desire to refer to your report of an accident involving Motor Car No. H 5231 insured under the above Policy, which occurred on 17th July, 1943, at the corner of Camp and Thomas Roads, and have now to advise you that we are satisfied that at the time of the accident the Car No. H 5231 was being used for a purpose other than any of those described in the "Limitations as to Use" set out in the Policy and that therefore the Insurers, Messrs. Commercial Union Assurance Co., Ltd., are not liable under their Policy of insurance and will not entertain any claim by you or anyone else in respect of damages or costs recovered against you or anyone else by any claimant.

In this letter the defendants made it clear to Mohamed Hassan that they were asserting that the car at the time of the accident was being used for a purpose other than any of those described in the "Limitations as to Use" set out in the Policy and the certificate of insurance; and that if any person obtained damages against Mohamed Hassan or any one else in respect of injuries arising from the accident the defendants would not pay the damages or the costs.

On the 7th January 1944 the plaintiff's solicitor, believing that Mohamed Yacoob who was the driver of the car at the time of the accident was the owner thereof, sent him a letter of demand claiming the sum of \$7,500 as damages on behalf of the plaintiff, and mentioning that, failing an amicable settlement, proceedings would be instituted by the solicitor on behalf of the plaintiff for damages sustained by him. A copy of this letter was sent to the defendants. On the 14th January 1944 the defendants replied as follows: "We have now to advise that we have never issued a policy of insurance to Mr. Mohamed Yacoob. For your information, we would also mention that we have advised Mr. Mohamed Hassan, to whom we have issued a policy of insurance in respect of Motor Car No. H 5231, that the Insurers, Messrs, Commercial Union Assurance Co., Ltd. will not entertain any claim by him

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or anyone else in respect of damages or costs recovered against him or anyone else by any claimant in connection with the above-mentioned accident".

On the 20th January 1944 the plaintiff's solicitor replied to the defendants as follows:

Since the despatch of my letter of the 7th instant to Mr. Mohamed Yacoob I have discovered that Mohamed Hassan of 62 Hunter Street, Albouystown, Georgetown, is the owner of the said car (that is to say, motor car No. H 5231) and to whom you issued a policy of insurance as agents of the Commercial Union Assurance Co., Ltd.

It is very strange indeed that the reply on behalf of the insurers is to the effect that they will not entertain any claim in respect of damages or costs recovered against Mohamed Hassan or anyone else by Mr. Husbands, as the object of a third-party insurance is clear and such an insurance policy issued to the owner of a car would become a farce if insurers take up the attitude you intend to do in this matter.

Having expressed the views you have in your said letter I am advised by Counsel that the Assurance Company should be joined as defendants, and if I do not hear again from you in connection with this matter on or before the 31st instant I shall file a writ of summons against both Mohamed Hassan and (the defendants)"

On the 24th January 1944 the plaintiff's solicitor wrote to Mohamed Hassan a letter in the same terms as the one he had written on the 7th January 1944. A copy of this letter was sent to the defendants. Mohamed Hassan forwarded to the defendants the letter which he received from the plaintiff's solicitor. On the 26th January 1944 the defendants sent a letter, by registered post, to Mohamed Hassan in the following terms: "We return herewith the letter of 24th instant addressed to you by Mr. F. I. Dias, Solicitor, in connection with his claim against you for damages in the sum of \$7,500 on behalf of Mr. Claude Ernest Husbands, and would refer you to our letter of 29th November, 1943 in which we advised you that the Insurers, Messrs. Commercial Union Assurance Co., Ltd.. are not liable under their Policy of insurance and will not entertain any claim in this matter".

On the 29th January 1944 the defendants' solicitor wrote to the plaintiff's solicitor as follows:

Your letter of the 20th inst., to our clients on behalf of Claude Ernest Husbands has been handed to us.

Our clients have been advised that at the time of the accident the car in question was not covered by the policy of insurance, and therefore they cannot be held responsible for the payment of any amount which may be recovered for injuries sustained by your client.

We cannot, of course, prevent your client from joining Messrs. Sprostons Limited (this is a mistake for the principals of Sprostons Limited, Commercial Union Assurance Company Limited), as a defendant in any action he may bring, but in the event of his failing against Sprostons, Limited (meaning thereby the defendants) he would probably be mulct in costs.

On the 29th February 1944 the plaintiff Claude Ernest Husbands issued writ No. 82 of 1944 Demerara against MOHAMED HASSAN claiming the sum of \$7,500 as damages for personal

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injuries sustained by the plaintiff and for consequential loss by reason of the negligent driving of the servant and/or agent of MOHAMED HASSAN on the 17th July 1943 at Camp Road Georgetown. The action was defended. It was tried on the 27th, 28th and 29th days of November 1944 before Verity, C.J., who found that there was negligence and ordered that judgment be entered for the plaintiff in the sum of \$1,514.06 and costs. Judgment was entered accordingly on the 30th November 1944.

The learned Chief Justice delivered an oral, and not a written judgment. I therefore allowed evidence to be given as to what he said: see *WANT v. MOSS* (1894) 70 Law Times 178, Privy Council.

I am satisfied from the evidence of the plaintiff, his solicitor Mr. Frank I. Dias, and Mr. C. J. Park who was Court Reporter for the "Daily Argosy" newspaper in November 1944, that the Chief Justice assessed the special damages at \$514.06 and the general damages at \$1,000, and then gave judgment for the plaintiff Claude Ernest Husbands for \$1,514.06 and the costs of the action. The proceedings in action No. 82 of 1944 Demerara clearly show that the general damages were entirely in respect of the bodily injuries suffered by the plaintiff. The special damages were partly in respect of the bodily injuries, and partly in respect of other injuries suffered by the plaintiff.

Section 9 (2) "(a) of Ordinance No. 22 of 1937 provides that no sum shall be payable by an authorised insurer under section 9 (1) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the authorised insurer had notice of the bringing of the proceedings. It is true that there is no evidence that the defendants had notice, within 7 days after the 29th February 1944 that Claude Ernest Husbands had brought the action No. 82 of 1944 Demerara against MOHAMED HASSAN. It is also true, as was held by PORTER, J., in *HERBERT v. RAILWAY PASSENGER ASSURANCE COMPANY LIMITED* (1938) 158 Law Times 417, 419 that the notice must be in such a form as to convey to the insurers that notice is being given, and that a statement by the insured, in a casual conversation with the insurer's agent that an action had been brought against the insured is not a sufficient compliance with the requirements of the subsection.

The notice, however, which is alleged by the plaintiff that the defendants had, was not so had in the course of casual conversation; it was given by the plaintiff's solicitor. The defendants received copies of the letters which the plaintiff's solicitor wrote on the 7th January 1944 and the 24th January 1944 to Mohamed Yacoob and Mohamed Hassan respectively, and in those letters the plaintiff's solicitor made it clear that, if an amicable settlement was not arrived at, legal proceedings would be instituted. As early as the 29th November 1943 the defendants had definitely made up their mind that they were not liable under the policy of insurance which they issued to Mohamed Hassan, and that they would not entertain any claim made by a third-party in respect of the said policy. This point of view was steadfastly maintained by the defendants in their letter of the 14th January

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1944 to the plaintiff's solicitor, in their letter of the 26th January 1944 to Mohamed Hassan, and in their solicitor's letter of the January 1944 to the plaintiff's solicitor. Counsel for the defendants has referred to section 9 (3) of Ordinance No. 22 of 1937. If the defendants had intended to rely on that subsection, they had ample opportunity so to do. The defendants were, however, entirely relying on their assertion that at the time of the accident motor car No. H 5231 was being used for a purpose other than any of those described in the "Limitations as to Use" set out in the Schedule to the policy of insurance issued to Mohamed Hassan. The defendants were informed that proceedings were being threatened by the plaintiff's solicitor against Mohamed Hassan, and they repudiated any liability on their part to indemnify Mohamed Hassan on the policy of insurance which he had effected with them. In *WINDSOR v. CHALCRAFT* (1938) 159 Law Times 104, C.A., cited by counsel for the defendants, the authorised insurers desired to defend the action which was brought against the insured person and in which judgment was allowed to go by default, and the Court of Appeal made an order which permitted the authorised insurers to defend the action.

I hold that the defendants, before the commencement on the 29th February, 1944 of the proceedings in Action No. 82 of 1944 in which the judgment was given, had notice of the bringing of those proceedings by the plaintiff Claude Ernest Husbands against Mohamed Hassan. Those proceedings were in respect, among other things, of the bodily injury to Claude Ernest Husbands caused by and arising out of the use of motor car No. H 5231 on a public road, and Mohamed Hassan was the person to whom the defendants had issued a certificate of insurance and a policy of insurance covering third-party risks in relation to the motor car.

At the close of the case for the plaintiff there was evidence —

- (a) that Mohamed Hassan, the owner of motor car No. H 5231, effected a Third-Party Risks policy of insurance with the defendants;
- (b) that the policy, subject to the Terms Exceptions and Conditions contained therein or endorsed or otherwise expressed thereon, insured Mohamed Hassan (and any person driving the motor car No. H 5231 on his order or with his permission) against all sums including claimant's costs and expenses which Mohamed Hassan shall become legally liable to pay in respect of bodily injury to any person caused by or arising out of the use of the motor car;
- (c) that the defendants issued, under section 4(4) of Ordinance No. 22 of 1937, a certificate of insurance to Mohamed Hassan;
- (d) that in the certificate the defendants certified that the policy was issued in accordance with the provisions of Ordinance No. 22 of 1937;
- (e) that bodily injury to the plaintiff was caused by and arose out of the use of motor car No. H 5231 on a public road;

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- (f) that a liability was incurred by Mohamed Hassan in respect of such bodily injury;
- (g) that judgment was obtained by the plaintiff against Mohamed Hassan in respect of, among other things, such liability.

In the General Exceptions contained in the policy of insurance there is the provision that the company shall not be liable under the policy in respect of any accident loss damage and or liability sustained or incurred while motor car No. H 5231 is being used otherwise than in accordance with the "Limitations as to Use" contained in the Schedule to the policy. The "Limitations as to Use" which are contained in the Schedule are as follows: —

Use only for Private Hire which means the letting out for any period to the Hirer direct from a garage and use by Mr. Hassan (that is to say, Mohamed Hassan) for social domestic and pleasure purposes.

The policy does not cover—

- (1) Use for racing, pace-making, reliability, trial or speed-testing.
- (2) Use whilst drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle.

No evidence was led on behalf of the plaintiff to show that motor car No. H5231 was, at the time of the accident, being used in accordance with the Limitations as to Use specified in the Schedule to the policy of insurance, or in the certificate of insurance, issued by the defendants to Mohamed Hassan. On the plaintiff's case being closed, counsel for the defendants submitted that, in the absence of such evidence, the plaintiff had not made out a *prima facie* case under section 9 of Ordinance No. 22 of 1937. He urged that by section 9 (1) of Ordinance No. 22 of 1937 it is incumbent on the plaintiff who sues by virtue of that subsection to prove that the liability of the insured under the judgment referred to in the subsection is a "liability covered by the terms of the policy", and he further submitted that the onus was on the plaintiff to establish, by evidence, that the motor car was, at the time of the accident, being used in accordance with the "Limitations as to Use" specified in the Schedule to the policy of insurance. He referred to BRIGHT v. ASHFOLD (1932) 2K.B. 153, GRAY v. BLACKMORE (1934) 1 K.B., 95, PASSMORE v. VULCAN BOILER AND GENERAL INSURANCE COMPANY LIMITED (1936) 154 Law Times 258, 259, WYATT v. GUILDHALL INSURANCE COMPANY LIMITED (1937) 106 L.J.K.B. 421, JONES v. WELSH INSURANCE CORPORATION (1937) 157 Law Times 483, and to MCGILLIVRAY on Insurance Law, 1937, 2nd edition, pages 1190 to 1192 (Conditions which have been judicially construed). He then submitted that as no evidence was adduced by or on behalf of the plaintiff to show that motor car No. H 5231 was, at the time of the accident, being used in accordance with the "Limitations as to Use" specified in the Schedule to the policy of insurance issued by the defendants to MOHAMED HASSAN, the plaintiff's claim should have been non-suited at the close of the plaintiff's case.

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The question raised by counsel for the defendants was, at the close of the plaintiff's case, fully argued by counsel on both sides. On the conclusion of the arguments I stated that a decision on the submission would be given when the whole case was heard, and that if the defendants wished to lead evidence they should do so at that stage of the proceedings. The defendants called one witness, PATRICK TANG: his evidence will be considered later. After the case for the defendants was closed, counsel on both sides adduced further arguments.

In *BRIGHT v. ASHFOLD* (1932) 2 K.B. 153, 155, 158 the following provision appeared among the "General Exceptions" to the policy of insurance —

GENERAL EXCEPTIONS

Provided always and it is hereby expressly agreed that the Corporation shall not be liable for any accident loss or damage caused or sustained while any motor cycle in respect of which indemnity is granted under this policy is

(a) carrying a passenger unless a side-car is attached.

It was proved that the respondent Ashfold was driving, on a public road, a motor cycle with another person sitting behind him as a passenger on the pillion of the motor cycle, and that no side-car was attached to the motor cycle. It was argued on behalf of the respondent that, notwithstanding the express words of *the* exception, there was in force a policy of insurance in relation to the user by the respondent of the motor cycle at the time when he was driving it as aforesaid in accordance with the requirements of the Road Traffic Act, 1930, and that he could not be convicted of using a motor vehicle on a public road, without there being in force in relation to the user of the vehicle such a policy of insurance in respect of third-party risks as complied with the requirements of the said Act, contrary to section 35 (1) thereof (this is equivalent to section 3 (1) of Ordinance No. 22 of 1937). The Divisional Court rejected the argument of the respondent. The question of onus of proof did not arise in the appeal.

In *BRIGHT v. ASHFOLD* Lord Hewart, L.C.J., referred to the General Exception under consideration, as a condition. The Lord Chief Justice stated:

Reliance is placed by the respondent upon section 38 of the Road Traffic Act, 1930 (section 6 of Ordinance 22 of 1937) but I think it is quite clear that that section has no relation to a condition such as is contained in this policy. Section 38 provides that "Any condition in a policy.... providing that no liability shall arise under the policy.....or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy.....shall be of no effect."

This was a condition which circumscribed the operation of the policy from the beginning. There was therefore no policy of insurance against third-party risks at all in force in relation to the use of the motor cycle by the respondent, where a passenger was being carried otherwise than in a side-car.

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I may here observe that Exceptions are dealt with along with Conditions, in WELFORD's Accident Insurance, 1932, 2nd edition, in Chapter 4 (Conditions of the Policy).

In GRAY v. BLACKMORE (1934) 1 K.B., 95, the following provision appeared among the "General Exceptions" to the policy of insurance —

GENERAL EXCEPTIONS OF THE POLICY

This policy does not cover:

Any accident, injury, loss, damage and/or liability caused, sustained or incurred whilst any motor car in respect of or in connection with which insurance and/or indemnity is granted under this policy is—

(a) being used otherwise than for private purposes.....

It was proved before BRANSON, J., that the motor car in question was, at the time of the accident, being used by the Insured, the plaintiff in the action, otherwise than for private purposes. On, behalf of the plaintiff arguments similar to those adduced by the respondent in BRIGHT v. ASHFOLD were addressed to, and were rejected by, the trial judge. The question of onus of proof did not arise in the action.

In PASSMORE v. VULCAN BOILER AND GENERAL INSURANCE CO. (1936) 154 Law Times 258, 259, the following provision appeared among the "General Exceptions" to the policy of insurance —

The insurers will not be liable in respect of (1) Any Accident, injury, loss, damage and (or) liability caused, sustained or incurred while any motor vehicle..... is being used otherwise than in accordance with the 'Description of Use' contained in this policy.

The 'Description of Use' was as follows —

Use for social, domestic and pleasure purposes and use for the business of the insured as stated in the Schedule hereto excluding.....

In the schedule the business of the Insured is stated to be —

Carrying on or engaged in the business or profession of representative and no other for the purpose of this insurance.

An accident happened in relation to the use of the motor car which was insured under the policy. The insurers denied liability, and the dispute was referred to an arbitrator. The arbitrator found that the accident happened while the car was being used for the business of the Insured and also for the business of another person who was travelling in the car. He held that, on the true construction of the policy, the business use of the car covered by the policy was use for the business of the Insured alone, and he made his award in favour of the Insurers. On appeal, it was held by du PARCQ, J., that the arbitrator had correctly construed the policy in question. The question of onus of proof did not arise for determination in the appeal.

In WYATT v. GUILDHALL INSURANCE CO. (1937) 106 L.J.K.B. 421, 423 the facts were agreed between the plaintiff and the Insurers. The question submitted to the Court for deter-

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mination was whether on those facts the motor car was, at the time of the accident, being used in accordance, or not in accordance, with the "Description of Use" specified in the policy of insurance. The trial judge, BRANSON, J., answered that question in the negative. The question of onus of proof did not arise for determination in the action. After referring to the agreed statement of facts, the trial judge said:

The only ground on which the defendants now deny their obligation to indemnify the plaintiff is that the policy did not cover the user of the car in the way in which Mr. Wilcox (the Insured) was using it. The plaintiff brings his action under section 10 of the Road Traffic Act, 1934 (section 9 of Ordinance No. 22 of 1937), and in order to recover he must show.....that Mr. Wilcox (the Insured) was entitled to be indemnified under the policy in respect of the liability falling on him as a result of this accident ....

Counsel for the defendant has submitted that this passage shows that, in an action under section 9 of Ordinance No. 22 of 1937 against the insurers, the onus is on the plaintiff to prove that at the time of the accident the car was being used in accordance with the Limitations as to Use contained in the policy. I am unable to agree that the passage quoted is authority for the submission: there was no question of onus of proof involved in the determination of the action.

The question of onus of proof did not arise for determination in *JONES v. WELSH INSURANCE CORPORATION LIMITED* (1937) 157 Law Times 483. The only question involved in that action was whether the use to which the motor car was being put at the time of the accident was, or was not, a use which was within the "Description of Use" contained in the policy and this question was answered by the trial judge, GODDARD J., in the negative.

In *MACGILLIVRAY* on Insurance Law, 1937, 2nd edition, at pages 1190 to 1192, there is a list of "Conditions which have been judicially construed". The cases of *BRIGHT v. ASHFOLD* and *GRAY v. BLACKMORE* are referred to. In the policies considered in those cases, there were certain provisions therein which were expressly stated to be General Exceptions to the policies: the learned author deals with them as Conditions.

The plaintiff did not, in his statement of claim, plead that the motor car No. H 5231 was, at the time of the accident, being used in accordance with the "Limitations as to Use" specified in the Schedule to the policy of insurance. On the other hand, the defendants pleaded that, at the time of the accident, MOHAMED HASSAN or his servant or agent was using the motor car, and the motor car was being used, otherwise than in accordance with the Limitations as to Use agreed on between the defendants and MOHAMED HASSAN and set out in the policy and in the certificate of insurance issued by the defendants to MOHAMED HASSAN. Counsel for the plaintiff has submitted that the pleadings show that it was for the defendants to establish, by evidence, that at the time of the accident the motor car was being used! otherwise than in accordance with the "Limitations as to Use"

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in relation to the motor car. It is however to be observed that the defendants expressly pleaded that the statement of claim disclosed no cause of action against them. The defendants pleaded as they did, but they reserved the right to contend that the statement of claim should have contained an allegation that the motor car, at the time of the accident, was being used in accordance with the "Limitations' as to Use" specified in the Schedule to the policy of insurance issued by the defendants to MOHAMED HASSAN.

The liability to third parties as expressed in Section II of the policy of insurance is subject to the Terms Exceptions and Conditions contained in the policy or endorsed or otherwise expressed thereon.

The Insurers promise, in paragraphs 1 (i) and 3 of Section II, to indemnify the Insured, or any person holding a driver's licence who is driving the motor car No. H 5231 on the order of or with the permission of the Insured, against all sums which the Insured or any such person shall become legally liable to pay in respect of the death of or bodily injury to any person caused by or arising out of the use of motor car No. H 5231. This complies with section 4 (1) (b) of Ordinance No. 22 of 1937 which provides that in order to comply with the requirements of that Ordinance a policy of insurance must be a policy which insures such person, persons, or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle on a public road. The Insurers further promise, in paragraph 1 (ii) of Section II, to indemnify the Insured or any such person as aforesaid against all sums which the Insured or any such person shall become legally liable to pay in respect of damage to property caused by the use of the motor car No. H 5231, but a third-party has no cause of action under section 9 of Ordinance No. 22 of 1937 in respect of such damage.

Section III of the policy contains special exceptions to the general liability of the Insurers under paragraphs 1 (i) and 3 of Section II, in cases where disabled mechanically propelled vehicles are being towed by motor car No. H 5231.

In sub-paragraph (3) (a) of the first paragraph of the General Exceptions to the policy of insurance it is expressly stated that the Insurers shall not be liable under the policy in respect of any accident loss damage and/or liability caused sustained or incurred while the motor car No. H 5231 is being used otherwise than in accordance with the "Limitations as to Use" contained in the Schedule to the policy. There is no provision in the policy of insurance that in the event of any claim the Insured shall prove that the motor car was, at the time of the accident, being used in accordance with the "Limitations as to Use" contained in the Schedule to the policy.

However, in the second paragraph of the General Exceptions to the policy, there is a provision that in the event of a claim under the circumstances therein stated the Insured shall prove

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that the accident loss damage and/or liability arose independently of and was in no way connected with or occasioned by or contributed to by or traceable to any of the occurrences specified in the said second paragraph or any consequence thereof, and in default of such proof the Insurers shall not be liable to make any payment in respect of such a claim.

The use of the motor car referred to in paragraph 1 (i) of Section II of the policy is a general use. Section 4 (4) of Ordinance No. 22 of 1937 provides that a certificate of insurance issued under the Ordinance shall be in the prescribed form and shall contain such particulars of any conditions subject to which the policy of insurance is issued and of any other matters as may be prescribed. The Motor Vehicles (Third-Party Risks) Regulations, 1937 (see Rules and Regulations, 1937, pages 271, 276, 277) have been made under the authority of section 26 of Ordinance No. 22 of 1937. In those Regulations forms of the certificate of insurance have been prescribed, and provision has been made for the insertion in such certificate of "Limitations as to Use". A policy of insurance is of no effect for the purposes of Ordinance No. 22 of 1937 unless and until there is issued by the authorised insurer in favour of the person by whom the policy is effected a certificate of insurance.

In the Motor Vehicles (Third-Party Risks) Regulations, 1937, the limitations as to use are not described as conditions.

Counsel for the plaintiff pointed out that the portion of the policy of insurance in which "Limitations as to Use" are mentioned is headed in heavy type "General Exceptions" and that there is no provision in the policy that the burden of proving the Exception in relation to Limitations as to Use rests on the Insured; and he submitted that the burden of proving the said Exception rests on the Insurers.

In WELFORD'S Accident Insurance, 1932, 2nd edition, pages 114 and 284 it is stated as follows:

The onus of proving that the loss falls within an exception lies upon the insurers, unless by the language of the exception the assured is expressly required to prove that in the circumstances the exception does not apply.

The onus of proving that an exception applies rests on the Insurers.

At note (m) of page 114 it is stated that BIGHAM, J., in summing up to the jury in an action on a policy of fire insurance, said:

You must remember that this is what is called an exception in the policy, and it is for the defendants to satisfy you that the exception has arisen which excuses them. They must not leave your minds in any reasonable doubt about it, because if they do they may not have discharged the burden which is upon them.

IN ETHERINGTON v. LANCASHIRE AND YORKSHIRE ACCIDENT INSURANCE COMPANY (1909) 25 Times L.R. 287, 288, C.A., Vaughan Williams, L.J. said:

It was well established by the authorities that in the construction of any policy of insurance, whether life fire or marine, any really ambiguous clause should be construed against, rather than in favour of the insurance company.

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And in *ENGLISH v. WESTERN* (1940) 2 A.E.R., 515, 518, C.A., SLESSER, L.J. quoted, with approval, the following passage from *MACGILLIVRAY* on Insurance Law. 1937. 2nd edition, page 1029:

If there is any ambiguity in the language used in a policy, it is to be construed more strongly against the party who prepared it, that is in the majority of cases, against the company. A policy ought to be so framed that he who runs can read. A party who proffers an instrument cannot be permitted to use ambiguous words in the hope that the other side will understand them in a particular sense, and that the court which has to construe them will give them a different sense, and therefore where the words are ambiguous they ought to be construed in that sense in which a prudent and reasonable man on the other side would understand them.

It was open to the Insurers to create a qualified promise in paragraph 1 (i) of Section II of the policy by substituting for the words "the use of any vehicle described in the Schedule hereto" the words "the use of any vehicle described in the Schedule in accordance with the "Limitations as to Use" contained therein". The Insurers however, did not do so. They, of set purpose, deliberately inserted a provision among the General Exceptions that the Insurers were not to be liable under the policy in respect of any accident loss damage and/or liability sustained or incurred whilst the vehicle is being used otherwise than in accordance with the "Limitations as to Use" contained in the Schedule to the policy. The Insurers described such provision as an Exception. They, however, made no special provision as to onus of proof, as they did in relation to the second paragraph of the portion of the policy containing the provisions as to General Exceptions. The Insurers prepared the policy of insurance, and proffered it to the Insured. They cannot complain, now that the plaintiff contends that the provision which the defendants expressly inserted among the General Exceptions in the policy (this provision is hereinbefore set out) should be construed as an Exception. If there is any ambiguity as to the said provision, that ambiguity would not be determined in favour of the Insurers. It seems to me that, in the circumstances of the policy, the above described Exception should be construed as an Exception, even if it be not a true exception within the meaning of Rule 2, as enunciated by Bailhache, J. in *MUNRO, BRICE & CO. v. WAR RISKS ASSOCIATION* (1918) 2 K.B. 78, 88.

For the above reasons I hold that, upon the true construction of the policy of insurance, sub-paragraph (3) (a) of the first paragraph of the provision in the policy relating to General Exceptions, is to be construed as an exception; and that, in an action under section 9 of Ordinance No. 22 of 1937, the onus of proving that the exception applies, rests on the Insurers.

Counsel for the defendants has, however, submitted that by section 9 of Ordinance No. 22 of 1937, a plaintiff who brings an action under that section does not make cut a *prima facie* case against the authorised insurers unless there is evidence that the liability required to be covered by a policy under section 4(1) (b) is a liability covered by the terms of the policy. Counsel urged

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that there can be no proof that the liability is covered by the terms of the policy in the present case unless there is evidence that the motor car No. H 5231 was at the time of the accident, being used in accordance with the Limitations as to Use contained in the Schedule to the policy. Counsel for the plaintiff, on the other hand, contended that a plaintiff in an action under section 9 makes out a prima facie case against the authorised insurers if he establishes, in accordance with the requirements of section 4(1) (b), that the judgment referred to in section 9 is in respect of any liability incurred in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor vehicle on a public road. With respect to this submission of counsel for the defendants it is sufficient to state that section 9 of Ordinance No. 22 of 1937 does not, in any operate so as to alter the burden of proof in any particular case.

For the above reasons I hold that the plaintiff has made out a prima facie case against the defendants in so far as the judgment in action No. 82 of 1944 Demerara relates to bodily injuries.

PATRICK TANG gave evidence for the defendants. On the 9th July, 1942 he was disqualified by the Supreme Court, for a period of 10 years, from holding or obtaining a licence to drive a motor vehicle. The only portions of Tang's evidence upon which I can rely, and which I accept, are that Yacoob was the driver of motor car No. H. 5231; that at the time of the accident the motor car was being driven by the driver of the car, Yacoob; and, that at the time of the accident two ladies were in the car.

Tang gave evidence for Mohamed Hassan in November 1944 in action No. 82 of 1944 Demerara. On being cross-examined in the present action, he denied that he so gave evidence, but later he admitted it. In his evidence in action No. 82 of 1944 Demerara he stated that he joined the motor car No. H 5231 at Bel Air in which event he would not know when how why or where the two ladies entered the motor car. In the present action he stated that he joined motor car No. H 5231 at the ferry stelling, that the two ladies were picked up when the car was going east, and that the ladies were taken to "Dixie" on Bel Air front for a joy ride. He stated that the ladies did not hire the car, but later he said that he didn't know if they did hire the car. He also stated that he could not remember where the ladies were picked up, and later he said it was in Georgetown around Orange Walk way. Tang further stated that he was not quite sober at the time he met Yacoob on the 17th July. 1943 and that he was very hazy as to what happened, as to where the car went, and as to where "the car picked up anybody, on that day. Tang is not a trustworthy witness.

With respect to the portions of Tang's evidence which I felt myself able to accept, I should state that ladies do hire cars, and that ladies do go to a garage and hire cars there. There is nothing to prevent them from so doing.

The defendants have failed to satisfy the Court that motor car No. H. 5231 was at the time of the accident, being used

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otherwise than in accordance with the Limitations as to Use contained in the Schedule to the policy of insurance No. 4160612 issued by the defendants to Mohamed Hassan. The evidence that, at the time of the accident, two ladies were in the motor car is not inconsistent with, and is consistent with, the view that at the time of the accident the car was being used for Private Hire as defined in the Schedule to the Policy.

The only sums of money which the defendants may be liable, under the policy of insurance issued to Mohamed Hassan and by virtue of sections 4 and 9 (1) of Ordinance No. 22 of 1937, to pay to the plaintiff are those sums which, by the judgment in action No. 82 of 1944 Demerara, Mohamed Hassan has become legally liable to pay in respect of bodily injury to Claude Ernest Husbands caused by or arising out of the use of motor car No. H 5231 on the public road on the 17th July, 1943.

In paragraph 1 of the statement of claim in this action it is alleged that the sum of \$1,514.06 was awarded to the plaintiff in action No. 82 of 1944 Demerara in respect of damage and bodily injuries suffered by the plaintiff as a result of being knocked down and injured by motor car No. H 5231 on the 17th July, 1943. Reference to the statement of claim in action No. 82 of 1944 Demerara discloses that there are items of special damage which relate to injury to the property of Claude Ernest Husbands and not to bodily injuries received by him, for instance, —

Item				
4	Replacement of spectacles	..	..	\$30.00
12	Replacement of cycle	..	..	\$60.06
13	Gent's Wrist Watch lost in accident	..	..	\$45.00

Counsel for the defendants has submitted that the plaintiff cannot sue upon the judgment in action No. 82 of 1944 Demerara because the judgment, as entered, is for one sum namely \$1,514.06 and does not show separately the sum awarded in respect of bodily injuries; and the judgment cannot, in these proceedings be apportioned to show what sum was awarded in respect of bodily injuries. In respect of the costs awarded in action No. 82 of 1944 Demerara counsel for the defendants submitted that as! no apportionment was made by the trial judge between costs incurred in respect of claim for bodily injuries and costs incurred in respect of other injuries, no portion of the taxed costs can be recovered by the plaintiff against the defendants.

In support of his argument counsel for the defendants cited WEBER v. BIRKETT (1925) 133 Law Times 598, C.A. In that case the plaintiff brought an action for slander and for libel. The defendant tendered an apology and paid £105 into Court in respect of the slander, and a further sum of £105 into Court in respect of the libel. The jury returned a verdict for the plaintiff for £200 damages and stated that they were unable to apportion the amount between the slander and the libel: they were then discharged. In that case it was material that there should be an apportionment by the jury, as the incidence of the costs depended thereon. The judges, quite correctly, refused to perform the functions of the jury, held that the verdict, in the circumstances, was no verdict, and set it aside.

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The plaintiff was awarded judgment for \$1,514.06 and costs (which were taxed in the sum of \$609.35) against Mohamed Hassan. No portion of the judgment or costs has been paid. He now invokes his statutory right, under section 9 of Ordinance No. 22 of 1937, to recover from the defendants the judgment and costs in so far as they are in respect of the bodily injury to the plaintiff which was caused by or arose out of the use of the motor car No. H 5231 on the public road.

In my opinion, the plaintiff should not be deprived of the benefits of section 9, merely because it is difficult to apportion the judgment. If, after careful consideration, it is found that it is not possible to arrive at any apportionment beyond all reasonable doubt, then the plaintiff will fail: but if, after such consideration, the Court is satisfied, beyond all reasonable doubt, that a specified portion of the judgment is in respect of bodily injury, the Court will give judgment accordingly for that portion against the defendants.

The trial judge assessed the general damages at \$1,000, and those damages clearly relate to the bodily injuries suffered by the plaintiff as a result of the negligent driving of motor car No. H. 5231 on the public road.

The sum of \$567.74 was claimed as special damage, and the trial judge assessed the same at \$514.06, thus disallowing only the small sum of \$53.68. The items of special damage which may possibly be said not to relate to the bodily injuries amount in the aggregate to the sum of \$298.72 and are as hereunder:

Item					
4	Replacement of spectacles	..	..	\$	30.00
5	Locum tenens	..	..	..	100.00
6	Car hire	..	....	..	35.00
7	Special pair of boots	..	..	..	6.72
12	Replacement of cycle	..	..	..	60.06
13	Wrist watch lost in accident	..	..	..	45.00
14	Pictures of cycle damaged	..	..	..	2.50
15	Cartage of damaged cycle	..	..	..	.60
16	Special cot and mattress for injured foot				15.00
18	Anklet to support ankle	..	..	..	<u>3.84</u>
	TOTAL	..	..	..	<u>\$298.72</u>

The items of special damage which clearly are in respect of the bodily injuries amount in the aggregate to the sum of \$269.02 and are as hereunder:

Item					
1	Public hospital fees	..	..	..	\$39.30
2	Meals supplied while at hospital			..	30.00
3	Drugs, etc.	..	..	..	11.80
8	Masseur	..	..	..	74.00
9	Nurse	..	..	..	37.00
10	Physician	..	..	..	12.00
11	Drugs	..	..	..	14.92
17	Injections	..	..	..	<u>50.00</u>
	TOTAL	..	..	..	<u>\$269.02</u>

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Assuming that the sum disallowed, namely \$53.68, related entirely to the latter items, then the special damage assessed in respect of the bodily injuries amounted to \$269.02 less \$53.68 that is to say, the sum of \$215.34.

I am satisfied beyond all reasonable doubt that the damages, general and special, which are recoverable under section 9 of Ordinance No. 22 of 1937, amount to the sum of \$1,215.34.

The defendants have not established that the costs in action No. 82 of 1944 Demerara were in any way increased because in the statement of claim special damages in respect of injuries other than bodily injuries were claimed; and it appears, from an examination of the taxed bill of costs, that the costs were not so increased.

The plaintiff is therefore entitled to recover in this action under section 9 of Ordinance No. 22 of 1937 against the defendants, the sum of \$1,215.34 plus the sum of \$609.35, that is to say, the sum of \$1,824.69.

There will be judgment for the plaintiff against the defendants for the sum of \$1,824.69 and costs.

In order to make it clear that this action is brought under section 9 of Ordinance No. 22 of 1937, I shall amend the statement of claim by inserting between the words "from the defendants" and the words "the said sum" in paragraph 8, the words, "by virtue of section 9 of the Motor Vehicles Insurance (Third-Party Risks) Ordinance, 1937,".

*Judgment for plaintiff.*

Solicitors: *Francis Dias, O.B.E.; A. G. King.*

C. De FREITAS v. DEMERARA LEATHER AND  
BOOT FACTORY, LTD.

CLEMENT deFREITAS in his capacity as the executor under the last will  
and testament of Manoel Gregor deFreitas, deceased,  
Plaintiff,

v.

THE DEMERARA LEATHER AND BOOT FACTORY LIMITED,  
Defendants.

[1946. No. 219.—DEMERARA.]

Before DUKE, J. (Acting) in Chambers.

1946. May 6, 13, 14: June 24.

*Practice and procedure—Writ of summons—Issue of—Production of authority in writing before—Not required for entry of opposition—Rules of Court, 1900, Order 3, rule 9; Rules of the Supreme Court (Deeds Registry), 1921.*

*Opposition to transport or mortgage—Entry of—On behalf of person not resident in Colony—May be made—Even where such person has no attorney therein under power deposited or recorded in deeds registry—Rules of the Supreme Court (Deeds Registry), 1921.*

*Principal and agent—Powers of attorney—Powers of Attorney Ordinance, 1932 (No. 16)—Object and effect of.*

*Opposition to transport or mortgage—May be entered—On behalf of opponent—By barrister—Legal Practitioners (Definition of Functions) Ordinance, 1931 (No. 15), sections 3, 5, 6, 7; Rules of the Supreme Court (Deeds Registry), 1921.*

*Barrister and solicitor—Opposition to transport or mortgage—May be entered—On behalf of opponent—By barrister—Legal Practitioners (Definition of Functions) Ordinance, 1931 (No. 15), sections 3, 5, 6, 7; Rules of the Supreme Court (Deeds Registry), 1921.*

*Practice and procedure—Plaintiff suing in a representative capacity—Rules of Court, 1900, Order 4, rule 5—"and stating its date, if executed in the Registrar's office, and the date of the record, or deposit as of record, if executed elsewhere"—In relation to grants of probate or letters of administration—Inoperative.*

*Practice and procedure—Plaintiff may sue as executor—Before issue of grant of probate—Rules of Court, 1900, Order 4, rule 5.*

*Practice and procedure—Action by executor—Probate not yet obtained—Power of Court to stay action—Until issue of probate.*

*Practice and procedure—Writ of summons—Application to set aside—Abuse of process of Court.*

Order 3, rule 9 of the Rules of Court, 1900 (which provides that the plaintiff's 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) does not apply to the entry of an opposition under the Rules of the Supreme Court (Deeds Registry), 1921.

An opposition can be entered under the Rules of the Supreme (Deeds Registry), 1921 to a transport, mortgage or long lease, on behalf of a person not resident in the Colony who has no attorney therein under a power deposited or recorded in the Deeds Registry.

*Re Trade Mark No. 1745A, 1943 No. 395 Demerara, (1944) L.R.B.G. 69. applied, and Georgetown Coconut Estates Limited, v. Argosy Company Limited and Cunningham (1917) L.R.B.G. 78, distinguished.*

The Powers of Attorney Ordinance, 1932 (No. 16) merely made provision with respect to the recording of powers of attorney their effect and their revocation. Section 3 does not, for instance, prohibit a bank manager in this Colony from giving effect to the wishes of a

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customer temporarily or permanently resident abroad, merely because the customer has no attorney in the Colony under a deposited or registered power of attorney. Further, the Ordinance does not prohibit a person resident abroad from giving instructions on legal business to a barrister or solicitor in the Colony.

Under sections 3 and 5, the proviso to section 6, and section 7, of the Legal Practitioners (Definition of Functions) Ordinance, 1931 (No. 15) it is competent for a barrister to enter in the Deeds Registry an opposition on behalf of an opponent under the Rules of the Supreme Court (Deeds Registry), 1921.

Order 4, rule 5 of the Rules of Court, 1900 is as follows: "Where a plaintiff sues in a representative capacity, the indorsement shall describe the document proving such representative capacity and stating its date, if executed in the Registrar's office, and the date of the record, or deposit as of record, if executed elsewhere."

*Held* that the words "and stating its date, if executed in the Registrar's office, and the date of the record, or deposit as of record, if executed elsewhere" in Order 4, rule 5 of the Rules of Court, 1900 are inoperative in so far as grants of probate or of letters of administration are concerned.

*de Freitas v. Mendonca*, Limited Jurisdiction, 26th August, 1911, considered.

Order 4, rule 5 of the Rules of Court, 1900, does not operate to debar an executor from bringing an action before a grant of probate has been issued to him.

*Chetty v. Chetty* (1916) A.C. 603, 608, 609, considered.

A Court may, in the exercise of its inherent jurisdiction, stay an action brought by an executor until probate has been issued to him.

Summons to set aside a writ of summons to enforce an opposition to the passing of a transport and the opposition on the ground that the writ, and the opposition, were an abuse of the process of the Court dismissed on the evidence adduced on the hearing of the application.

*Austin v. Austin* (1921) L.R.B.G. 76, considered.

SUMMONS by the defendants The Demerara Leather and Boot Factory Limited, to set aside, among other things, the writ of summons issued herein by the plaintiff Clement deFreitas. The facts and arguments sufficiently appear from the judgment.

*H. C. Humphrys*, K.C. and *S. L. van B. Stafford*, K.C., for the applicants, the defendants.

*J. L. Wills*, for the respondent, the plaintiff.

*Cur. adv. vult.*

DUKE, J. (Acting): This is a summons by THE DEMERARA LEATHER AND BOOT FACTORY LIMITED for an order; (a) setting aside for irregularity an opposition entered on behalf of the plaintiff on the 13th April, 1946. to the passing of a mortgage by THE DEMERARA LEATHER AND BOOT FACTORY LIMITED in favour of the British Guiana and Trinidad Mutual Fire Insurance Company Limited and/or the writ of summons herein to enforce the opposition, and all subsequent proceedings; (b) that, if necessary, the said opposition be declared abandoned; (c) that the said opposition and/or writ be struck out or set aside, or in the alternative that the claims for \$37,500 and \$53,400 therein specified or mentioned be struck out, or that all further proceedings in this action be stayed on the ground that the same is or are vexatious and an abuse of the process of the Court;

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and (d) that the plaintiff Clement de Freitas pay to the defendants THE DEMERARA LEATHER AND BOOT FACTORY LIMITED their costs of this action and of the summons to be taxed.

On the 2nd December, 1944 Manoel Gregor de Freitas made his last will and testament appointing as his executors his sons Vasco Ferdinand de Freitas and Clement de Freitas and his daughter Sylvia Augusta de Freitas. After making certain specific bequests and devises to four of his daughters, Manoel Gregor de Freitas bequeathed and devised —

- (d) to my son Clement, Medical Practitioner, at present residing and practising in the Island of Trinidad, all the residue of my estate, including all shares held by me in the business of the Demerara Leather and Boot Factory, Ltd."

On the 13th July, 1945 Vasco Ferdinand de Freitas filed in the Supreme Court Registry his act of renunciation to all his right and title to the probate and execution of the said will.

On the 14th August, 1945, Sylvia Augusta de Freitas, in her capacity as one of the executors and one of the legatees under the said last will and testament of Manoel Gregor de Freitas, deceased, issued a writ of summons, No. 328 of 1945 Demerara, against the said Vasco Ferdinand de Freitas for the propounding of the said will. The said Vasco Ferdinand de Freitas set up a counterclaim that a will made by Manoel Gregor de Freitas dated the 22nd May, 1944 was the last will and testament of the said Manoel Gregor de Freitas.

On the 28th August, 1945 Estella de Freitas, a daughter of the late Manoel Gregor de Freitas, and the aforesaid Sylvia Augusta de Freitas, two of the directors of THE DEMERARA LEATHER AND BOOT FACTORY LIMITED (hereinafter in this judgment referred to as "the company") presented to the Supreme Court a petition for the winding-up of the company.

By an agreement in writing made on the 25th March, 1946 between Estella de Freitas and Sylvia Augusta de Freitas, parties of the first part, Stanley McDonald de Freitas, the party of the second part and The Demerara. Leather and Boot Factory Limited the party of the third part, Estella de Freitas and Sylvia Augusta de Freitas agreed to sell and transfer to Stanley McDonald de Freitas and/or to his nominees, and Stanley McDonald de Freitas agreed to purchase from Estella de Freitas and Sylvia Augusta de Freitas, all of the shares held by them in the capital of the company for a purchase price of 80 per centum of the face value of the said shares. The sale was to be completed on the passing of an intended mortgage by the company in favour of the British Guiana and Trinidad Mutual Fire Insurance, Company, Limited, and not later than 6 weeks from the date of the agreement. The company assumed, on the execution of the agreement, liability to Frank de Souza for the sum of \$2,400 due on a promissory note made by Manoel Gregor de Freitas now deceased in favour of the said Frank de Souza. In consideration of the purchase of the shares by Stanley McDonald de Freitas from Estella de Freitas and Sylvia Augusta de Freitas, and in consideration of the assumption of liability by the company of the debt due to Frank de

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Souza, Estella de Freitas and Sylvia Augusta de Freitas agreed and undertook, immediately after the last will and testament of the said Manoel Gregor de Freitas deceased had been admitted to probate, to withdraw absolutely and for ever the winding-up petition against the company. It was further agreed that on the withdrawal of the winding-up petition, Estella de Freitas and Sylvia Augusta de Freitas the company, and all other parties who entered appearance to the said petition or are concerned in any other proceedings whatever at present pending between any of the parties to the agreement shall pay his, her or their own costs in any such proceedings.

The last clause of the agreement, as drafted, was as follows:

6. The Sellers (that is to say, Estella de Freitas and Sylvia Augusta de Freitas) or either of them shall not after the execution of this Agreement in their own right *or as executors or legatee of the estate of M. G. de Freitas or in any other capacity whatsoever* bring any action or take any proceedings against any other party hereto other than to enforce the terms of this Agreement.

The words underlined were however deleted from the agreement before it was signed, and the deletion was duly attested by the parties to the agreement. In paragraph 16 of the affidavit filed on behalf of the company it is stated as follows:

- "16. In the aforesaid negotiations (that is to say, the negotiations which terminated in the agreement of the 25th March 1946) it was proposed that a compromise be accepted in respect of the said sum of \$17,168.85 (that is to say, the sum hereinafter referred to as claimed in the notice of opposition and the writ of summons as due by the company to Manoel Gregor de Freitas on accounts stated) but in the settlement arrived at with the said Estella and Sylvia de Freitas it was decided that this should be left over for settlement with the plaintiff and the words "or as executor or legatee of M. G. de Freitas or in any other capacity whatever"—were omitted from Clause 6 of the said Agreement".

Sylvia Augusta de Freitas is an executor and a legatee under the will of Manoel Gregor de Freitas deceased dated the 2nd December, 1944, but Estella de Freitas is neither an executor nor a legatee under the said will. Sylvia Augusta de Freitas is the legatee and devisee in respect of certain parcels of land in St. Vincent, British West Indies but not otherwise.

On the 25th March, 1946 the Court, in Action No. 328 of 1945 Demerara, dismissed the counterclaim in which the will of the 22nd May, 1944 was sought to be propounded by Vasco Ferdinand de Freitas, and pronounced for the force and validity of the last will and testament of Manoel Gregor de Freitas dated the 2nd December, 1944 propounded by Sylvia Augusta de Freitas one of the executors and legatees named therein. The Court also ordered "that probate of the said will dated the 2nd day of December, 1944 be granted to the plaintiff Sylvia Augusta de Freitas power being reserved by the Court to grant probate to Clement de Freitas the other executor named in the said will whenever he shall duly apply for same." Each party to the action was ordered to bear his own costs.

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On the 25th March, 1946, the winding-up petition was, with the leave of the Court, withdrawn.

THE DEMERARA LEATHER AND BOOT FACTORY, LIMITED, caused the Registrar of Deeds to advertise in the Gazette of the 30th March, 1946, and the 6th and 13th April, 1946, notice of its intention to pass a First Mortgage, (for the sum of \$45,000) in respect of the property described in the advertisement, in favour of the British Guiana and Trinidad Mutual Fire Insurance Company, Limited.

On the 13th April, 1946 an opposition in the name of "Clement de Freitas of Port-of-Spain, Trinidad, British West Indies, doctor of medicine in (his) capacity as one of the executors of the last will of Manoel Gregor de Freitas, deceased dated the 2nd day of December, 1944" was entered to the passing of the mortgage as aforesaid. The notice of opposition was signed by "J. Lyttleton Wills, Counsel for opponent". Clement de Freitas was not in this colony on the 13th April, 1946, and on that day there was no instrument deposited, or on record, in the Deeds Registry appointing any person to be his attorney in this colony.

The first question for determination on this summons is whether an opposition to a transport mortgage or long lease can be entered on behalf of a person not resident in the colony who has no attorney in the colony under a power of attorney deposited or recorded in the Deeds Registry. Mr. H. C. Humphrys, K.C., senior counsel for the defendant company referred to GEORGETOWN COCONUT ESTATES, LIMITED v. ARGOSY COMPANY, LIMITED and J. CUNNINGHAM (1917) L.R.B.G. 78 and to section 3 of the Powers of Attorney Ordinance, 1932 (No. 16) in support of his objection that an opposition cannot be so entered. In the case cited the plaintiff was represented in the colony by an attorney who, purporting to act under the power of attorney in his favour, authorised a solicitor to issue a writ in the name of the plaintiff for damages for libel. The power of attorney did not authorise the attorney to issue a writ for damages for libel. It was held by the Full Court (Sir Charles Major, C.J. and Dalton, J.) affirming the decision of Berkeley, J., that the writ was issued without authority and in direct contravention of Order 3, rule 9 of the Rules of Court 1900; that the issue of the writ was more than an irregularity; that it was an illegality and must be set aside.

In the case of RE TRADE MARK No. 1745A, 1943 No. 395 Demerara, (1944) L.R.B.G. 69 an originating notice of motion was filed in the Supreme Court on behalf of THE FLORSHEIM SHOE COMPANY which was incorporated under the laws of the State of Illinois, United States of America. That Company had no attorney in the colony, and when the notice of motion was filed by the Company's Solicitor there was not produced to the Registrar of the Supreme Court an authority in writing authorising him to act for the applicant in the matter of the originating motion. I held that Order 3, rule 9 (which provides that the plaintiff's 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 writ-

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ing signed by the plaintiff or his attorney appointing the solicitor to act for him in the action) applies to writs of summons only, and does not apply to an originating notice of motion. I also held that an originating motion may be filed on behalf of a company which is incorporated under the laws of a country other than this colony even though the company has no attorney in the colony. I adhere to that decision, and to the principle tan which it is founded. I therefore hold that Order 3, rule 9 of the Rules of Court, 1900, does not apply to the entry of an opposition under the Rules of the Supreme Court (Deeds Registry), 1921; and that an opposition can be entered under the Rules of the Supreme Court (Deeds Registry), 1921 to a transport mortgage or long lease on behalf of a person not resident in the colony who has no attorney therein under a power deposited or recorded in the Deeds Registry.

The Powers of Attorney Ordinance, 1932 (No. 16) merely made provision with respect to the recording of powers of attorney, their effect and their revocation. Section 3 does, not, for instance, prohibit a bank manager in this colony from giving effect to the wishes of a customer temporarily or permanently resident abroad, merely because the customer has no attorney in the colony under a deposited or registered power of attorney. Further, the Ordinance does not prohibit a person resident abroad from giving instructions on legal business to a barrister or solicitor in the colony.

The second question for determination on this summons is whether an opposition to the passing of a transport mortgage or long lease can lawfully be entered by a barrister on behalf of an opponent.

The Rules of the Supreme Court (Deeds Registry), 1921 (see Regulations 1923, page 129) relate to business in the Deeds Registry. Rule 2 (1) provides for the entry of opposition to the passing of a transport mortgage or long lease, by filing a notice thereof in the form, and containing the particulars and requirements given, in the First Schedule to the Rules. Form 1 in that Schedule provides that a notice of opposition may be signed by the opponent in person in which case it must be signed in the presence of the Registrar of Deeds. It also provides that a notice of opposition may be signed by the opponent's counsel or solicitor.

It is, however, contended by senior counsel for the defendant company that, since the enactment of the Legal Practitioners (Definition of Functions) Ordinance, 1931 (No. 15), an opposition to the passing of a transport mortgage or long lease cannot be entered by a barrister on behalf of an opponent.

The entry of an opposition does indeed have the same effect as if an injunction were granted by the Supreme Court restraining the proponent from passing the transport mortgage or long lease as the case may be, until such time as the opposition is withdrawn, or is declared to be abandoned or to be unjust or not well founded, or is set aside. If, however, the entry of an opposition is an act which a barrister is not prohibited from doing, or which a barrister is permitted to do, by the Legal Prac-

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tioners (Definition of Functions) Ordinance, 1931 (No. 15), it would be competent for a barrister to enter an opposition on behalf of an opponent.

By sections 3(1) B (b) and 5 of Ordinance No. 15 of 1931, a barrister may issue a specially indorsed writ, whether the sum of money claimed or value of the property in dispute exceeds the sum of \$500 or not: and such a writ may be a writ to enforce an opposition. It would, therefore be a surprising result if it were ascertained, from an examination of the Legal Practitioners (Definition of Functions) Ordinance, 1931, that it is not competent for a barrister to enter an opposition.

By paragraph A of subsection (1) of section 3 of Ordinance No. 15 of 1931 a barrister is entitled to act alone and have audience in any matter in a magistrate's court or other inferior court or tribunal. By section 5 (1) of the Interpretation Ordinance (Chapter 5) the words "or other" are to be construed disjunctively and not as implying similarity. By section 3 of the Deeds Registry Ordinance, 1931 (No. 2) any person affected by any order or decision of the Registrar of Deeds may appeal to a Judge in Chambers. The Registrar of Deeds is therefore a tribunal inferior to that of the Supreme Court, and falls within the ambit of the expression "or other inferior tribunal" as aforesaid. A barrister is therefore entitled to act alone and have audience in any matter in the Deeds Registry; and he may, for instance, enter an opposition on behalf of an opponent. There is an exception to this rule: by section 100 of the Patents and Designs Ordinance, 1937 (No. 9) business under that Ordinance or the Trade Marks Ordinance (Chapter 59) cannot be transacted by a barrister unless he is a licensed patent agent.

Section 4 (1) of Ordinance No. 15 of 1931 confers on a barrister exclusive right of audience in certain matters in the Supreme Court, in the Full Court except in certain cases specified in paragraph D of section 3 (1), and in the West Indian Court of Appeal; and section 4 (2) provides that where a barrister has exclusive right of audience, he shall, except when the Supreme Court is sitting in its original criminal jurisdiction or as a Court of Crown Cases reserved or as a Court of Criminal Appeal, be instructed by a solicitor on the record.

The expression "record" means the record of the proceedings in the Supreme Court, the Full Court, or in the West Indian Court of Appeal, as the case may be. The notice of opposition does not form part of the record of proceedings in the action to enforce the opposition. The statement of claim in such action sets out the notice of opposition in full, and alleges the entry thereof. If these averments are denied, or are not admitted, by the defendant in the opposition action, the plaintiff has to prove them. Matters forming part of the record are not required to be proved. It must be assumed that the Legislature, in using the expression "record", intended it to have the meaning which for centuries has been attached to the expression in England: compare *R. v NICHOLAS* (1931-1937) L.R.B.G. 674, W.I.C.A. The record in an action brought to enforce an opposition commences

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with the filing of the writ, and not with the entry of the opposition. It therefore follows that section 4 of Ordinance No. 15 of 1931 does not relate to the entry of an opposition under the Rules of the Supreme Court (Deeds Registry), 1921. The entry of an opposition is therefore not a matter in which a barrister is required to be instructed by a solicitor.

By section 6 of Ordinance No. 15 of 1931 a barrister is not entitled to practise as a solicitor in "any matter" in which a barrister is required by section 4 (2) to be instructed by a solicitor, provided that nothing contained in section 6 shall be deemed to prohibit a barrister from acting fully for a client in any matter of a legal nature without the intervention of a solicitor up to the time when it has been decided by the client that litigation between that client and any other person will ensue.

By Rule 6 of the Rules of the Supreme Court (Deeds Registry) 1921, [a, copy of a notice of opposition should be served, within 3 days after the entry of the opposition, on the person seeking to pass the transport mortgage or long lease in respect whereof the opposition is entered. The object of this Rule is to give such person an opportunity to settle, if possible, the claim of the opponent before the issue, within ten days after the certificate of the Registrar of Deeds of the entry of the opposition, of a writ to enforce the same.

It is a pre-requisite to the institution of an action of detinue that there should be a demand and a refusal: *AGARD v MAY-COCK*, 1945 No. 420, (1946) L.R.B.G. 65, Full Court. The client of a barrister who consults him in relation to the recovery from another person of goods the property of the client cannot decide that litigation will ensue between himself and the person unless and until a demand has been served upon such person and he has refused to deliver. The barrister is therefore entitled, if so instructed, to write to the person a letter demanding delivery, and to act fully for the client in connection therewith until it is finally decided" by the client that "litigation will ensue".

It is a pre-requisite to the filing of a writ to enforce an opposition to the passing of a transport mortgage or lease that notice of opposition should have been entered in the Deeds Registry. The client of a barrister who consults him in relation to the entry of such an opposition cannot decide that litigation will ensue between himself and the person seeking to pass the transport mortgage or lease unless and until such person has been served with a copy of the notice of opposition and has failed to settle the opponent's claim. The barrister is therefore, by the proviso to section 6 of Ordinance No. 15 of 1931, entitled, if so instructed, to enter the notice of opposition, to serve a copy of the notice of opposition on the person seeking to pass the transport mortgage or lease, and to act fully for the client in connection therewith until it is finally decided by the client that "litigation will ensue". A writ to enforce an opposition is required to be filed within 10 days after the certificate by the Registrar of Deeds as to the entry of the opposition, so that the client has to make up his mind promptly. If he decides to file a writ to

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enforce the opposition, the writ may be issued by the barrister, if it is specially indorsed under the Rules of Court 1900 and 1932. The writ in this action is not specially indorsed, but it could have been specially indorsed under the Rules and in such case it could have been issued by a barrister.

By section 7 of Ordinance No. 15 of 1931 a barrister or a solicitor shall be entitled to transact alone all legal business of a non-contentious nature not otherwise provided for in the Ordinance or in any other Ordinance or rule.

An opposition is entered in the Deeds Registry which is quite separate and apart from the Supreme Court Registry even though the offices of Registrar of Deeds and Registrar of the Supreme Court are held by one and the same person. The entry of an opposition is legal business of a non-contentious character. It may, like a letter of demand, lead to the filing of a writ, but it does not necessarily so lead. I may here observe that Order 2, of Part II of the Rules of Court, 1900 (which was replaced by the Rules of the Supreme Court (Deeds Registry, 1921) is described in Rule 5 of Order 1 of Part I of the Rules of Court, 1900, as containing rules regulating the procedure on matters of a non-contentious nature. Rule 2 of Order 2 of Part II of the Rules of Court, 1900, provided for the entry of oppositions and that an opposition shall be signed by a barrister-at-law or solicitor in the presence of the Registrar.

For the above reasons I am of the opinion that under sections 3 and 5, the proviso to section 6, and section 7, of the Legal Practitioners (Definition of Functions) Ordinance, 1931 (No. 15) it is competent for a barrister to enter in the Deeds Registry an opposition on behalf of an opponent under the Rules of the Supreme Court (Deeds Registry), 1921.

It is alleged in the notice of opposition that the Company is indebted to the opponent in his quality as executor of the estate of Manoel Gregor de Freitas deceased in the sum of \$108,068.85 the particulars whereof are as follows: —

- (a) \$37,500 being money paid and, advanced by the said Manoel Gregor de Freitas, deceased, for the use of the company at the latter's request in or about the month of April, 1933, in respect of the purchase of the assets of the Colonial Tanning and Refrigerating Company, Limited, including the property proposed to be mortgaged and the business therein carried on which was re-acquired by the Demerara Leather and Boot Factory, Limited, on the winding-up of the said Colonial Tanning and Refrigerating Company, Limited, and, which said sum has not been repaid by the company;
- (b) \$53,400 being balance of salary as Governing Director of the company payable to the said Manoel Gregor de Freitas in his lifetime under a resolution of the company dated the 19th September, 1918, to pay the said Manoel Gregor de Freitas \$400 per month, in respect of the period April 1933 to December 1944, inclusive as follows: —
- |                             |    |    |              |
|-----------------------------|----|----|--------------|
| To 141 months salary        | .. | .. | \$56,400     |
| By paid during 1943—\$1,800 |    |    |              |
| By paid during 1944—\$1,200 |    |    |              |
|                             |    |    | <u>3,000</u> |
|                             |    |    | \$53400      |

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- (c) \$17,168.85 payable to the said Manoel Gregor de Freitas on an account stated and adjusted in writing, to wit a balance sheet of the company dated the 31st December 1944, whereby the company acknowledged itself indebted to the said Manoel Gregor de Freitas in the sum of \$17,168.85.

On the 23rd April, 1946 a writ was filed by "Clement de Freitas in his capacity as executor under the Last Will and Testament of Manoel Gregor de Freitas deceased probate whereof was granted by the Supreme Court of British Guiana to him on the 25th March, 1946, appearing herein by his duly constituted attorney in this colony Francis Othniel Richards" against the company, to enforce the opposition entered on the 13th April, 1946ft In the indorsement of claim it is stated that "the plaintiff sues in his capacity as an executor under the Last Will and Testament of Manoel Gregor de Freitas, deceased, dated the 2nd day of December, 1944, probate whereof was granted to him by the Supreme Court of British Guiana in solemn form on the 25th day of March 1946. The plaintiff in his said capacity is represented herein by his duly constituted attorney in this colony Francis Othniel Richards agreeably with Power of Attorney dated the 18th day of April, 1946, and recorded in the Deeds Registry of British Guiana on the 23rd day of April, 1946, Book of Records No. folio *et sequentibus*".

The plaintiff's claim, as indorsed on the writ of summons, is for —

- (a) a declaration that the opposition entered on the 13th April, 1946 is just legal and well-founded;
- (b) an injunction to restrain the defendant company from passing the mortgage;
- (c) the sum of \$37,500;
- (d) the sum of \$53,400
- (e) the sum of \$17,168.85; and
- (f) costs.

On the 10th May, 1946 Clement de Freitas and Sylvia Augusta de Freitas, two of the executors under the will of Manoel Gregor de Freitas deceased dated the 2nd December, 1944, (the other executor Vasco Ferdinand de Freitas having renounced Ms appointment as such), deposited the said will (referred to in the Order of Court made the 25th March, 1946 in Action No. 328 of 1945, Demerara) in the Registry of the Supreme Court, and formally applied for probate, lodging with the application the usual Oath of Executors and a certified copy of the said Order of Court. On the 11th May, 1946 the Registrar of the Supreme Court, under the authority of the said Order of Court, issued, by virtue of section 26 of the Deceased Persons Estates Administration Ordinance (Chapter 149), a grant of probate to Clement de Freitas and Sylvia de Freitas in Form 2 in the Schedule to the said Ordinance. The grant is dated the 25th March, 1946, the date of the Order of Court under whose authority the grant was issued.

The third question for determination on this summons is whether an opposition to a transport, mortgage or long lease can

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be entered, or a writ of summons to enforce the opposition can be issued, by an executor named in a will before probate is issued to the executor.

On the 13th April, 1946 when the opposition was entered, and on the 23rd April, 1946 when the writ to enforce the opposition was filed, probate of the will of Manoel Gregor de Freitas deceased dated the 2nd December, 1944 had not yet been issued to Clement de Freitas the plaintiff in this action. Such probate, although dated as of the day on which probate was granted in solemn form, namely the 25th March, 1946, was not issued to Clement de Freitas until the 11th May, 1946.

This action has not yet come on for trial, and further, the statement of claim has not yet been filed. When the summons herein came on for hearing on the 13th May, 1946 probate of the will of Manoel Gregor de Freitas deceased had in fact been issued to the plaintiff Clement de Freitas, although such probate was not issued when the summons herein was filed.

In CHETTY v. CHETTY (1916) A.C. 603, 608, 609, an appeal to the Privy Council from the Supreme Court at Singapore, Lord Parker of Waddington said:

It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vest in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree (that is to say, in the action) before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title.

Mr. Humphrys, K.C., senior counsel for the defendant company submitted that, in this colony, an executor is, by reason of Order 4 rule 5 of the Rules of Court, 1900, required to prove his title as executor before instituting an action as such. Order 4 rule 4 provides that "if a plaintiff sues in a representative capacity the indorsement shall show in what capacity such plaintiff sues"; and Order 4, rule 5 is as follows:

Where a plaintiff sues in a representative capacity, the indorsement shall describe the document proving such representative capacity and stating its date, if executed in the Registrar's office, and the date of the record, or deposit as of record, if executed elsewhere.

In DE FREITAS v. MENDONCA, Limited Jurisdiction, 26th August, 1911, Hewick, acting Chief Justice, held that a plaintiff does not sue in a representative capacity within the meaning of Order 4, rule 5 of the Rules of Court, 1900, where he sues by an attorney; and he expressed the opinion that a plaintiff sues in a representative capacity within the meaning of Order 4, rule 5 where he sues as executor or as administrator.

The words "and stating its date, if executed in the Registrar's office, and the date of the record, or deposit as of record if executed elsewhere" in Order 4 rule 5 are appropriate in relation to powers of attorney, but are not appropriate in relation to grants of probate issuing out of the Supreme Court Registry.

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This is not surprising because when Order 4 rule 5 was enacted in 1900 grants of probate were unknown: such grants were issued for the first time, under the Deceased Persons Estates Administration Ordinance (Chapter 149) which came into operation on the 1st January, 1920. A grant of probate, whether it issues out of the Supreme Court Registry or out of any other Registry in the British Empire (see Ordinance No. 34 of 1936), is never "executed" in the Registry. I am therefore of the opinion that the words "and stating its date, if executed in the Registrar's office, and the date of the record, or deposit as of record, if executed elsewhere" in Order 4 rule 5 of the Rules of Court, 1900 are inoperative in so far as grants of probate or of letters of administration are concerned.

The plaintiff has complied with the provisions of Order 4, rule 5. He has stated in the indorsement on the writ of summons that he "sues in his capacity as an executor under the last will and testament of Manoel Gregor de Freitas, deceased, dated the 2nd day of December, 1944, probate whereof was granted to him by the Supreme Court of British Guiana in solemn form on the 25th day of March, 1946". He has therefore described the document proving his representative capacity. The words "Registrar's office" in Order 4, rule 5 mean, since the Deeds Registry Ordinance (Chapter 177) came into force on the 1st January, 1920, the Deeds Registry. The will was neither executed nor deposited in the Deeds Registry. It was deposited in the Registry of the Supreme Court.

I hold that Order 4, rule 5 of the Rules of Court, 1900 does not operate to debar an executor from bringing an action before a grant of probate has been issued to him. The decision in *CHETTY v. CHETTY* states the English law on the point accurately (see *INGALL v. MORAN*, 1944, 1 A.E.R. 97, C.A.), and it accurately expresses the law of this colony.

A Court may, in the exercise of its inherent jurisdiction, stay an action brought by an executor until probate has been issued to him. In this case, however, probate was issued to the executor before arguments were heard on the summons. No order for such a stay can, therefore, be made.

The fourth question for determination on this summons is whether the opposition, and the writ of summons filed herein to enforce the opposition, should be set aside as being an abuse of the process of the Court, or, alternatively, whether the opposition and the writ should be so set aside in so far as they relate to the claim of the plaintiff for \$37,500 moneys paid and advanced by the plaintiff's testator to and for the use of the defendant company, and for \$53,400 balance of salary due owing and payable by the defendant company to the plaintiff's testator.

In the course of his argument Mr. S. L. Van Batenburg Stafford, K.C., junior counsel for the defendant company, contended that paragraphs 11, 12, 13, 14 and 15 of the affidavit filed on behalf of the company disclosed that —

- (a) certain disputes between the defendant company Estella de Freitas and Sylvia Augusta de Freitas, and the plaintiff were settled by agreement dated the 25th March, 1946, and that the plaintiff knew of, and induced, the settlement

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- (b) the opposition is based on a claim by the plaintiff for accounts and not on a liquidated demand;
- (c) the plaintiff has entered opposition in respect of sums which are clearly in excess of what the plaintiff considers is really due to him ;
- (d) while, subject to paragraph (b) hereof, there may be a triable issue in respect of the third item in the notice of opposition, namely, the sum of \$17,168.85 alleged to be due by the defendant company to the plaintiff's testator, the items \$37,500 and \$53,400 are a bogus claim made by the plaintiff with the object of delaying the carrying out of the terms of settlement contained in the agreement of the 25th March 1946 which was expressed to be made between (1) Estella de Freitas and Sylvia Augusta de Freitas, (2) Stanley Mc Donald de Freitas, and (3) The Demerara Leather and Boot Factory, Limited.

According to paragraphs 6, 7 and 8 of the affidavit filed on behalf of the company, negotiations were started with a view to settlement of the winding-up matter, and of the suit No. 328 of 1945, and Estella de Freitas, who is a full sister of the plaintiff in this action represented herself to be the attorney of and duly authorised to act for the plaintiff Clement de Freitas; on a date subsequent to the 6th November, 1945 all the parties involved in the aforesaid matter and suit, including the said Estella de Freitas acting on behalf of the plaintiff, approved of certain terms of settlement one of the terms of which was the sale by Estella de Freitas, Sylvia de Freitas and the plaintiff of their shares in the company, when it was discovered that the said Estella de Freitas had no power to bind the plaintiff; and after the lapse of several weeks it emerged that the plaintiff was not willing to enter into any compromise until probate of the will of the 2nd December, 1944 had been granted.

According to paragraph 9 of the said affidavit Mr. W. J. Gilchrist, barrister-at-law, who was acting on behalf of the plaintiff and of Estella de Freitas and of Sylvia Augusta de Freitas showed the legal advisers of the company and Vasco Ferdinand de Freitas a letter which he had received from the plaintiff in which the plaintiff had stated, *inter alia*:—

"I, however, still feel that I ought not to agree to any compromise which makes it appear that probate of my father's last will depends on my agreeing to such compromise in advance.

I am not seeking probate as a favour, but as a matter of right. When the Will is admitted to probate, then I shall enter wholeheartedly into terms of compromise, because then I shall have something to compromise".

It would appear from the said paragraph of the affidavit that Mr. Gilchrist stated to the legal advisers of the company and of Vasco Ferdinand de Freitas that the above quoted passages from a letter of the plaintiff "clearly showed that the plaintiff would be *willing to settle* once the will was admitted to probate".

It does not, however, appear from the affidavit that Mr. Gilchrist; told the legal advisers as aforesaid that the plaintiff would, in respect of his shares in the company, agree to whatever terms of settlement were agreed to by Estella de Freitas and Sylvia Augusta de Freitas, Further, there is nothing in the

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above-quoted passages which indicates, or even suggests, that the plaintiff had agreed in advance to terms of compromise.

The defendant company may have believed that the plaintiff would, on the will of the 2nd December, 1944 being proved before the Court to be the last will and testament of Manoel Gregor de Freitas. enter into a written agreement with Stanley Mc Donald de Freitas and with the company to the same effect as Estella de Freitas and Sylvia de Freitas did in the agreement of the 25th March 1946, but the affidavit filed on behalf of the defendant company does not disclose that Estella de Freitas, or any other person in the colony, had any authority to bind the plaintiff. Neither does the affidavit disclose that the agreement was induced by any act of the plaintiff, or that the plaintiff did anything which would, in law or equity, render him bound by the agreement in the same manner and to the same extent as Estella de Freitas or Sylvia Augusta de Freitas is so bound. Further, the affidavit does not disclose that the plaintiff ever agreed to be bound by the terms of the agreement, or that he ever agreed to waive and abandon his claim for \$37,500, or for \$53,400, or for \$17,168.85, alleged by him in his notice of opposition to be due by the defendant company to the plaintiff's testator.

Paragraphs 11, 12, 13, 14, and 15 of the affidavit filed on behalf of the company disclose such facts and circumstances that if the plaintiff had filed a specially indorsed writ, and not as he did a generally indorsed writ, to enforce the opposition, the defendant company would have been given unconditional leave to defend. They do not, however, disclose such facts and circumstances that the Court would have given judgment in favour of the defendant company with costs. They disclose a triable issue in respect of each of the three sums of money mentioned in the opposition and in the indorsement of claim on the writ of summons. The plaintiff alleges that the sum of \$37,500 was paid by Manoel Gregor de Freitas to the Official Receiver for the purchase of the company's property. The company alleges that certain entries were made in the books of the company relative to that payment. The entries are of such a nature that, if the writ were specially indorsed, judgment would not be given, without a trial, for the plaintiff. The plaintiff alleges that the sum of \$53,400 is due by the company to the estate of Manoel Gregor de Freitas deceased for remuneration or salary at the rate of \$400 a month, in accordance with a resolution of the company dated the 19th September, 1918. The company does not deny that such a resolution was passed. It, however, alleges that no cash books of the company for the years 1933 to 1942 can be found, that no cash account was kept in the ledger for the years 1933 to 1942, and that no entries can be found in the books of account of the company in respect of the remuneration or salary of the deceased at the rate of \$4,800 per annum. It is also stated that the undertaking of the company had been sold to the Colonial Tanning and Refrigerating Company, Limited, in or about the year 1931 for \$100,000, of which \$50,000 had been received in cash and had not been accounted for by the deceased; that the trans-

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action had not been recorded in the books of the company; and that the deceased had received from time to time considerable sums of money belonging to the company and that he had not entered such sums in its books. Here again, if the writ had been specially indorsed, judgment would not have been given, without a trial, in favour of the plaintiff. The plaintiff alleges that the sum of \$17,168.85 is due by the defendant company to Manoel Gregor de Freitas on accounts stated. The defendant company states that Mr. E. A. Adams, certified accountant, was allowed to examine the books of the company on behalf of Estella de Freitas and Sylvia de Freitas; that he reported that the accounts of the company had been kept in an unsatisfactory manner during the lifetime of the deceased; that he further reported that the sum of \$17,168.85 or \$17,168.52 was, according to the books of the company, payable to Manoel Gregor de Freitas deceased; and that he prepared a balance sheet as at 31st December 1944 in which the company is shown as being indebted to the estate of Manoel Gregor de Freitas, deceased, in the sum of \$17,168.52. In paragraph 16 of the Company's affidavit it is stated that "in the settlement arrived at with the said Estella and Sylvia de Freitas it was decided that this should be left over for settlement with the plaintiff". In these circumstances, if the writ were specially indorsed judgment would not be given, without a trial, for the plaintiff for the sum of \$17,168.85.

In the course of his argument Mr. Stafford, K.C. contended that paragraphs 11 to 15 of the affidavit filed on behalf of the defendant company show that the claims of the plaintiff as set forth in his notice of opposition arose out of accounting matters; that no accounts were stated and that the state of accounts was unsettled and in doubt. In *AUSTIN et. al. v. AUSTIN* (1921) L.R.B.G. 76 an opposition was entered to the passing of a transport on the ground that the opposers had an action for accounts against the person seeking to pass the transport. An action was brought to enforce the opposition, and the opposers filed their statement of claim therein. The defendant applied for an order striking out the statement of claim on the ground that it disclosed no reasonable cause of action in opposition, and Dalton, J. made an order in terms of the application. In that case it appeared on the face of the proceedings that the relief which the opposers were claiming was that an account be taken. In the present case, however, there is nothing on the face of the notice of opposition to indicate or suggest that the plaintiff's claim is one for accounts.

Counsel urged that the statements contained in the affidavit filed on behalf of the defendant company were not denied by the plaintiff, and therefore they must be taken, for the purposes of this application, to be true and correct. On the other hand, Mr. J. L. Wills, counsel for the plaintiff, submitted that the defendant company is seeking to have this action tried and disposed of on affidavits before a statement of claim is filed, and before to unconditional appearance is entered to the writ- If I had formed the opinion that this case was one which could properly be tried on affidavits, I would have given leave to the plaintiff to file

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an affidavit traversing, or confessing and avoiding, the allegations made in paragraphs 6 to 8 and 11 to 15 of the affidavit filed on behalf of the defendant company. This case is, however, essentially one which must be fought out on trial in open Court.

I am unable to find, in the affidavit filed on behalf of the defendant company any evidence upon which I can, at this stage of the proceedings, say that the plaintiff has, in any way, abused the process of the Court.

For the above reasons, the summons of the defendant company is dismissed with costs, and I certify for counsel.

*Summons dismissed.*

Solicitors: *J. Edward de Freitas*, for the defendants; *R. G. Sharples*, for the plaintiff.

RAJCOOMAR SINGH, Plaintiff,

v.

ERNEST HIGGINS et al, Defendants.

[1944. No. 490.—DEMERARA.]

Before DUKE, J. (Acting).

1946. JUNE 14, 17, 18, 19, 20, 21, 28.

*Action—Founded on an agreement in writing—Moneys due under agreement—To be repaid in gold won by defendants—All such gold to be shipped to plaintiff at price below market price—Agreement not broken by defendants—Moneys due to plaintiff thereunder—Action to recover— Not competent—During continuance of agreement.*

*Rectification—Agreement of sale—Purchase price to be \$500 more than price paid by vendor—Statement by vendor—Relied on by purchaser —That price paid by vendor was \$3,000—Purchase price thereupon agreed at \$3,500—Price paid by vendor \$1,000—Purchase price rectified to \$1,500.*

The defendants were financed in their mining operations by the plaintiff who was a registered money-lender, but they were considerably hampered in their business as miners of gold by reason of the circumstance that they did not have a stamp mill. The plaintiff had acquired a stamp mill and he agreed to sell it, along with certain claim licences, to the defendants for the sum of \$3,500. The defendants were then indebted to the plaintiff in the sum of \$3,000, and the plaintiff agreed to advance them the further sum of \$1,000.

The plaintiff entered into an agreement in writing with the defendants whereunder, on the signing of the agreement, the further sum of \$1,000 would be advanced, and the defendants agreed that, during such time as the sum of \$7,500 being the aggregate of the several sums of \$3,500, \$3,000 and \$1,000 or any further advances under the agreement remained unpaid, they would ship to the plaintiff all gold won by them and at the rate of \$26.50 per ounce which rate was far below the market value of gold. The stamp mill was delivered to the defendants, but the property therein was not to pass until it was paid for in full. The plaintiff advanced the further sum of \$1,000 as provided in the agreement.

The defendants shipped to the plaintiff all gold won by them, and they committed no breach of their obligation to ship gold to the plaintiff.

It was expressly agreed that the agreement was to continue during such time as the defendants were indebted to the plaintiff.

The plaintiff sued the defendants for the recovery of the sum of \$7,500,

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*Held* that it was not competent for the plaintiff to sue for this sum during the continuance of the agreement.

The plaintiff informed the defendants that he would sell them a stamp mill and certain licences (which he had purchased from I.G.R.) at the price at which he had purchased from I.G.R. plus the sum of \$500, and that he had purchased, the same from I.G.R. for the sum of \$3,000. The defendants agreed to purchase the stamp mill and the claims at the purchase price paid by the plaintiff to I.G.R. plus \$500; they believed and relied upon the statement of the plaintiff that he had purchased the same from I.G.R. for the sum of \$3,000, and they agreed to purchase the same from the plaintiff for the sum of \$3,500, that is to say, \$3,000 plus \$500. The price at which the plaintiff had actually purchased from I.G.R. was the sum of \$1,000, and not the sum of \$3,000 as the plaintiff falsely represented.

*Held* that the agreement must be rectified by substituting \$1,500 for \$3,500 as the purchase price.

ACTION by the plaintiff Rajcoomar against the defendants Ernest Higgins and others claiming the sum of \$7,898.28 upon accounts stated and for moneys paid and advanced.

*C. Lloyd Luckhoo (J. A. Luckhoo, junior, with him), for plaintiff.*

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

*Cur. adv. vult.*

DUKE, J. (Acting): In this action the plaintiff RAJCOOMAR SINGH claims from the defendants ERNEST HIGGINS, CLIFFORD HIGGINS. ERNEST VANDYKE, SIDNEY HIGGINS and JOSEPH HIGGINS the sum of \$7,898.28 being, firstly, the balance found to be due from the defendants to the plaintiff on accounts stated between them in an account signed by the defendants and dated the 3rd February, 1944, and secondly, for money paid and advanced by the plaintiff for the defendants at their request and money lent by the plaintiff to the defendants on and between the 4th February, 1944, and the 2nd November, 1944. The plaintiff's claim arises out of and under an agreement in writing made on the 18th August, 1941, between the plaintiff and the defendants. The particulars of the claim, as disclosed at the trial are as hereunder:

Purchase price of stamp mill and claims under the agreement .. ..	\$ 3,500.00	
Moneys due by defendants to plaintiff in accordance with paragraph 3 of agreement	3,000.00	
Moneys advanced by plaintiff in accordance with paragraph 3 of agreement ..	1,000.00	\$ 7,500.00
Moneys advanced, and goods supplied, by plaintiff to defendants subsequent to date of agreement: —		
From August 18, 1941. to February 3, 1944	\$18,187.48	
From February 4, 1944, to November 28, 1944	<u>1,868.68</u>	<u>\$20,056.16</u>
		\$27,556.16
Gold received, by plaintiff from defendants: —		
From August 18, 1941, to February 3, 1944		
667 ozs. 9 dwts. .. ..	\$17,687.48	
From February 4, 1944 to November 28, 1944.		
74 ozs. 7 dwt. 2 grs. .. ..	<u>1,970.40</u>	<u>\$19,657.88</u>
Balance .. ..		<u>\$ 7,898.28</u>

## RAJCOOMAR SINGH v. ERNEST HIGGINS, ET AL.

The defendants have been carrying on a gold mining business together in partnership since the year 1930. The defendants, or some of them, were the proprietors of a stamp mill and three claim licences for gold claims, known as In Time No. 1 and In Time No. 2, in the Barama District, and for a gold claim known as Powis in the Cuyuni District. The stamp mill was situate on, the claim known as In Time No. 1. The defendants, or some of them, were financed by I. G. Ribeiro. In or about the year 1939, I. G. Ribeiro obtained judgment against Ernest Higgins and Sydney Higgins for the sum of \$800 or thereabouts: he levied on the interest of Ernest Higgins in the three claims, and on the stamp mill, and he purchased the same at execution sale on the 1st June, 1939.

After the execution sale the defendants, or some of them, were financed, in their mining operations by the plaintiff who! is a registered money-lender; but they were considerably hampered in their business as miners of gold by reason of the circumstance that they did not have a stamp mill. The defendants, or some of them, indicated this to the plaintiff, and asked him to buy back the stamp mill from I. G. Ribeiro.

On the 6th August, 1940, the plaintiff purchased, for the sum of \$1,000, from I. G. Ribeiro the stamp mill and the right, title and interest of the defendant Ernest Higgins in claim licences Nos. 2828 and 3154 (previously held by Ernest Higgins) and in claim licence No. 2908 (previously held by Ernest Higgins and the defendant Joseph Higgins). The purchase price was not paid on the 6th August, 1940: the plaintiff made a promissory note in favour of I. G. Ribeiro for the sum of \$1,000, and the note was paid off in instalments. The claim licences have never been transferred by I. G. Ribeiro to the plaintiff.

In August 1941, the business done by the plaintiff with the defendants had amounted in the aggregate to the sum of \$17,000; and the defendants were indebted to the plaintiff in a sum stated by the plaintiff to be \$3,000. The plaintiff wished to be associated with the defendants as a partner with them in their gold mining business, but negotiations to this effect were unsuccessful.

The plaintiff informed the defendants that he would sell them the stamp mill and the claim licences (which he had purchased from I. G. Ribeiro) at the price at which he had purchased from, I. G. Ribeiro plus the sum of \$500, and that he had purchased the same from I. G. Ribeiro for the sum of \$3,000. The defendants agreed to purchase the stamp mill and the claims at the purchase price paid by the plaintiff to I. G. Ribeiro plus \$500; they believed and relied upon the statement of the plaintiff that he had purchased the same from I. G. Ribeiro for the sum of \$3,000, and they agreed to purchase the same from the plaintiff for the sum of \$3,500, that is to say, \$3,000 plus \$500. The agreement of the 18th August, 1941, recited that the plaintiff has sold to the defendants for the sum of \$3,500, the stamp mill (stated in the agreement to be in the possession of the defendants) and the three mining claims known as In Time No. 1, In Time No. 2 and Powis.

In paragraph 1 the plaintiff bound himself "to pay off I. G.

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Ribeiro the sum of \$1,000 presently due by him to the said I. G. Ribeiro in respect of the purchase by him from the said I. G. Ribeiro of the abovementioned claims and stamp mill". The plaintiff had said that there was a balance of \$1,000 then due by him to I. G. Ribeiro. According to the recollection of I. G. Ribeiro, the note was paid off in full early in 1941. The plaintiff made the statement referred to, in order to bolster up his representation that he had purchased the stamp mill and the mining claims from I. G. Ribeiro for the sum of \$3,000.

In paragraph 2 it was agreed that transfer of the mining, claims; from the plaintiff to the defendants was to be effected immediately as the defendants shall pay off their entire indebtedness to the plaintiff and also pay off such advances as may from time to time be made by the plaintiff to the defendants in the working of the various gold claims.

In paragraph 3 the plaintiff undertook to advance to the defendants "the further sum of \$1,000 immediately on the signing of this agreement"; and the defendants acknowledged the receipt of the sum of \$3,000 already advanced to them by the plaintiff. In paragraph 5 the defendants bound themselves to ship all gold won on their respective claims to the plaintiff during the continuance of the agreement.

In paragraph 4 the plaintiff undertook to pay to the defendants the sum of \$26.50 per ounce during the continuance of the agreement for all gold shipped by them to the plaintiff.

In paragraph 6 the plaintiff, in addition to the above obligations, bound himself to make further advances (that is to say, in, addition to the advance of \$1,000 referred to in paragraph 3) on behalf of the defendants "if and when so required in any sum whatsoever provided he at the time such advances are demanded has enough gold to meet the cost of such advances and this apart from the fact that the sum of \$7,500, representing the sale price of claims and stamp mill and the \$4,000 advanced as afore-described (that is to say, as described in paragraph 3) may not have been paid off at the time such further advances are sought".

By paragraph 7 the defendants bound themselves, during the continuance of the agreement, not to encumber in any way whatsoever or to dispose of their claims Nos. C.6734, C.6735, and C.6736, known as Adventure No. 1, Bush Hog No. 1, Bush Hog No. 2, Good Intent and Good Will.

By paragraph 8 the cost of the transfer of the gold claims known as In Time No. 1, In Time No. 2 and Powis by the plaintiff to the defendants is to be borne by the plaintiff.

By paragraph 9 it is declared that the aforementioned terms shall be subject to the condition that all dues in respect of the claims In Time No. 1, In Time No. 2 and Powis have been paid up to the date of the agreement by I. G. Ribeiro or the plaintiff.

By paragraph 10 it is provided that "hereafter all further dues to Government in respect of all the claims herein mentioned shall be met immediately as they fall due by the (defendants) during the continuance of this agreement that is until such time as the (defendants) may have paid off their entire indebtedness in pursuance of the terms of this agreement to the (plaintiff) at which

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time this agreement shall come to an end". The obligation of the defendants to ship all gold to the plaintiff at the rate of \$26.50 per ounce therefore exists so long as the sum of \$7,500 (being the price of stamp mill and claims In Time No. 1, In Time No. 2 and Powis, \$3,500, moneys advanced by plaintiff to defendants before the agreement, \$3,000, and moneys advanced immediately on the signing of the agreement by the plaintiff to the defendants, \$1,000) and any further advances under paragraph 6 remain unpaid. The expression "during the continuance of this agreement" is expressly defined for the purposes of the agreement.

By paragraph 11 the plaintiff and the defendants bound their respective theirs executors' administrators and assigns to the due performance of the agreement.

Subsequent to the making of the agreement of the 18th August, 1941, the plaintiff made cash advances to the defendants paid cash orders issued upon him by the defendants, and supplied goods to them.

It is admitted by the plaintiff that up to the 3rd February, 1944, he had received from the defendants 667 ounces 9 dwts. of gold which, at the agreed rate of \$26.50 per ounce specified in paragraph 4 of the agreement, entitled the defendants to receive from the plaintiff a credit of \$17,687.48. The plaintiff asserted that, subsequent to the making of the agreement, he had made cash advances to the defendants, had paid cash orders issued upon him by the defendants, and had supplied goods to them, to an amount aggregating \$18,187.48, that is to say \$25,687.48 less \$7,500; and that on the 3rd February, 1944, there was due by the defendants to him the sum of \$8,000, that is to say \$25,687.48 less \$17,687.48.

Counsel for the plaintiff has submitted that accounts were stated between the plaintiff and the defendants on the 21st March, 1942, on the 11th September, 1943, and on the 3rd February, 1944, and that on each occasion the defendants were satisfied, with the balance struck.

An engine which was purchased at some time between the 18th August, 1941, and the 23rd March, 1942, by the plaintiff from Sprostons Limited for the defendants was charged up, in the sum of \$900, by the plaintiff against the defendants. At the trial of this action, it was shown or admitted that the cost was the sum of \$825: the defendants were therefore overcharged to the extent of \$75. This was not a blackmarket transaction.

On the 23rd March, 1942 the defendant Ernest Higgins purporting to act for and on behalf of the defendants signed a page of an account book kept by the plaintiff, in the following terms:

Brought forward	..	..	..	\$11,294.31
				1942
February 10—1 Bag Rice	..	..	..	6.60
March 21—1 Bag Rice	...	..	..	<u>6.60</u>
				<u>\$11,307.51</u>

Examined and Check Amount Correct,  
 E. Higgins for E. Vandyke & Higgins Bros.,  
 23 March, 1942.

The page which contains particulars of the aggregate sum of

\$11,294.31 (part of which is presumably the sum of \$7,500 hereinbefore mentioned) has been torn out of the account book. The plaintiff asserts that he tore out the page on the advice of Mr. L. A. Hopkinson, barrister-at-law, now deceased, and he states that the page contained particulars of goods purchased "on the black market", that is to say, at prices in excess of those fixed by law. Mr. L. A. Hopkinson was concerned on behalf of the defendants and not on behalf of the plaintiff and his opinion as to the plaintiff was that he was digging out the eyes of the defendants. I do not believe that Mr. Hopkinson told the plaintiff to destroy any portion of his account book, or any bills relating to goods supplied by the plaintiff to the defendants.

On the 23rd March, 1942, when E. Higgins signed the account book kept by the plaintiff, he had not seen the bills or vouchers relating to the items of goods supplied by the plaintiff to the defendants. The plaintiff kept a small note book, and the only check the defendants could make was to compare the account book with the small note book.

On the 6th August, 1943, the defendants wrote a letter to the plaintiff calling on him to have the full account gone into, and adding "as you are well aware you failed to produce any vouchers for the goods and the price charged for some of the goods are (sic) to our minds far above the control price." On the said day, the plaintiff's then counsel wrote a letter, on the instructions of the plaintiff, to the defendants which shows that the transactions subsequent to the signing of the agreement were regarded by the plaintiff as loans. The plaintiff is a money-lender, and if, when he purchased goods for the purpose of supplying the same to the defendants he regarded the transaction as a loan by him to the defendants of the amount of the purchase price paid by him for the goods, it would be natural for him, in his capacity as a moneylender, to think that he ought to charge up goods to the defendants at prices higher than those which he actually paid for them. On the 14th August, 1943, the defendants wrote the plaintiff asking him "to get the bills from the merchant so that we can have a proper check of the goods you sent us and their prices".

In September, 1943, the defendants went to see the plaintiff at Hampton Court, Essequibo, where he resides. Although they remained at Hampton Court for 3 days, the plaintiff did not produce any bills, or vouchers.

On the 11th September, 1943, the defendant Ernest Vandyke wrote down on a sheet of paper what the plaintiff and his bookkeeper, had said, namely —

Goods Amount to	..	..	..	..	\$25,073.36
Gold Amount to—667 ozs. 9 dwts.	..	..	..	..	<u>\$17,687.48</u>
Amount balance	..	..	..	..	<u>\$ 7,385.88</u>

The sheet of paper was not signed by the defendants, or any of them.

The plaintiff alleges that between the 11th September, 1943, and the 3rd January, 1944, the gross indebtedness of the defendants to the plaintiff was increased from \$25,073.36 to \$25,687.48. The

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account book which was kept by the plaintiff appears to show That up to the 22nd July, 1943, the indebtedness of the defendants to the plaintiff was in the sum of \$24,893.49. The plaintiff has produced no books to show the particulars of the increase of indebtedness from \$24,883.49 to \$25,678.48, that is to say, the particulars of the increase of \$803.99 between the 22nd July, 1943, and the 3rd February, 1944. The plaintiff, however, says that in the sum of \$25,687.48 there are included the following items purchased from Booker Brothers, McConnell and Company, Limited, on the 6th August, 1942, but not previously entered in his books:

1 Tangye Pump	..	..	..	..	..	\$240.00
160 feet Gripoly Belting at 60 cents	..	..	..	..	..	96.00
1 Box Griplace	..	..	..	..	..	<u>1.10</u>
						<u>\$337.10</u>

I am satisfied that the plaintiff charged the defendants prices in respect of these items which were in excess of those charged to him by Booker Brothers, McConnell and Company, Limited. I am not certain as to the extent of the actual overcharge in relation to the Belting and the Griplace, but I am satisfied that the plaintiff charged the defendants \$375 for the Tangye engine: in other words the overcharge in respect of this one item was \$135. The Engine, the Belting and the Griplace were not purchased by the plaintiff on the black market.

The defendants, subsequent to the 11th September, 1943, pursued their request for production of bills and vouchers and a proper reckoning-up. Eventually, the plaintiff and the defendants came to Georgetown and they went to the chambers' of Mr. L. A. Hopkinson. The plaintiff did not produce any bills or vouchers. He stated to Mr. Hopkinson that he had been purchasing on the black market. The defendants were not satisfied, but, upon the plaintiff informing them that unless they signed a document accepting his figures as correct he would not make any more advances to them, the defendants signed the following document:

"To amount of account stated by and between R. Singh and Vandyke and the Higgins Brothers as per agreement between the parties. On the 3rd, day of February, 1944.

To amount of goods received and cash advances made to par(t)ies personally and cash orders from the date of agreement to date .. .. . \$25,687.48  
By amount of gold received 667 ozs. 9 dwts.

Agreement to be continued.

*Witnesses*

1. K. Murray
2. Sookram Singh

Rajcoomar Singh  
E. Vandyke  
E. Vandyke for C. Higgins  
E. Higgins  
Joseph Higgins  
Sidney Higgins"

At the trial of this action the plaintiff stated that, in respect of goods purchased by him for the defendants on the black market

## RAJCOOMAR SINGH v. ERNEST HIGGINS, ET AL.

prior to the 3rd February, 1944, the excess of prices over the controlled prices was \$200. He, however, gave no particulars.

Subsequent to the 3rd February, 1944, the plaintiff made cash advances to the defendants, paid a cash order issued upon him by the defendants, and supplied goods to them.

On the 18th May, 1944, the following statement was signed by the defendant Ernest Higgins for the defendants. "Bills all checked and amount is correct". All the bills were not produced, but the prices on such bills as were produced appeared to accord with the entries in the account book kept by the plaintiff.

At the trial of this action the plaintiff stated that, in respect of goods purchased by him for the defendants on the black market subsequent to the 3rd February, 1944, the excess of prices over the controlled prices was \$30. He, however, gave no particulars.

The plaintiff has failed to establish that the defendants have committed a breach, or breaches, of paragraph 5 of the agreement. I do not accept the evidence of Leonard Joaquim da Silva that, during the period from August, 1941 to May, 1942, the defendants won 620 ounces 10 dwts. of gold from claims in the Barama District, or that in May, 1942, the defendants sold 1 ounce of gold to the shop of I. G. Ribeiro (a witness called on behalf of the plaintiff). Indeed, I am convinced, on the evidence that the defendants have shipped to the plaintiff all gold won by them since the 18th August, 1941, whether won on the claims In Time No. 1 and In Time No. 2 or on any other claims whatsoever.

Counsel for the plaintiff has submitted that the agreement could not endure in perpetuity; that the provisions of the agreement relating to the sum of \$7,500 which was due by the defendants to the plaintiff at the time the agreement was signed are entirely separate and distinct from the portions of the agreement relating to further advances under paragraph 6. to shipping gold to plaintiff under paragraph 5, to the payment therefor under paragraph 4 by the plaintiff to the defendants at the rate of \$26.50 per ounce, and to the other provisions of the agreement; and that, notwithstanding that the defendants have committed no breach of the agreement, the plaintiff is entitled to sue for the recovery of the sum of \$7,500 hereinbefore referred to.

The agreement cannot be divided, as counsel for the plaintiff strenuously urged, into two separate and independent watertight compartments. The object of the agreement was to enable the defendants, effectively to mine for gold with the aid of a stamp mill belonging to the plaintiff and to ship all *gold* won by them to the plaintiff at the rate of \$26.50 per ounce which rate is far below the market value of gold. The plaintiff was to be re-imbursed out of such gold. The provisions of the agreement relating to the purchase price \$3,500 of the stamp mill and the claims In Time No. 1, In Time No. 2 and Powis, to the sum of \$3,000 owed by the defendants to the plaintiff on gold mining transactions prior to the date of the agreement, and to the sum of \$1,000 advanced by the plaintiff to the defendants immediately on the signing of the agreement are therefore closely associated with the provisions relating to further advances, the disposal of gold won by the de-

## RAJCOOMAR SINGH v. ERNEST HIGGINS, ET AL.

defendants, and the meaning of the words "during the continuance of this agreement".

I am therefore of the opinion that it is not competent for the plaintiff to sue for the recovery of the sum of 87,500 during the continuance of the agreement. At the time of the commencement of this action, the agreement was in existence and no steps had been taken by the plaintiff to bring it to an end. On the other hand, the defendants have maintained, even after the writ was served upon them, that the agreement is still in existence.

The plaintiff's action is therefore non-suited with costs *in* so far as the sum of \$7,500, part of the sum claimed is concerned.

I shall now proceed to consider the plaintiff's claim, in so far as it relates to the sum of \$398.28, that is to say, the sum of \$7,898.28 less the sum of \$7,500. From what has been previously stated, it is clear that the following items must be deducted from the sum of \$398.28: firstly the sums of \$200 and \$30 in relation to black market transactions, and secondly the sums of \$75 and \$135 in respect of overcharges not connected with black market transactions. These several sums amount to the sum of \$440. As the plaintiff's claim has vanished, it is unnecessary for me to say anything as to other items which were questioned by counsel for the defendants or as to items which I have queried from my examination of such accounts.

There will be judgment on the plaintiff's claim, in so far as it relates to the sum of \$398.28, for the defendants with costs.

The defendants have counterclaimed

- (a) rectification of the agreement of the 18th August, 1941, of the sum of \$3,500 mentioned as the purchase price of the stamp mill and claims In Time No. 1, In Time No. 2 and Powis to the proper and correct sum of \$1,500; or alternatively, damages for the plaintiff's misrepresentation alleged in paragraphs 6 and 12 hereof;
- (b) that all accounts stated between the plaintiff and the defendants be reopened;
- (c) that accounts be rendered by the plaintiff to the defendants for all goods supplied and all moneys paid and advanced to and for and on behalf of the defendants herein since the year 1940 to the date of rendering said accounts;
- (d) that accounts be rendered by the plaintiff to the defendants for all gold received by plaintiff from defendants since the year 1940 to date of rendering the said accounts;
- (e) damages for the plaintiff's breaches of agreement of the 18th August, 1941.

The defendants are entitled to a rectification of the agreement of the 18th August, 1941, as follows: —

- (a) For the words "the sum of \$3,500 (Three thousand five hundred dollars)" in the third recital, there shall be substituted the words "the sum of \$1,500 (One thousand five hundred dollars)";
- (b) For the words "the sum of \$7,500 (seven thousand five hundred dollars)" in paragraph 8, there shall be substituted the words "the sum of \$5,500 (five thousand five hundred dollars)".

The defendants agreed to purchase the stamp mill and the claims at a sum exceeding by \$500 the price actually paid by the plaintiff to I. G. Ribeiro for the same. The sum so paid was not

\$3,000, as the plaintiff falsely represented, but the sum of \$1,000. It is unnecessary to consider the alternative claim.

Counsel for the plaintiff has urged that an order should not be made requiring the plaintiff to render accounts. He contended that the plaintiff had led all the evidence which it was possible for him to adduce, and that an order requiring him to file accounts would fail to have effect. The plaintiff has: indeed destroyed the page of his account book containing transactions between the 18th August, 1941 and the 10th February, 1942, aggregating in amount the considerable total of \$11,294.31. He has, however, not stated that he has destroyed the note book or other memoranda from which the torn out page was written up. The account book is silent as to the transactions between the 22nd July, 1943 and the 3rd February, 1944: during that period the debits rose from \$24,883.49 (\$24,261.17 plus \$265.87 plus \$356.45- by the not inconsiderable sum of \$803.99 to the sum of \$25,687.48. Further, if the plaintiff makes false entries in his accounts in relation to prices charged him by responsible business houses like Booker Brothers McConnell and Company Limited and Sproston's Limited, it would not be unreasonable to think that similar false entries must have been made in relation to goods purchased by him for the defendants from other business houses.

I therefore order that the "account stated" dated the 3rd February, 1944, and all other "accounts stated" subsequent to the 18th August, 1941, between the plaintiff and the defendants be reopened. And I further order that accounts be rendered by the plaintiff to the defendants in respect of the true and lawful prices of all goods supplied, and all moneys paid and advanced to and for and on behalf of the defendants since the signing of the agreement of 18th August, 1941, and up to the date of the rendering such accounts. There is no dispute as to the amount of gold received by the plaintiff from the defendants since the 18th August, 1941, and so I make no order as to that.

The defendants claim damages in respect of the plaintiff's breaches of the agreement of the 18th August, 1941. This point was, however, not argued at the trial.

The defendants' costs of and incidental to their counter-claim are to be recovered by them from the plaintiff.

The plaintiff will have leave to bring a fresh action, if so advised, with respect to the sum of \$5,500 referred to in paragraph 6 of the agreement as rectified by this judgment. Such action, however, is not to be brought before the plaintiff files his accounts in pursuance of this judgment, and it is not to be brought, except by special leave of a judge in chambers, until such accounts are taken.

It cannot be too strongly emphasised that a dishonest agent may pretend to his principal that he has purchased goods on the black market when he has in fact purchased them at the controlled prices. Further, a dishonest agent may, in fact, purchase goods on the black market at, say five points above the controlled price, and falsely represent to his principal that he has purchased such goods at fifteen points above the controlled price.

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In conclusion, I should like to express my appreciation of the forceful, yet correct, manner in which plaintiff's counsel, Mr. C. Lloyd Luckhoo, presented the case for the plaintiff.

*Judgment for defendants.*

Solicitors: *Francis Dias, O.B.E.; H. B. Fraser.*

BRODIE AND RAINER, LIMITED, Plaintiffs  
 v.  
 FRANCIS ISIDORE LARROUY, Defendant.

[1945. No. 539.—DEMERARA.]

BEFORE LUCKHOO, C.J. (Acting).

1946. MAY 28, 29; JUNE 4, 5, 6, 7, 12, 14; JULY 10.

*Trade mark—Registration conclusive after 7 years—Even though mark does not contain one of the essential statutory particulars—Trade Marks Ordinance, cap. 59, sections 8(1), 10, 39.*

*Trade mark—Infringement—Evidence of—Use of substantial portion of registered mark.*

*Passing-off action—Acts done by defendant—To make persons believe—That when defendant is selling his goods, he is in fact selling the plaintiff's goods—Injunction granted—To restrain defendant from so doing.*

By section 39 of the Trade Marks Ordinance, cap. 59, the registration of a trade mark becomes unimpeachable after the expiration of 7 years, even though the mark registered does not contain one of the essential particulars specified in section, 8 (1).

Where the words device and figures—

The

NUMBER (87077) MEDICINE

are registered as a trade mark in respect of medicines, the use of the words device and figures—

Number Medicine

(813)

in respect of medicines constitutes an infringement of the trade mark.

Where a defendant did acts which were calculated to make persons believe that, when he is selling his own goods, he is in fact selling the plaintiffs' goods, an injunction was granted restraining him from passing his goods as those of the plaintiff.

ACTION by the plaintiffs Brodie and Rainer Limited against the defendant Francis Isidore Larrouy for (1) an injunction to, restrain the defendant his servants and agents from infringing the plaintiffs' trade mark No. 1485A and from passing off goods not of the plaintiffs' manufacture as or for the goods of the plaintiffs. And in particular to restrain him and them from selling, offering for sale, or disposing of any bottles or other vessels containing

## BRODIE &amp; RAINER, LTD. v. F. I. LARROUY.

medicine not of the plaintiffs' manufacture, bearing the device of a rectangle with a number inset and/or "NUMBER MEDICINE" thereon or having fixed on them labels in imitation of the get-up of the plaintiffs' goods, as mentioned in paragraph 7 of the statement of claim; (2) an account of the profits made by the defendant in selling or disposing of any medicine not of the plaintiffs' manufacture, sold under the device mentioned in paragraph 8 of the statement of claim or as the "NUMBER MEDICINE", or in bottles or other vessels bearing labels; alternatively damages in the sum of \$10,000; (3) delivery up to the plaintiffs by the defendant upon oath of all bottles or other vessels containing medicine not of the plaintiffs' manufacture, in the defendant's possession or under his control, marked with the said device and/or the words "NUMBER MEDICINE" or bearing the said labels, copies of invoices and other documents, and of all advertisement blocks in the defendant's possession or under his control, bearing the said device and/or the words "NUMBER MEDICINE" for erasure or cancellation of the devices, labels and words, or for destruction.

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

*C. Vibart Wight*, for the defendant.

*Cur. adv. vult.*

LUCKHOO, C.J. (Acting): This is by no means a very difficult case to decide in view of the most peculiar circumstances which have emerged during the hearing of the action.

The claim of the plaintiffs is two-fold.

They complain of an invasion by the defendant of their proprietary rights in and to their registered Trade Mark No. 1485 A, Class 3 in respect of medicines and a violation to him of the common law right to protection which the long user of the words "number medicine" with regard to a medicinal preparation gave them.

The plaintiffs carry on the business of registered Chemists and Druggists in this Colony both by Wholesale and Retail and have acquired for a considerable time past a good reputation in the eyes of the general public.

They became established under the name of Brodie and Rainer Limited in the year 1912, the company having been formed to acquire the business of Smart Dalgliesh Limited in liquidation. The names Brodie and Rainer were well known, however, in the Chemists and Druggists' business for many years previously.

The defendant first became connected with that firm in 1898 and two years afterwards he was licensed to practise as a Chemist and Dispenser. His long association with the original Brodie and Rainer and with the present Company whose business he managed until he severed his connection with them in April, 1945, became so much identified, that his own name Larrouy has become regarded as co-extensive with that of the plaintiffs.

Towards the end of the last century, to be precise in the year 1890, there was admitted to practice a medical practitioner by the name of James Monteith Rohlehr who had prescribed a remedy for one of his patients apparently suffering from rheumatism and

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blood disorders. The preparation must have proved beneficial in view of the subsequent great public demand for the same.

It was first made up by the firm of J. D. Alty for I find recorded in the prescription book now in the possession of the plaintiffs, the original number given to that doctor's prescription as 29297 and of date the 23rd day of May, 1896. J. D. ALTY was the firm whom Brodie and Rainer succeeded. It would appear that that prescription was made up for one Mrs. Schwatz on the 8th day of May, 1912 and recorded in that book and given a new number 87077. The formula in that prescription was thenceforward used by the plaintiffs for the manufacture and sale to the public of a preparation, which became known in many parts of this Colony as 87077. The evidence discloses that the remedy proved efficacious for pain and for use as a blood purifier. During the defendant's management of the plaintiffs' business it was put up in flat medical containers and to which was affixed a typewritten label bearing the numeral 87077 indicative of the description by which the medicine could be purchased from retail chemists and druggists to whom the plaintiffs sold the same.

The plaintiffs themselves retailed the medicine in their business premises in Water Street, Georgetown.

The sale of this medicine became so well known that in the year 1933 a chemist whose name was not disclosed by the defendant resorted to the practice of selling his preparation as 87077 using the same numeral as those denoting on behalf of the plaintiffs their preparation. Legal advice having been taken on behalf of the Company by Mr. Larrouy (defendant), in the month of October, 1933, they made an application to have registered a Trade Mark for their preparation in order to distinguish it from that of any other person. That application was signed by Mr. Larrouy who was then a Director of the Company along with another Director and the Secretary. It was made for the registration of a trade mark in part A of the register in Class 3, in respect of medicines.

The application was in no way limited to any particular colour. On it there is affixed a type of label which, as far as I have been able to ascertain from the exhibits produced, has been consistently used by the plaintiffs. It is as follows:

	The	
NUMBER	87077	MEDICINE

This type of label with that diagram contained other words which form the label used on bottles containing the plaintiff's preparation. That trade mark was approved of by the Registrar of Trade Marks, who issued a Certificate of Registration on the 12th day of October, 1934, having accepted the application since the 22nd day of January of that year; for a period of 14 years from the date of the filing of the application on the 17th day of October, 1933. The defendant himself stated that the reason for using the words "number medicine" was to distinguish the preparation of Brodie and Rainer Ltd. from that of the offending chemist. From that time the medicine was put up in flat medical containers labelled with the trade mark design of the plaintiffs and enclosed in

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cartons bearing on the outside, unmistakably prominent, the trade mark above referred to.

In the year 1942, due to the scarcity of these flat medical containers the plaintiff's manager made use of small tubular shaped bottles called "nips," an abbreviation from a now obsolete word "nipperkin", which were still in use when he severed his connection with the Company.

It was in the month of August or September, 1945, that the defendant put into the market a preparation which on the label, affixed to a similar tubular shaped bottle or "nip," bore the following in the form of a trade mark design:

LARROUY'S  
NUMBER MEDICINE

813

at prices of \$60:—per gross bottles and in quantities of 3 dozens and less \$6:—per dozen and sold by retail at 64 cents per bottle, at the same price at which the plaintiffs and other apothecaries sold the plaintiffs' preparation.

It was in those circumstances that the plaintiffs' solicitors on the 18th day of September, 1945, wrote the defendant calling upon him to desist from infringing plaintiffs' registered trade mark and requesting him by the 26th day of the month to give an undertaking to change the labels on all bottles put into circulation by him for sale to the public. Defendant's reply through his solicitors to that letter denied any infringement of the trade mark.

Consequent on that reply the plaintiffs on the 22nd day of December, 1945, caused a Writ of Summons to be issued out of this Court against the defendant claiming:—

- (a) An injunction to restrain the defendant from infringing their registered trade mark, and from passing off goods not of the plaintiffs' manufacture as or for the goods of the plaintiffs.
- (b) An account or \$10,000:—damages.
- (c) Delivery up of the marked goods and Costs.

The contentions of the parties on the pleadings raise three distinct questions:

- (1) Whether the alleged Trade Mark is a trade mark and properly registrable under the Trade Marks Ordinance Chapter 59 and Rules made thereunder,
- (2) Whether, if so, there has been any infringement thereof, and
- (3) Whether the defendant independently of the Trade Mark had violated the common law right of the plaintiffs by making up his goods so as to deceive or which may likely deceive pur chasers and pass them off as made by the plaintiffs.

I shall deal with these contentions in the order as set out above.

That first one is founded on the statements in paragraph 7 of the Defence where the defendant asserts that the devices of a rectangle and/or the words "the" "number" and "medicine" are and each of them is common to the trade in medicines and/or in chemical substances prepared for use in medicine and pharmacy.

Assuming that the defendant had launched this attack on the plaintiffs' case within the statutory period for so doing what are

the legal implications to be made on a scrutiny of the words figures and devices of the trade mark and other evidence in the case.

"A Trade Mark" is defined as a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of the trade mark, by virtue of manufacture, selection, certification, dealing with or offering for sale; and is only registrable if it complies with the conditions contained in section 8 of the Ordinance, the relevant ones of which are 8 (1) (d) and (e)—as to (d) "a word or words having no direct reference to the character or quality of the goods and not according to its ordinary signification, a geographical name or a surname," as to (e) any other distinctive mark, but word or words other than those falling within the description of paragraph (d) shall not be registrable under (e) except upon evidence of its distinctiveness. "For the purposes of this section "distinctive" means adapted to distinguish the goods of the proprietor of the trade mark from those of other persons, and in determining whether a trade mark is so adapted, the registrar may, in the case of a trade mark in actual use, take into consideration the extent to which the user has rendered it *in fact* distinctive for the goods with respect to which it is registered or proposed to be registered."

It therefore follows that the registrar has jurisdiction under section 8 (2) just quoted to permit registration of words having a direct reference to the character or quality of the goods, as well as a geographical term, but it would be for the applicant to satisfy the registrar by proof of user that words *prima facie* unsuitable for registration have acquired a distinctiveness.

The attack upon this part of the first contention is made up of two points — the first is that the words are *prima facie* unsuitable for registration and the second is that at the time of registration of the trade mark in 1933, there was no proof that the trade mark applied for was in actual use and the only distinctive feature of the trade mark which was in actual use was the numeral 87077. It is asserted that the vocabulary of the English language is common property. It is in the same position like numbers. It belongs to all alike. Moreso there is evidence that the word "number" and the word "medicine" are commonly and frequently used in the business of Chemists and Druggists. My own opinion is that no amount of user could possibly withdraw the word "number" or "medicine" from its primary and proper meaning in the pharmaceutical trade, so as to give it a secondary meaning in relation to the plaintiff's goods

Considering each word by itself and apart from any evidence of user by the plaintiffs it is quite clear that they are unsuitable for the purpose. They are not in the least calculated to distinguish the goods to which they are applied as those made or sold by one chemist more than another.

In so far as evidence of user of the trade mark there is none except that the numeral 87077 was known to the public as representing the plaintiffs' manufacture prior to the year 1933 when they applied for registration of their trade mark.

There can be no doubt had there been an objection by an aggrieved person to the present trade mark being registered at the time, the register would not have been justified in accepting the application and issuing his certificate.

As Lord *Justice Farwell* said in the case of *Re Crossfield & Sons application* (1910) 1 Ch. 130, 151:

"The whole basis of the enactment is that the word or words to be registered must be distinctive, i.e., adapted to distinguish the goods of the proprietor of the trade mark from those of other persons; and this is obviously right and just, for a trade mark is necessarily a monopoly, and although it is no doubt proper and not injurious to any honest man to allow a trader to monopolize a trade in certain cases, it would be wrong to allow to any one man a monopoly of ordinary words, commonly used in the trade and simply descriptive of the nature or colour or laudatory of the quality of the goods."

The answer on behalf of the plaintiffs could be presented in this way: whilst the words per se might be unsuitable and publici juris, yet when a trader puts a combination of indicia —

The  
NUMBER                      | 87077 |                      MEDICINE

upon his goods he means the whole combination to represent that the goods are his. That is how I take it the registrar in viewing the application for the registration of the trade mark acted under (e) of section 8 (1) of the Ordinance.

It may be that the registrar gave full consideration to the long user of the numeral as indicative of reference to the plaintiffs' preparation coupled with the use of words though common to the English language have never been used in the apothecary's trade in that setting. In other words the restriction contained in the section does not apply to marks consisting of a combination of words and numeral, but before such a mark be accepted the registrar has to be satisfied that it is adapted to distinguish the goods of an applicant from those of others.

The plaintiffs' further answer to the merits or demerits of the registration of their trade mark is that the defendant is statutorily estopped by section 39 of the Ordinance where after seven years a trade mark is taken to be valid in all respects in all legal proceedings relating to a registered trade mark unless that registration was obtained by fraud (and it can never lie in the defendant's mouth to say so, he made the application himself on behalf of the plaintiffs) or unless the trade mark offends against the provisions of section 10 of the Ordinance which does not apply in the instant case.

Much controversy has arisen over this latter point in Courts in England.

In *Wigfull and Sons Ltd. v. Jackson and Sons Ltd.* (1916) 1 Ch. 213, Neville J. held that sections 11 and 41 of the Trade Marks Act, 1905, which correspond with sections 10 and 39 of the Ordinance are to be read together, and that a trade mark which has remained unchallenged on the register for more than seven years may nevertheless be removed from the register if at the date of its registration it was a mark common to the trade.

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Counsel for the plaintiffs in that case submitted that section 41 of the Act was practically a statute of Limitation for a registered trade mark, and after seven years a registered trade mark must be taken to be valid in all respects except in a case of fraud or unless it offends against section 11 of the Act. That Section 11 was not directed to anything in the mark itself. It was submitted that the section only applied to a deceptive or scandalous mark. That a trade mark is not calculated to deceive merely because it is common to the trade.

Section 11 of the Act (Section 10 of the Ordinance) reads as follows:—

"It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of Justice, or would be contrary to law or morality, or any scandalous design."

And Section 41 of the Act which corresponds to section 39 of the Ordinance reads thus: —

In all legal proceedings relating to a registered trade mark (including applications under section thirty-five of this Act) the original registration of such trade mark shall after the expiration of seven years from the date of such original registration (or seven years from the passing of this Act, whichever shall last happen) be taken to be valid in all respects unless such original registration was obtained by fraud, or unless the trade mark offends against the provisions of section eleven of this Act;

Provided that nothing in this Act shall entitle the proprietor of a registered trade mark to interfere with or restrain the user by any person of a similar trade mark upon or in connexion with goods upon or in connexion with which such person has, by himself or his predecessors in business, continuously used such trade mark from a date anterior to the user (or registration, whichever is the earlier) of the first-mentioned trade mark by the proprietor thereof or his predecessors in business or to object (on such user being proved) to such person being put upon the register for such similar trade mark in respect of such goods under the provisions of section twenty-one of this Act.

The learned Judge stated in the course of his judgment that in his opinion section 41 is itself in terms subject to a proper construction of section 11 of the same Act, and held that the reasonable interpretation of that section is that if the trade mark is disentitled to protection in a Court of Justice, then, notwithstanding the lapse of seven years — section 41 being expressly declared to except any trade mark which offends against the provisions of s.11 — it is not protected by s.41.

He then dealt with the question whether or not the trade mark did offend against the provisions of s.11 and referred to two decisions of Eve J. which when considered were to this effect that if a trade mark is properly registered in the first instance, the fact that subsequent events have placed it in such a position that if the application to register were made today it would fail does not prevent the operation of s.41, so that after seven years it is a good mark and can be sued upon and cannot be removed from the register. Whilst agreeing with that pronouncement he held that, in a case where upon the evidence it appears that at the time of

the registration of the mark it was a mark which was not en-titled to protection in a Court of Justice, because it was an attempt on the part of an individual trader to monopolise a device which was the common property of the public, and particularly of those engaged in carrying on the trade in question, it did not apply.

Two years later there arose another case *Imperial Tobacco Company of Great Britain and Ireland v. Pasquali*, (1918) 2 Ch. 207, where Astbury J. held

"That if a trader chooses to register an absolutely common and ordinary word, such as "Regimental" as his trade mark, the use by another trader of an equally common and ordinary word, such as "Regiment" resembling his mark is no infringement, unless the first trader proves that his mark has acquired a secondary meaning distinctive of his goods, or that there was an appreciable risk of passing off."

The plaintiffs in that case registered the word "Regimental" and sold their cigarettes as "Smith's Regimental Cigarettes." The defendant sold his under the name of Pasquali's "The Regiment" High-Class Virginia Cigarettes. The defendant's were put up in packets and boxes and wholly distinctive from that of the plaintiffs and the trade mark was used in a different setting, besides which both the goods and the methods of sale were different.

The passing off action failed on the evidence and dealing with the questions of the removal of the mark from the register, the learned Judge adopted the learning of Neville J. in the previous case, referred to the decision of Eve J. in the cases of *In re Imperial Tobacco Co's Trade Marks* (1915) 2 Ch.27, and *In re Wood-ward's Trade Mark* (1915) W.N. 124, and came to the conclusion that the plaintiffs' mark was at the date of registration, disentitled to protection as being common and ordinary descriptive expressions applicable to cigarettes as well as to many other goods, and that no user had been shown which entitled the mark to be registered when the registration was obtained.

The *Court of Appeal* however did not agree with this decision and overruled the previous judgment of Neville J.

In the course of his judgment *Swinfen Eady, M.R.* at p.221 of the said report stated: —

"The learned judge has ordered both marks to be removed from the register on the ground that they offend against sec. 11 of the Trade Marks Act, 1905. With regard to the first of the two marks, "Regimental cigarettes," it is urged by the respondent on the appeal, who was successful on the application to take the mark off the register, that the mark "Regimental cigarettes" ought never to have been registered, because it has direct reference to the character of the goods, and therefore is not within sec. 9, sub-sec. 4, of the Trade Marks Act, 1905. With regard to the second mark, the word "Regimental" alone without any addition, it is said that that word was and always has been a descriptive and laudatory adjective which other sellers of cigarettes were entitled to use, and that it was a word commonly used in the trade as a descriptive word, and therefore was incapable of registration and ought not to have been registered, having regard to sec. 9 of the Act of 1905, which prescribes the essentials which a registered trade mark must contain or consist of. The learned judge has accepted the contentions put forward on behalf of the respondent, and has directed both marks to be removed from the register. It will be observed from the dates of registration that each of the marks has

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been registered for a period exceeding seven years, the first having been registered in 1885 and the second in 1908. It is provided by sec. 41 of the Act of 1905 that in all legal proceedings relating to a registered trade mark, including applications under sec. 35 of the Act— and this is an application under sec. 35 to take the marks off the register — "the original registration of such trade mark shall after the expiration of seven years from the date of such original registration .... be taken to be valid in all respects unless such original registration was obtained by fraud" — there is no suggestion of that in the present case—"or unless the trade mark offends against the provisions of section 11 of this Act." Pausing there, it is common ground that the marks are to be taken to be valid in all respects unless they offend against the provisions of sec. 11. There is no suggestion that the original registration was obtained by fraud, but the respondent's case is based on sec. 11. It is said that the trade marks cannot now be taken to be valid, as they offend against the provisions of sec. 11. Sec. 11 contains a prohibition as to what it shall not be lawful to register, and it follows upon sec. 9, which provides for the essentials of a registrable trade mark. Sec. 9 provides that a registrable trade mark must contain or consist of at least one of certain essential particulars, and then it details them, five in number. Then sec. 11 provides that it shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice, or would be contrary to law or morality. It will be observed that that is a prohibition, an enactment against registration—"It shall not be lawful to register as a trade mark"—and in my opinion that section is a qualification upon sec. 9. Sec. 9 points out what a registrable trade mark must contain or consist of, and unless it contains or consists of one or other of the essentials there enumerated it is not a registrable trade mark, and it is only registrable trade marks that are entitled to registration. No prohibition is required against anything which does not come within sec. 9, because there is no authority to register it. But even if a mark comes within one or other of the sub-sections of sec. 9 that alone is not necessarily sufficient to entitle it to registration, because it may offend against sec. 11. Even if a mark does contain or consist of one or more of the essentials enumerated in sec. 9, still it is not lawful to register it if the mark, or part of it, contains any matter the use of which is calculated to deceive, or is otherwise disentitled to protection in a Court of justice, or would be contrary to law or morality, or any scandalous design. Secs. 11 and 41 must be construed together. In my opinion sec. 41 forms a new departure in dealing with trade marks. The section departs widely from the language used in the previous statutes of 1875 and 1883. Under those Acts it was held by the Court of Appeal in *In re Palmer's Application* 21 Ch. D. 47 that the Court was bound to consider whether the trade mark was properly on the register, and although it may have been on the register for five years, which was the period provided for in the earlier Acts, if it ought not to have been on the register at all, then it ought to be taken off. Sec. 41 of the Act of 1905 proceeds upon entirely different grounds. It contains an express enactment that the original registration of the trade mark shall, after the lapse of seven years, be taken to be valid in all respects, and what is to be taken to be valid in all respects is the registration of the trade mark, unless it offends against the provisions of sec. 11. Sec. 11 is therefore a prohibitive section as to matter which is disentitled to protection in a Court of justice, which I think means in any Court of justice. It is a restriction upon the registration. It is intended to exclude from registration what would otherwise be included in or covered by sec. 9. In my

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opinion it does not extend to and does not include what the respondent argues that it does include. It does not extend to a mark which was not originally entitled to protection, because it did not contain or consist of one of the essential particulars under sec. 9. It does not extend to that at all. It is addressed to a different state of circumstances. The restriction is addressed to "matter the use of which would by reason of its being calculated to deceive"—it has not been argued that either of the marks registered here is calculated to deceive—"or otherwise be disentitled to protection." In the earlier statutes the phrase was "not entitled to protection": here it is "disentitled to protection," and the words "or otherwise" would extend to and include a matter which intrinsically from its nature no Court of justice would protect. That is, not only by reason of its being calculated to deceive, but by reason of the nature of the matter itself, as if it were blasphemous, or obscene or indecent, or seditious. These are instances of matters which, having regard to their nature, a Court of justice would not protect. Then the section proceeds, "or would be contrary to law or morality, or any scandalous design." The only way in which it is attempted to bring the two marks in question within this section, the only way in which it was argued that the two marks offend against the provisions of sec. 11, is by saying that they are disentitled to protection, which means, or is equivalent to, "that they are not entitled to protection because they ought not originally to have been registered as valid trade marks as coming within section 9." I am satisfied that that is not the true construction of the section. You have only to compare the analogous provisions in the previous statutes of 1875 and 1883 with the language of ss. 40 and 41 of the Act of 1905 to see the considerable extension in favour of protecting marks that is given by the later legislation. By s. 41 it is enacted that in all legal proceedings relating to a registered trade mark, including applications under s. 35, which provides for applications to rectify the register, the registration is to be taken to be valid in all respects except in one or other of two events. The first is unless such original registration was obtained by fraud. That is a new provision, and it was intended to extend to those cases in which the registering officer had been deceived, and where, if the full facts had been ascertained at the time of the registration, the registration would never have been allowed. It prevents a person, even after seven years, retaining the benefit of a registration which itself was obtained by fraud. The second event is offending against the provisions of s. 11. In my opinion that is limited in the way that I have explained, and does not extend to or include a case in which the mark originally ought not to have been registered because it did not contain one or more of the essential particulars. It will be observed that if the section be construed in accordance with the opinion which I have expressed the rights of individual traders will be protected both by the proviso in s. 41 and by the provisions of s. 44. The proviso in s. 41 is that nothing in the Act shall entitle the proprietor of a registered trade mark to interfere with or restrain the user by any person of a similar trade mark upon or in connection with goods upon or in connection with which such person has by himself, or his predecessors in business, continuously used such trade mark from a date anterior to the user of the first mentioned trade mark by the proprietor thereof, or his predecessors in business. So that if he had so used the mark he cannot be interfered with. Again, the registered proprietor is unable to object to such person also being put upon the register for such similar trade mark he has so used. Then s. 44 provides that no registration under the Act shall interfere with any bona fide use by a person of his own name, or place of business, or that of any of his predecessors in business, or the use by any person of any

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bona fide description of the character or quality of his goods, so that such user may still continue to be taken advantage of notwithstanding this registration."

I have quoted this important pronouncement of the Master of the Rolls at length as it may prove helpful to the Registrar of Trade Marks whenever applications for registration are made in the future to keep in mind the effect of the judgment and not to accept applications or to issue his certificates with respect to words which are in common use in the particular trade, as I doubt whether it would have been competent for him to register the words "number medicine" under the provisions of section 8 (1) (d) as words having no direct reference to the character or quality of the goods.

Had the registered mark of the plaintiffs' not become unimpeachable in the circumstances set out above, the plaintiffs' claim on the ground of infringement would have failed at its very threshold, as their mark would have been disentitled to protection in a, Court of Justice.

There still remains to be considered the defendant's rights under section 42 (equivalent to section 44 of the Act) in determining whether or not there has been an infringement.

Section 42 reads "No registration under this Ordinance shall interfere with any use in good faith by a person of his own name or place of business, or that of any of his predecessors in business, or the use by any person of any description in good *faith* of the character or quality of his goods."

This brings me to the question of the alleged infringement of the plaintiff's trade mark.

In considering whether or not there has been an infringement it is necessary to deal briefly with the course of legislation in England from the Trade Marks Registration Act 1875 to the Trade Marks Acts of 1905 and 1919, the provisions of which with certain modifications to meet local circumstances have been incorporated and enacted as the Trade Marks Ordinance, hereinafter referred to as the Ordinance.

In *Farina v. Silverlock* (1856) 6 De G.M. & G. 214, Lord Cranworth at p.217 spoke of the legal right to have a particular trade mark to designate a commodity. "This right cannot be properly described as a copy-right, it is in fact a right which can be said to exist only, and can be tested only by its violation; it is the right which any person designating his wares or commodities by a particular trade mark, as it is called, has to prevent others from selling wares which are not his marked with that trade mark *in order to mislead the public* and so incidentally to injure the person who is the owner of the trade mark."

This was a common law form of protection. In the year 1875, the Trade Marks Registration Act was passed and by section 3 it provided for the registration of a trade mark which *prima facie* gave the registered proprietor the right to the exclusive use of such trade mark. It gave to that proprietor by virtue of registration a statutory title in respect of his mark to the same rights which before the Act, he could have obtained only by proving that the mark had become his trade-mark.

The section appears to me to mean that the proprietor of a registered trade mark is to have the right *exclusively* to use such trade mark in the sense of *preventing others* from selling goods which are not his marked with the trade mark. Subsequently, several other Acts were passed the most important of which are two of them, 1905 and 1919.

In the Act of 1905 the word "trade mark" is defined as a mark used upon goods for the purpose of indicating that they are the goods of the proprietor of the mark, and reading this definition; into section 39 which corresponds to section 37 of the Ordinance it appears to me quite clear that the *exclusive right* to use the mark conferred on the registered proprietor by that section is the right to use the mark as a trade mark, i.e. as *indicating* that the goods upon which it is placed are his goods, and to exclude others from selling under the mark goods which are not his.

The question is whether the language used in section 3 of the Act of 1875 and in corresponding sections of the subsequent Acts operated to extend the rights of the proprietor of a trade mark from a right to prevent deception as to the origin of the goods into a right to the exclusive use of words contained in the registered trade mark will be fully exemplified by quotations which I shall make from certain authoritative statements by Judges in England; suffice it to say in the meantime that the Acts are a statutory recognition of the law which had been previously laid down by the Court of Chancery, and provide for a better method of procedure.

I have already referred to section 39 of the Ordinance which corresponds to section 41 of the Act of 1905 where the original registration of a trade mark shall after the expiration of seven years be taken to be valid in all respects, unless such original registration was obtained by fraud, or unless the trade mark offends against the provisions relating to restriction on registration.

Section 44 of the Act of 1905 corresponding to section 42 of the Ordinance, however, while not weakening the strength of validity of the registered trade mark, expressly provides that no) registration under the Act shall interfere with the use by any person of any *bona fide* descriptions of the character or quality of his goods,—and lastly, one of the most important alteration's *in* the law relating to trade marks effected by the Act of 1919 — the second part of the Ordinance — was the establishment of Part B of the register in which any mark which has been actually used as a trade mark for at least two years can be registered, even although it may not contain or consist of any of the essential particulars mentioned in section 9 of the Act of 1905 (Section 8 of the Ordinance) which section does not apply to registration in Part B.

Having set out what I consider the relevant and important aspects of the course of legislation pertinent to an investigation whether or not the defendant has in any way encroached upon the proprietary rights of the plaintiffs in and to their registered trade mark, let me turn for a moment and examine the authorities dealing with those legislative changes by way of an introduction

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to the discussion of the evidence dealing with this particular part of the plaintiffs' case —

In *re Paine & Co's Trade Marks* (1893) 2 Ch. 567 at p.584, Bowen L.J. said "The purity of the register of Trade Marks is of much importance to trade in general, quite apart from the merits or demerits of the particular litigants, and it is the duty of the tribunal to see that no word "not adapted to distinguish" shall be put on the register in the interest of other traders and of the public."

*Fletcher Moulton L.J.*, in *re Crossfield & Sons Application* (1910) 1 Ch. 130, 145. in the course of his judgment mentioned that "it often occurs in trade that by continued use words get recognised as denoting the goods of a particular firm. Those words may in themselves be unsuitable to be chosen as trade marks, but they have in fact become so." "The present Act (referring to the Act of 1905) seeks to remedy these defects by abandoning the policy of absolute exclusion of all the members of specified classes of words and *substituting therefor* a judicial examination of the merits of each individual case and leaving the Court free to pronounce the word or words to be eligible for registration if on such an examination it holds it proper to do so."

Descriptive names may therefore be distinctive and vice-versa. But the question whether a word is or is not capable of becoming distinctive of the goods of a particular make is a question of fact, and is not determined by its being or not being descriptive.

Under the provisions of the Act the Court clearly has power to allow descriptive words to be registered if a case on the merits is proved before it sufficiently strong to induce it to do so.

The language of section 8 (2) of the Ordinance puts this beyond doubt, but if any doubt upon the point could remain it would be set at rest by the language used in section 42. In this connection the provisions of section 42, afford a useful guidance. The registration is not to affect the use of the words by other traders in any *bona fide* description of the goods.

Such registration gives rights against all persons. It is necessary therefore to be careful in construing the provisions of the Ordinance not to hamper fair and legitimate trade.

The principle of protection of fair trade has been simplified, and developed as I have stated by legislation so as to enable a trader who has established that a mark, device or the like denotes his goods and his goods only, to register his title and so avoid the necessity of proving it against every defendant.

The test of infringement is laid down in the *Second Edition* of Halsbury's Laws of England, Vol. 32 at page 591, paragraph 899:

"What is protected is the whole mark as registered. The use of part of a mark is not an infringement, unless that part is so important, or is accompanied by other matter so resembling other parts of the trade mark registered, that it amounts to a substantial taking of the whole trade mark. In substance the test is whether or not the mark used by the infringer is likely to be confused with that registered. The rules of comparison resemble those by which the question whether a mark proposed to be registered resembles too closely an existing mark is tested, but it is necessary to establish a closer likeness in order to

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make out infringement than would justify refusal of registration. In the first case the *burden* of showing probability of deception is on the plaintiff, while in the second all reasonable possibility has to be disproved by the applicant."

Where however a defendant takes a substantial part of a mark the burden may be on him to show that the differences are sufficient to prevent confusion. In *Orr Ewing & Co. v. Johnston & Co.* (1880) 13 Ch.D. 434 C.A. it was decided that:

"If one trader appropriates a material and substantial part of a trade mark which belongs to another trader he is bound to use such precautions as to avoid the reasonable probability of error and deception, and the onus is on him to show that purchasers of the goods will not be deceived.

If the goods of a trader have acquired in the market a name derived from part of the trade mark which he affixes to them, a rival trader is not entitled to use a ticket which is likely to lead to the application of the same name to his goods, even though that name is not the only name by which the goods of the first trader have been known, or though it has always been used in conjunction with some other words."

Having traced somewhat the course of legislation relating to the registration of trade marks and the legal principles laid down in the cases decided by the highest tribunal in England referred to by me, I now approach consideration of the evidence both factual and visual on that part of the case relating to the infringement of the plaintiffs' registered trade mark.

I bear in mind that the burden of proving infringement by the defendant lies on the plaintiffs moreso in this case where undoubtedly the infringement complained of relates to the use of the words "number medicine", words, taken singly, are not only in common use in the English language but particularly so in the pharmaceutical business.

As I have already stated the plaintiffs have had registered, for over seven years before the acts complained of the trade mark, which trade mark cannot be impeached except on the grounds to which I have already referred, but such registration does not prevent any other person making use in good faith of one or both of those words in describing the character or quality of his goods.

This latitude which has been given by section 42 of the Ordinance does not however mean and can never mean that the whole or substantial part of the registered mark may be copied in such a way by anyone in describing the character or quality of his goods so as likely to mislead an incautious purchaser. If that were so then the protection given to the proprietor of the registered mark would be rendered nugatory. Mr. Wight for the defendant in effect contended that much more elasticity should be given to the use of those words even in the combined form "number medicine" because at the time of the registration by the plaintiffs those words could never themselves have been distinctive of the plaintiffs' preparation, that is to say, adapted to distinguish their goods as they only came into existence at the time of registration, were not in actual use and therefore could not have acquired any distinctiveness. For that reason and because the words themselves are purely descriptive in addition in common use as I have stated above the defendant should not be fettered in

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the use of them. With this wide and sweeping observation, notwithstanding its attractive presentation, I cannot agree. Wide though the interpretation of that section may be the plaintiffs', registered trade mark now rendered unimpeachable by lapse of time is not disentitled to protection in a Court of Justice.

Let me therefore examine the plaintiffs' trade mark on the register. Apart from the words complained of it has a rectangular device which contains the numeral 87077. There is no limitation as to colour and in comparing it with that of the defendant's mark I have to look at them both as if they were uncoloured diagrams. That being the test I set them out side by side:

The	Number Medicine
NUMBER 87077 MEDICINE	813

It is clear that the whole of the trade mark has not been copied. Was it substantially copied? There again I set them out side by side, omitting those parts which bear no similar resemblance. I get the following :

NUMBER	MEDICINE
NUMBER MEDICINE	

In each case the words "number medicine" and the rectangular device appear.

I have to ask myself: Has the defendant copied a prominent and substantial part of the plaintiffs' registered mark? What has he done in addition he has caged in the rectangular device the numeral 813, his telephone number it is true, but beginning with the figure 8, the same figure which begins the plaintiffs' set of figures similarly caged.

In those circumstances does the defendant's trade mark bear such a resemblance to that of the plaintiffs as to be calculated to mislead incautious purchasers? The answer to that can be found in a passage of Lord Watson's speech in the House of Lords in the well known case of *Johnson Co. v. Orr Ewing & Co.* (1882) 7 A.C. 219, at page 231:

"When a prominent and substantial part of a long and well known trade mark, denoting the manufacture of a particular firm, appears as a prominent and substantial part of the new trade mark of a rival, it seems reasonable to anticipate that the goods of the latter may be mistaken for, or sold as, the manufacture of the firm to which the older trade mark belongs.

In considering whether or not there has been an infringement I have not to consider whether upon a very close examination, almost a critical one, I would be able to discover any material difference. The one question to be decided is whether or not the registered mark has been imitated. If it has been, the fact that the get-up of the goods is otherwise entirely different, a feature with which I shall deal with fully on the second head of the claim of the plaintiffs would be no defence.

The fact that the defendant's mark would cause the goods to be called by the same name as the plaintiffs is important.

Examining the mark visually the words "number medicine" in heavy type attract the eyes. Those words are in a prominent

position on the label not very dissimilar in size.

As was said by *Lord Watson* later in his speech in the *Johnston and Orr Ewing's Case* (at page 232)

"But no man, however honest his personal intentions, has a right to adopt and use so much of his rival's established trade mark as will enable any dishonest trader into whose hands his goods may come, to sell them as the goods of his rival."

This brings me to the almost governing words in the section "good faith" — "or the use by any person of any description in *good faith* of the character or quality of his goods."

Even if what I have described above is or is not a prominent and substantial part of the plaintiffs' registered mark was there good faith on part of the defendant in adopting and using for his mark the words "number medicine" and the rectangular device?

I am going to give full effect to certain passages in two cases quoted by Mr. Wight, and weight my opinion in favour of the defendant in considering this aspect of the matter.

In *Dunhill v. Bartlett and Bickley* 39 R.P.C., 438. 442: "It is open to anyone to adopt the ideas or devices of his neighbour and apply them to his own goods, provided he clearly distinguishes his goods from those of his neighbour" and in *Cellular Clothing Co. v. Maxton and Murray* (1899) A.C. 340: "The utmost difficulty should be put in the way of anyone who seeks to adopt and use exclusively as his own a merely descriptive term".

In examining a person's *bona fides* his acts and conduct are relevant matters to be taken into consideration.

The defendant severed his connection with the plaintiffs in the month of April, 1945 and began the manufacture of his preparation which he told the Court contained an additional ingredient to those entered in the prescription book of the plaintiffs and numbered 87077.

He attempted to register his label, a rough design, which he said he showed to Mr. Todd of the Deeds Registry but was informed by that Officer that if registered it would be liable to create some confusion. Thereafter it would appear the defendant took no further action in that respect.

He began to sell by wholesale to retailers of medicinal preparations his own labelled as aforesaid from about the month of August, 1945.

He also solicited the patronage of several Chemists and Druggists and in the month of November more than once advertised, his preparation in the *Daily Chronicle*, a paper in circulation in this colony.

In those advertisements he offered and recommended to the public the same preparation which he manufactured on behalf of the plaintiffs for over 30 years. He was there identifying his preparation with that of the plaintiffs.

This is how he described it—Ask for Larrouy's "Number 813 Medicine." The numeral is placed between number and medicine just like the plaintiffs' arrangement in their trade mark—Then follows: "The marvellous Pain Eradicator and Blood Purifier" as prepared by him for over 37 years—Price 64 cents per bottle. Refuse all substitutes and ask for the Genuine 813.

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What did he mean by refusing all substitutes, and ask for the genuine 813, if he did not mean to convey the impression that what he had been preparing for the past 37 years and on his own evidence on the plaintiffs' behalf, he was now preparing under the trade name number 813 medicine, the only genuine thing.

Number 813 Medicine in a line are in bold type, Larger in size than any of the print in that advertisement.

I ask myself the question did he therefore in good faith when he used the words "Number Medicine" in bold type and 813 in a rectangular frame do so for the purpose of describing the character or quality of his goods so as to take advantage of the utmost expansion which that section gave him, or was he not proclaiming to the public by the use of his mark that "number medicine" the genuine stuff was sold by him.

Even if the defendant had purported to exercise a right given under that section in describing the character or quality of his goods he still has to take the precaution that such description was not likely to be taken as importing a reference to a person having a right to use the trade mark, besides which the defendant has referred to the manufacture of the plaintiffs' goods as indicative of the origin of his own goods.

Giving the matter the most favourable consideration I can, and yielding to the entreaties of Mr. Wight that I should place the utmost difficulty in the way of anyone who seeks to adopt and use exclusively as his own a merely descriptive term, I have come, nay, been driven to the conclusion that there has been an infringement by the defendant of the registered trade mark of the plaintiffs.

I have reached this conclusion independently of the evidence which was led to show that the market accepted it as a distinguishing mark of the plaintiffs' goods. Nor have I taken into consideration the evidence which the defendant gave that the words: "Number Medicine" forming so central an attraction both on the labels used by him and in the advertisements, and the fact that it was the defendant who had conceived the idea in the year 1933 when he managed the plaintiffs' business of using those words as a distinguishing feature of the plaintiffs' goods from those of another chemist, in giving weight and sanction to my conclusion.

I therefore hold that the circumstances to which I have adverted gathered from the comparison of the respective marks, the visual examination of them and the acts and conduct of the defendant relative thereto afford me sufficient grounds for making an order for an injunction against the defendant on this part of the plaintiffs' case.

A case somewhat resembling the present one is that of *Reinhardt v. Spalding* (1880) 28 W.R. 300.

The plaintiffs had registered under the Trade Mark Registration Acts 1875 and 1876, the term "Family Salve" as a trade mark for their said medicine as goods comprised in Class 3. Such medicine had a considerable reputation, and was known and asked for by customers under the title "Family Salve," The defendant

was formerly in the employ of the plaintiffs, and was now carrying on the business of a chemist.

The plaintiffs had recently discovered that the defendant was selling, or offering for sale, a medicine or a medical preparation, not of the plaintiffs' manufacture under the title "Family Salve" and they alleged that they had thereby sustained considerable damage, and would sustain greater damage unless the defendant was restrained.

The defendant in his defence denied that he was offering for sale a medicine as the plaintiffs' under that term and stated that for the last ten years and upwards he had manufactured and sold a preparation under the title of "Spalding's Universal Family Salve." That the term "Family Salve" was understood by the trade and public to mean a salve for ordinary family use and didn't designate a salve made by the plaintiffs.

Upon proof by the plaintiffs that they had registered the words "Family Salve" as their trade mark and upon production of their certificate of Registration the Court held they had established *prima facie* their title which cast the onus upon the defendant to destroy. The defendant admitted that for the last 15 years the plaintiffs had been using the name "Family Salve;" that it has had a reputation in the market that they had continually supplied it under that name and in wrappers which bear that name on the outside of them, which clearly proved that the plaintiffs were the possessors and proprietors of a trade mark — that is, the trade mark in question — and that the article was sold as and known by the name of "Family Salve." The defendant sold his article under the name of "Spalding's Universal Family Salve." The Court held that was no answer and made an order restraining the defendant from using the words complained of.

The question is whether there is an injury to the plaintiffs' rights. If there is such an injury, it is immaterial whether the defendant intended it or not. The Court must restrain him from that which is injuring the plaintiffs, however inadvertently or innocently he may have done it. He has trespassed upon the legal rights of the plaintiffs.

The second question remains — Did the defendant try to pass off his preparation as that of the plaintiffs' and deceive or try to deceive the public, Although this question is distinct from the first many of the observations I have already made are relevant and of weight.

The claim under this head is founded upon a violation of the common law rights of the plaintiffs by the use by the defendant of a substantial part and of essential features of the plaintiffs' trade mark and making up his goods so as to deceive and pass them off as made by the plaintiffs. It is commonly known as a passing off action and entitles a successful plaintiff to an order for injunction restraining a defendant from selling, offering for sale, or disposing of any goods not of a plaintiff's manufacture in imitation of the get-up of a plaintiff's goods.

During the hearing of this action I invited both learned

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Counsel to consider and expound in their respective addresses three questions of law.

The first of them was stated by me as follows: —

"If I should find that there was an infringement of the registered trade mark of the plaintiffs, would it necessarily follow that the defendant has passed off goods of his own as that of the plaintiffs by the use of the plaintiffs' said trade mark."

My own view is that it does not necessarily follow from an infringement that goods have been passed off because there may be cases where, before actual sale, an injunction applied for on interlocutory proceedings, an order can be made restraining the actual sale of the article. For it is clearly laid down in the authorities that the use of a trade mark may be restrained by injunction although no purchaser has actually been misled.

This question is only one of academic interest in view of my finding of facts on the latter part of the plaintiffs' case.

Assuming, however, that I had come to the conclusion that there was no infringement the second and third questions would still have become important and indeed they are, for the plaintiffs to succeed on the second branch of their action.

Those questions set out below bear inquiry when the authorities dealing with the law of passing-off are being investigated and the facts upon which the plaintiffs rely for the orders asked for in their statement of claim.

Those two questions are:

(1) "If I should find that there was no infringement then unless the defendant sold his goods as that of the plaintiffs, could an action for passing-off lie against him?" and (2) "If I should find that there was no infringement but the defendant has used marks, words, or devices so closely resembling those of the plaintiffs which are capable of misleading purchasers of his goods for those of the plaintiffs, would an action for passing-off lie against him?"

The law dealing with passing-off actions has been set down in many conceivable ways, for instance, the ground on which the Court protects trade marks is, that it will not permit a party to sell his own goods as the goods of another, and will therefore not allow such a party to use marks, letters or other indicia by which he may pass off his own goods to purchasers as the manufacture of another person. He must not use means which contribute to that end.

*Lord Blackburn* in the case of *Johnston and Co. v. Orr Ewing and Co.* quoted above adopting a passage from the speech of *Lord Kingsdown* in the *Leather Cloth Co. Ltd. v. American Leather Cloth Co. Ltd.* 11 H.L.C. 538, said,

"The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot therefore be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person," or "by using a trade mark so nearly resembling that of another as to be calculated to mislead incautious purchasers."

In the opening remarks of my judgment I gave a short summary of the undisputed facts for the purpose of dealing with the first contention of the parties on the pleadings, and dealt with by

Mr. Wight in the first part of his address. For this part of the case, it will be necessary to deal with the facts more closely some of which admit of no dispute and others so diametrically opposed to each other that in course of my judgment my adoption for the purpose of my finding under each subsidiary head would indicate my belief or disbelief of the facts as the case may be.

I do not propose to recapitulate all the facts but I must mention again some of them.

In the year 1896, Dr. J. M. Rohlehr, a medical practitioner, prescribed for a patient who took the prescription to be made up by J. D. Alty carrying on business as a Chemist and Druggist in this city. That prescription was given a number 29297 and apparently was dated the 23rd day of May, 1896.

J. D. Alty was the firm which Brodie and Rainer succeeded, they in turn were succeeded by Smart Dalgliesh Ltd. which went into liquidation when the plaintiffs came into existence and purchased the assets of that Company.

This was in the year 1912 and it would appear that certain prescriptions which they got from their predecessors in business were made up by them and given a new number in their prescription book Ex. C. The prescription containing the formula for the preparation, the subject matter of this action, was entered in that book as No. 87077. This was not a special number given to it but a sequence number in that book, the previous entry being 87076 and the subsequent one 87078. This formula contained three medicinal ingredients with their respective quantities and water to be added. There was also recorded the fact that the prescription originally came from J. D. Alty and was that of Dr. Rohlehr. At some subsequent time there were written in the margin to the entry the words: "No copy to be given" in the handwriting of one Dodson then in the employ of the plaintiffs. The remedy proved efficacious and as subsequent events show was largely used by persons suffering from rheumatic pain and blood disorders, and gained the approbation of the general public.

It was known for a considerable time as the 87077, put up in flat 6 ozs. medical glass containers and bore a typewritten label when in the year 1933 another chemist taking advantage of the fact that there was no trade mark in existence began to mark his own preparation with the numeral 87077. To put an end to this the defendant as manager of the plaintiffs' business in that year conceived the idea of distinguishing the plaintiffs' preparation by means of a trade mark specially selecting the words "The Number Medicine" with the numeral in a rectangular device to make clear and to proclaim to the public that henceforth the plaintiffs' preparation would carry on its labels that particular designed trade mark.

The registrar in due course granted the application of the plaintiffs and accordingly that trade mark to the knowledge of the defendant in that form conceived by him as aforesaid was entered upon the register of trade marks with a disclaimer in so far as the numeral was concerned.

From the year 1933 to the year 1942 the preparation was filled into flat 6 ozs. medical bottles with printed labels affixed as shown

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on Ex. B. These were placed in carton containers which on the face of one side of them appeared in large letters and figures

THE  
NUMBER            87077    MEDICINE

and on the top of them the number 87077 in red.

In 1942, the defendant on (account of the scarcity of these medical bottles began to use "nips" to which were affixed labels with the same inscription as shown on Ex. A.

When defendant severed his connection with the plaintiffs in April, 1945 there were then in stock in the plaintiffs' business "nips" containing the preparation besides a quantity (three jars) which the defendant shortly before had prepared. So it is clear and not disputed that the plaintiffs' goods were put in containers like Ex. A.

In August of that year the defendant made a preparation which he has since then labelled and sold as

NUMBER            813    MEDICINE

He has a perfect right to do so even if he uses the same formula, and by honest means to procure as extensive a sale for it as he can, and if he thought fit to sell it by the name "Larrouy's No. 813" or by any other name unconnected with the plaintiffs' preparation the plaintiffs at least could not have complained, for the defendant has a right to enter into a fair competition with the plaintiffs or any one else in the sale of this article.

The defendant, however, has thought fit to sell and encourage and solicit patronage for the sale of his own preparation by means of a label as shown on Ex. D so similar to that of the plaintiffs without endeavouring to bring to the notice of the public by steps of the clearest nature that he had severed connection with the plaintiffs. On the contrary he makes a free use by advertisement of the reputation gained by the plaintiffs in the manufacture and sale of the medicine.

Let me compare the general get-up and the two labels as they appear on Exhibits A and D.

They are similar sized bottles. They have labels not very dissimilar in size. They each have a strip label over the top of the cork, and the liquid through the bottle reflects the same colour.

On both labels you have the words "Number Medicine." On Ex. D the type is much bolder. "Shake the bottle" coming below the numeral in each case, and then Dose — Two teaspoonfuls to be taken every four hours. For Adults only. It is true that if one were to compare the labels side by side he will find some difference because of the colour and type used, but it is not by the similarity of form or mode of printing that one can get at the result. He has in my opinion used a substantial part and the essential features of the plaintiffs' mark.

As I said before there was nothing to indicate to the public and likely purchasers of the medicine that the defendant had

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severed his connection with the plaintiffs. As a matter of fact, the public and likely purchasers would feel that he was still connected when he stated "as prepared by him for over 37 years" prepared on whose behalf: "Brodie and Rainer." There you have a direct representation. The name Larrouy has been intimately connected with Brodie and Rainer for over 40 years and the defendant himself admitted that when reference is made to Larrouy's Drug Store people mean Brodie and Rainer.

What would the name "Larrouy" in bold type in the advertisement signify to the ordinary man — Brodie and Rainer, then follows in equally bold type —

## NUMBER 813 MEDICINE

Whilst it is true that instead of 87077 coming between number and medicine you have 813 that apparent difference is destroyed and of no effect when almost directly following the words "As prepared by him for over 37 years" appear — prepared by him for whom? Brodie and Rainer, and it is a reasonable inference for persons to draw that the preparation is being sold under a different numeral 813 instead of the old 87077. It has been artfully prepared and is deceptive.

The advertisement goes on to proclaim to the public that they must refuse all substitutes and ask for the genuine 813. According to the defendant himself 87077 could not be a substitute nor not genuine, for in manufacturing his own 813 he used the same formula which he over a long period of years used for the plaintiffs. He made three jars before he severed his connection with the plaintiffs.

Remember the name is your guarantee — whose name? If the name meant Larrouy, then Larrouy to the ordinary person would mean Brodie and Rainer. If the name refers to "Number 813 Medicine" then he was calling public attention to the description of the preparation.

He has craftily employed language in that advertisement as to be well calculated to produce in the minds of ordinary readers, the impression that the preparation made and sold by him is the same as that to which the advertisement is applicable, that is to say the preparation of the plaintiffs.

If the defendant had made it perfectly clear that he claimed no connection with the successful article beyond similarity in the ingredients used and practical identity in the substance produced, and he had left the plaintiffs' employ and had started his own business, he, subject to the general get-up not being similar to the plaintiffs', would have stood on safe ground.

This he has failed to do because it was entirely foreign to his purpose.

After his second advertisement he discontinued the use of the words "as prepared by him for over 37 years." Maybe he was self conscious of the effect but the violation of the plaintiffs' rights had already been accomplished by him.

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No better passage could be more applicable to the facts as I find them than that of *Lord Justice James* in the report of the decision of the Court of Appeal in *Orr Ewing & Co. v. Johnston & Co.* (1880) 13. Ch.D. at p. 453, where he said

"Now, what could have been the only motive which can be suggested to a man of the world by a man of the world of the defendants in doing that, but to do something which was likely to be mistaken for the plaintiff's goods, which would be accepted by the customers of the man who had been in the habit of selling them as being a continuation of the same goods which he had been in the habit of supplying to them? It is not necessary for this case to decide that a man actually intended to tell a lie, or that a lie has been told. It is sufficient, in the language of Lord Kingsdown, that a man should wilfully use a part of the trade-mark of his neighbour, that part so used being by the user of it calculated to enable his goods to be passed off for the goods of his neighbour. I am of opinion, independently of the mass of evidence which has been given in support of that probability, that it was probable, and probable almost to a certainty, that the new ticket of the defendants would tend to enable anybody so minded to represent those goods as being goods of the same character, proceeding from the same manufacturers, as the goods which had been formerly accepted with confidence under the mark which was a guarantee of the plaintiffs' goods. It was calculated to do so. Beyond that, supposing that by some accident a man had inadvertently used a ticket which was so calculated to deceive the ultimate purchaser, and therefore so calculated to injure the plaintiffs in their legitimate right of property in a trade-mark, the moment the attention of the defendants or any persons in their position was called to the fact of the similarity of the two marks and to the complaint of the persons who owned the first mark that it was likely to injure them, it was his duty to immediately discontinue the use of the trade-mark complained of; and, however honest or inadvertent the original mistake may have been, the continuation of the use of it after that was pointed out is itself sufficient evidence of a fraudulent intention. The fraud would then consist in continuing to do it even if there had been an original inadvertence in the use of it. But I am bound to say in this case, that I am not, on the evidence, satisfied that there was any innocent inadvertence or mistake. I am not satisfied that there was not from the first an original intention to use an imitation of the plaintiffs' mark with the intent that that imitation should enable the defendants' goods to be passed off as the plaintiffs' goods.

I adopt as part of my judgment every word which has fallen from the lips of that most learned Lord Justice 65 years ago.

Defendant should have taken great care knowing that he had gained knowledge of the formula whilst in the plaintiffs' employ not to put forward his manufacture in such a similar form as is likely to deceive an incautious purchaser. Greater still when he sought to compete with his former employers in the sale of the preparation.

The defendant called a number of witnesses, retail Chemists and Druggists, who testified that no person, if ever very seldom, would call for the plaintiffs' preparation by the name "number medicine" but by the numeral 87077, and that the words mean nothing because Parke Davis, Humphreys and other exporters of medicinal products have a number to every preparation to

distinguish them, one from the other when orders are put through to them.

But in no instance do any of the witnesses, some of them connected with the druggist business ranging from a quarter to half a century, remember having seen the words "number medicine" on any other preparation imported or prepared locally except that of the plaintiffs' and since August, 1945, on the defendant.

This evidence was led to show that no one was or could be possibly deceived even if the defendant's bottles bore a label with the words on them, as invariably when a purchaser asks for a medicine with a number or a number medicine the "Retailer" druggist would make enquiries from that person whether for fever, for pain or for any other ailment when a particular remedy would be recommended.

General statements by witnesses that nobody calls for "number medicine" do not express pure fact. They express the belief of those witnesses that the facts which came under their observation justified the inference drawn by them, but nothing more.

In this case there is undoubtedly a number of these general statements but there are circumstances proved by the number of bills tendered, witnesses called on behalf of the plaintiffs and the inherent nature of the evidence of the defendant himself which point most strongly in the opposite direction, and which I accept on that issue in favour of the plaintiffs.

The defendant has given evidence that the preparation manufactured by him on behalf of the plaintiffs and now by him in his own right was brought about as the result of a suggestion made by Dr. Rohlehr to him in 1909, in the town of New Amsterdam.

Dr. Rohlehr's solicitude that the defendant should commercialise a prescription of his the formula of which should be modified so as to distinguish it from his (the Doctor's) regular prescription without a quid pro quo, if true, is stranger than fiction. He (defendant) then propounded an idea to give it a number. There was then recently introduced a particular medicine called 606 and working on the theory of that number, the idea came to him that the new preparation might be called AT 707, the significance being that A for ante and T for testimony would draw investigation from the public as to what the preparation meant. But the public not apparently being of a curious turn of mind called for AT 707. He then decided to get rid of AT and added to the first 7 of 707 the sound of AT called separately which made the figures 8707. He then placed a new digit 7 and the numeral became 87077. This was done in the month of October, 1909, after his return from England. If this explanation as to how the preparation bore the numeral 87077 is true then the defendant foretold prophetically that Brodie & Rainer Ltd (the plaintiffs) would sometime in the future, in 1912, enter the identical prescription of Dr. Rohlehr's in their prescription book not intentionally but a chance of 1 in nearly

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100,000 by the self same number and purely sequential as appears in Exhibit C: not until it was shown to him during the hearing of the action did he (defendant) know of the existence of this prescription book.

These several coincidences — the prescription of Dr. Rohlehr, the numeral, the ingredients contained in the formula, and. the malady for which the preparation has become famous — do not reflect to the credit of the defendant whose evidence I have strained my mind to, but cannot accept.

He told the Court that AT stand for ante testimony which means confession or proof, but his story as to the invented numeral looks rather in the nature of a post testimonium. Such is my diagnosis of the defendant's evidence on this point.

He hardly realised the effect of his answer in cross-examination when he said that "number medicine" on his preparation had no significance but only balanced the design of the label, yet I find great prominence given to those words in bold type on the label.

There is abundant evidence that during the defendant's management of the plaintiffs' business many bills were issued under the name of — "number medicine".

I do not think that the defendant can now complain of any hardship by being restrained in the use of his mark if he does not take the precaution to make it quite unlike an established one. He does so at the peril of making evidence against himself.

To quote *Lord Watson* again in this respect :

But no man, however, honest his personal intentions, has a right to adopt and use so much of his rival's established trade-mark as will enable any dishonest trader, into whose hands his goods may come, to sell them as the goods of his rival."

The defendant did not use the words "Number medicine" and the rectangular frame through inadvertence. He had the most intimate knowledge which prompted the plaintiffs to register those words and device as part of their trade mark, yet, although he was entering into direct competition with the plaintiffs in markets where the plaintiffs manufacture distinguished by that trade mark had been long and favourably known, he selected a substantial part of that mark to sell his own goods.

There was a peculiar obligation upon him so to carry on his business as not to lead people to believe that the goods he was offering for sale were the goods of the plaintiffs.

Mr. Wight strenuously contended on this part of the action that nobody had been or could be deceived. It is quite sufficient if the Court came to the conclusion that it is calculated and intended to deceive, or apart from intention to deceive, that it is calculated to deceive whether it is so intended or not.

As was said in the case of *Singer Manufacturing Co. v. Loog* (1880) 18 Ch.D. 395 at p. 412

"No man is entitled to represent his goods as being the goods of another man, and no man is permitted to use any mark, sign or symbol, device or other means, whereby without making a direct false representation himself to a purchaser who purchases from him, *he enables such purchaser* to tell a lie or to make a false representation to somebody who is the ultimate customer."

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I am satisfied that the defendant's conduct is calculated to pass off goods as those of the plaintiffs or, at least to produce such confusion in the minds of the probable customers or purchasers or other persons with whom the plaintiffs have business relations and the evidence discloses that it has had this effect. He, the very creator of the combination now illustrating the trade mark of the plaintiffs, after he had been divorced from their business sought to stifle and check the growth of the child no longer in his custody, the off-spring of his creation, for the protection of the plaintiffs' business, and to render sterile for his own benefit the growing trade in the particular preparation.

It is this very person who informed the Court that the words "number medicine" mean nothing.

If not why did he apply for the trade mark on behalf of the plaintiffs in those words, and why did he give to them such prominence on the label describing his preparation.

His conduct and general attitude lack sincerity. There is not a tincture of truth in that statement.

The general effect of the label and the words, the device, arrangement and make-up of the container convince me they were calculated to deceive and mislead, and liability cannot be, evaded by pointing out that if the label is critically examined and studied by a vigilant purchaser there would be no deception.

This case fails within the principle that the defendant is doing that which is calculated to make persons believe (the persons who purchase from the retail druggists) that when he is selling his own article, he is in fact selling the plaintiffs'.

This is a fraud on the plaintiffs which the defendant has no right to commit, and he must therefore be restrained by injunction for the protection of the plaintiffs.

In so deciding I am far from saying that the plaintiffs have any exclusive right to manufacture the preparation or to sell it. The defendant is at liberty to make and sell his own preparation which might be as efficacious as that of the plaintiffs but he must do so in an open and fair way.

Looking at it from the defendant's point of view I do not think that any irreparable harm will be done to him by granting this injunction. He must change his label and make it quite clear on any new label he may choose to use that there is no connection between his manufacture and that of the plaintiffs.

This case illustrates the danger which must encounter an applicant at times who without resort to professional advice prepares a trade mark which to eye and ear may seem and sound differently to one already registered, but when judicially examined contravenes the provisions relating to restriction on registration.

Mr. Humphrys in the course of his reply stated that there was no intention on part of the plaintiffs to ask for heavy damages for the infringement of plaintiffs' trade mark and/or for the violation by the defendant of their common law rights if the Court were to so find, but that these proceedings were instituted by them in order to safeguard the use by them of their registered

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mark and to prevent the defendant from passing off goods manufactured by him as for the goods of the plaintiffs.

Evidence has been given that a few persons were sold either the preparation contained in Ex. A or Ex. D under the name Number Medicine and that both were sold as "Number Medicine" and meant either one or the other.

The plaintiffs have moved the Court promptly and have not suffered any appreciable damage, and in order to avoid the expense of taking an account of the profits made by the defendant under the latter head of plaintiffs' claim, if the parties agree I would fix the amount of damages at \$100: —

I do not think it is necessary to make the order asked for in paragraph 12 (3) of the plaintiffs' statement of claim.

For the reasons which I have given above I grant an injunction to restrain the defendant, his servants, workmen and agents from infringing the plaintiffs' Trade Mark No. 1485 A and from affixing or causing to be affixed to his preparation, the subject matter of this action the label as shown on Ex. D and from using the words "Number Medicine" and the rectangular design on any label without clearly distinguishing such label from the plaintiffs' label as shown on Ex. A, and from employing any mark or words which would be calculated to cause any preparation manufactured by the plaintiffs known as "Number Medicine" or to represent or induce the belief that any of the said preparation was manufactured by the plaintiffs and from passing off goods not of the plaintiffs' manufacture as or for the goods of the plaintiffs, to restrain him and them from selling, offering for sale, or disposing of any bottles or other vessels containing medicine not of the plaintiffs' manufacture, bearing the label as shown on Exhibits A or D or having fixed on them labels in imitation of the get-up of the plaintiffs' goods, with an account for profits as claimed if the sum I have mentioned is not agreed upon.

I have given careful consideration to the observation of Mr. Wight during his address on the question of costs, and I cannot find any ground for depriving the plaintiffs of any part of their costs. I have read and re-read the correspondence which passed between the parties before the writ of summons was filed and to me the answer from the defendant was very disingenuous.

If the defendant had not known of the plaintiffs' rights (he himself, however, had acquired them on behalf of the plaintiffs) and had withdrawn from the contest after ascertaining that his trade-mark was likely to mislead, the matter might have been different. But he has challenged the plaintiffs' rights to the exclusive use of the mark "Number Medicine" which they undoubtedly possess in the form indicated above and he cannot now invoke the aid of the Court to adopt an attitude of appeasement in his favour.

The plaintiffs are entitled to their full costs of the action which I certify fit for Counsel, if such certificate be necessary.

*Judgment for plaintiff.*

Solicitors: *H. C. B. Humphrys; A. G. King*

E. McD. GILL v. R. ALERT, P.C. No. 4327.

EGERTON McD. GILL, Appellant (Defendant),

v.

RICHARD ALERT, P.C. No. 4327, Respondent (Complainant).

[1945. No. 305.—DEMERARA.]

Before Full Court: Luckhoo, C.J. (Acting), Boland, J. and  
Jackson, J. (Acting).

1946. January 4, 18.

*Criminal law and procedure—Summary conviction offence—False pretences—Complaint for—Omission therefrom of words "with intent to defraud"—Complaint not rendered defective thereby—Summary Jurisdiction (Offences) Ordinance, cap. 13, section 102; Criminal Justice Ordinance, 1932 (No. 21), section 7.*

*Criminal law and procedure—Summary conviction offence—False pretences—Conviction for—Omission therefrom of the words "with intent to defraud"—Intent to defraud shown by evidence—Found by magistrate in reasons of decision to be established—Conviction amended on appeal—By insertion of words "with intent to defraud"—Conviction as amended affirmed—Summary Jurisdiction (Offences) Ordinance, cap. 13, section 102; Summary Jurisdiction (Appeals) Ordinance, cap. 16, section 24.*

A complaint for the offence of false pretences contrary to section 102 of the Summary Jurisdiction (Offences) Ordinance, cap. 13, is not defective merely because the words "with intent to defraud" do not appear in the complaint.

Where a conviction for the offence of false pretences contrary to section 102 of the Summary Jurisdiction (Offences) Ordinance, cap. 13, did not contain the words "with intent to defraud", but the evidence, and the reasons of decision of the magistrate, showed that the defendant did have an intent to defraud and that the magistrate so found, the conviction was amended by the insertion therein of the words "with intent to defraud", and was affirmed as amended.

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

APPEAL by the defendant Egerton McD. Gill from the decision of a Magistrate of the Georgetown Judicial District, convicting him of the offence of false pretence, contrary to section 102 of the Summary Jurisdiction (Offences) Ordinance, Cap. 13.

*C. Lloyd Luckhoo*, for appellant.

*A. C. Brazao*, acting Legal Draftsman, for respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by Luckhoo, C.J. (Acting) on the 18th January, 1946 as follows:

The only point raised by counsel for the appellant in this appeal which is worthy of the Court's consideration is that the conviction as drawn up is bad in law.

The appellant was charged with the offence of false pretence contrary to section 102 of the Summary Jurisdiction (Offences) Ordinance, Cap. 13.

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As we have already indicated during the hearing of the appeal the complaint was properly laid and the evidence in support thereof was ample and sufficient for the learned Magistrate to convict the appellant.

Section 7 of the Criminal Justice Ordinance, No. 21 of 1932, provides that any complaint in any proceedings for an offence shall be sufficient if it contains a statement of the specific offence with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

The statement of the offence is to describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, it shall contain a reference to the section of the statute creating the offence.

Looking at the complaint laid by the respondent the only essential element of the offence not stated in words is the allegation "with intent to defraud" but the section of the Ordinance creating the offence is cited and, only one offence is created by that section, contains those words. The complaint in this case is not ambiguous. The precise matter on which the Court is called upon to adjudicate is clearly set out.

This however does not do away with the necessity of setting out in a conviction facts which are a necessary ingredient of the particular offence in question — all the ingredients of the offence must appear, and a necessary ingredient of the offence of false pretence is the intent to defraud without which no conviction can be sustained.

The conviction before us reads "The 15th day of June 1945 (obviously an error in typing as to the month, it should be May instead) Egerton McD. Gill is this day convicted before the said Court for that he on Wednesday, 28th March, 1945, at Georgetown in the Georgetown Judicial District, obtained from Carlos Vieira the sum of two dollars (\$2:—) by falsely pretending that a letter of notification from the Distributing Officer of cycle tyres and tubes was a permit to purchase two tyres and one tube, contrary to Section 102 of the Summary Jurisdiction (Offences) Ordinance, Cap. 13."

Although the section which is contravened is set out in the conviction a necessary ingredient of the particular offence "the intent to defraud" is omitted and the conviction as drawn up is undoubtedly deficient to this extent.

The general rule is that all facts and circumstances should be stated with such certainty and precision that the defendant may be enabled to judge whether they constitute an offence, to determine the species of the offence and to be enabled to plead a conviction or acquittal in bar of another prosecution for the same offence.

The real question for us to determine is: Can the conviction, which on the face of it is deficient, be amended to include the words "with intent to defraud" an essential element to establish the offence.

For the reasons given hereafter we are of the opinion we can.

Our attention has been attracted to the recent case of *Bagado v. Welcome* a decision of this Court reported in (1942) L.R.B.G. p. 293 in which it was held that the conviction as drawn up by the Magistrate could not be amended to make it appear that the decision of the Magistrate was that the defendant was convicted of driving a motor vehicle on a road in a manner (or at a speed) which was dangerous to the public, as the Magistrate did not convict the defendant of that offence, but of the offence of dangerous driving simpliciter, which is not an offence under the law.

The section under which that charge was laid is section 35(1) of the Motor Vehicles and Road Traffic Ordinance No. 22 of 1940, and the essence of the offence is danger to the public and there was no reference thereto either in the complaint, Magistrate's reasons for decision or in the conviction as drawn up by the Magistrate.

That case however can be distinguished from the present appeal on two grounds.

Section 35 (1) creates three different offences, driving a vehicle on a road recklessly or at a speed or in a manner dangerous to the public.

It is necessary therefore in the conviction to indicate by clear language the particular offence for which a defendant has been convicted in order that he may, if he is charged again on the same facts, plead *res judicata*.

As was pointed out in the judgment of the Court in *Bagado v. Welcome* it is an offence under section 35 (1) to "drive a motor vehicle on a road at "a speed which is dangerous to the public, having regard to all the "circumstances of the case, and it is also an offence to drive a motor "vehicle on a road in a manner which is dangerous to the public, having "regard to all the circumstances of the case."

In the instant appeal only one offence is created by section 102 of the Summary Jurisdiction (Offences) Ordinance, Cap. 13 though the means of committing that offence are many and varied.

The second ground on which it can be distinguished is that there is evidence before us of, and the reasons given by the Magistrate make it clear that he did find from the facts, an intent to defraud.

We quote from his reasons: "I believed and acted upon the evidence of "the witnesses deSilva, Vieira and Butler and I rejected as untrue the "statement of defendant from the dock that he lost Exhibit 'A' about the "29th March, 1945. I regarded the defendant's conduct as deliberately "fraudulent and considered his untruthful defence as that of an impenitent "offender."

The omission from the conviction is one of form and not of substance. Section 24 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 16, empowers us to amend the conviction if it is shown to the satisfaction of this Court that sufficient grounds

## E. McD. GILL v. R. ALERT, P.C. No. 4327.

were in proof before the Magistrate who made the conviction and authorised the drawing up thereof free from that omission.

Had there been no finding by the Magistrate of fraudulent conduct on part of the appellant we would not have exercised the powers to amend as there would clearly have been a defect in substance. (See *Smith v. Moody* (1903) 1 K.B. 56).

We feel that greater care should be exercised by Magistrates to see that convictions should set out all the necessary ingredients or the essential elements of proof of the offence as, on appeal, against the conviction, the Court might feel justified in not awarding costs to the successful respondent in view of any amendment to the conviction that may be necessary.

However this is not a case where there are any merits on the part of the appellant. There was ample evidence before the Magistrate for convicting him and to impose the sentence he did.

In the circumstances we cannot give effect to the application by learned counsel for the appellant to alter the penalty by the substitution of a fine in place of imprisonment.

We therefore amend the conviction to include the words "with intent to defraud" in its proper place in the body of the conviction. There will also be an amendment of the date of conviction by substitution of "May" for "June".

The appeal is dismissed with costs.

*Appeal dismissed.*

## J. A. BERESFORD v. JASON WARNER

J. A. BERESFORD,  
Appellant (Defendant),

v.

JASON WARNER,

Respondent (Plaintiff).

1946. No. 111.—DEMERARA.

BEFORE LUCKHOO, C.J. (Acting), and DUKE, J. (Acting).

1946. MAY 15, JULY 19, 20, 26.

*Appeal—From magistrates court—Civil action—Question of fact—Preponderance of probability in favour of appellant—Appeal allowed.*

An appeal from the decision of a magistrate's court sitting in its civil jurisdiction was allowed where the preponderance of probability was that the appellant's case, and not the respondent's case, was true.

APPEAL by the defendant J. A. Beresford from a decision of the Magistrate of the Georgetown Judicial District awarding damages to the plaintiff Jason Warner in an action for illegal levy.

*John Carter*, for the appellant.

There was no appearance by or on behalf of the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by DUKE, J. (Acting) as follows: —

This is an appeal by the defendant J. A. Beresford from a decision of a Magistrate of the Georgetown Judicial District awarding damages to the plaintiff Jason Warner in an action for illegal levy on the goods of the plaintiff under a writ of execution in *J. A. Beresford versus Basil A. Clarke*.

On the hearing of this appeal there was no appearance by or on behalf of the respondent Jason Warner. By section 38 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, a notice of the grounds of appeal is properly served on the opposite party if it is left at the last known place of abode of the party to be served. The notice of the grounds of appeal in this case was left at the last known place of abode of the respondent. The notice having been properly served, this Court proceeded with the hearing of the appeal.

Basil A. Clarke carries on a saw-pit at Bartica. On the 30th November 1944 the appellant J. A. Beresford obtained judgment against Clarke for the sum of \$37.16 and costs. A writ of execution was applied for at 9 a.m. on the 8th December, 1944.

The respondent gave evidence that on the 8th December, 1944 he purchased certain lumber from Clarke, that the lumber was to be shipped to him as early as possible and that he paid him the sum of \$20 on account; and that on the 14th December 1944 he paid to Clarke the further sum of \$50 on account. On the 20th December 1944 Clarke shipped certain lumber to the respondent, and the consignment note showed that the respondent was the

## J. A. BERESFORD v. JASON WARNER

consignee of the lumber. On the 21st December 1944 the appellant, acting under the authority of the writ of execution herein before mentioned, levied upon the lumber as the property of Clarke. On the 22nd December 1944 the respondent Jason Warner paid into Court, under protest, the amount of the judgment in Beresford versus Clarke (together with all costs and subsequent charges) and obtained the release of the lumber from execution. The respondent further gave evidence that on the 27th December 1944 he paid to Clarke the sum of \$26 being the balance due by him to Clarke for the lumber shipped by Clarke to him on the 20th December 1944. He, however, did not tell the bailiff, at the time of the levy, that he was then indebted to Clarke in the sum of \$26 in respect of the purchase price of the lumber which was consigned by Clarke to him (the respondent) on the 20th December 1944. In the action, which was filed on the 9th January 1945, by the respondent against the appellant for illegal levy the respondent asserted that the lumber which was levied upon was his property and not the property of Clarke, and the appellant asserted in his defence that the lumber which was levied upon was the property of Clarke and not the property of the respondent. At the hearing of the action the respondent produced receipts dated the 8th, 14th and 27th days of December 1944 which he alleged were made by Clarke in his favour: Clarke was not called as a witness.

It cannot be disputed that, on the facts previously stated, it was competent for the Magistrate to find that at the time of the levy the lumber levied upon was the property of the respondent: and it is equally clear that it was competent for the Magistrate to say that, in the absence of Clarke's evidence, he could not so find.

Mr. JOHN CARTER, counsel for the appellant, has submitted that the evidence given on behalf of the appellant by Hubert Beresford and Bailiff Boilers is of such a nature that the preponderance of probability is that the lumber levied upon was the property of Clarke and not the property of the respondent. In order to deal with this submission it will be necessary to set out, in some detail, the evidence of Hubert Beresford and of Bailiff Boilers as well as the evidence given by the respondent in opposition thereto.

Hubert Beresford deposed that he was the duly authorised agent of the appellant; that on the 21st December 1944 he went with the bailiff to the Government Steamer Stelling Georgetown to point out, on behalf of the appellant, to the bailiff the goods to be levied upon in the matter of Beresford *versus* Clarke; that he asked the respondent if he was Clarke's agent and that he (the respondent) said yes; that he (Hubert Beresford) told the respondent that there were some materials on the stelling for Clarke and that on behalf of his father he wanted to levy upon them; that the respondent asked him (Hubert Beresford) to wait on him a little and that he replied that that was a matter between the respondent and the bailiff; that the respondent asked the bailiff to wait on him for half an hour; that about 15 minutes after, the

respondent returned and stated that the materials were his property and the levy could not take place; that the bailiff asked the respondent for his proof and the respondent said he had none; and that he (Hubert Beresford) pointed out to the bailiff the materials to be levied upon; and that the bailiff thereupon made the levy.

The bailiff deposed that he went to the Government Steamer Stelling, Georgetown where he spoke to the respondent; that the respondent told him that he was the agent of Clarke; that the respondent pointed out the lumber as being that of Clarke; that he told the respondent that he had come to execute a writ in the matter of Beresford *versus* Clarke; that the respondent said that he was going to raise the money and he asked for some time to get it; that the respondent returned later and said that the goods did not belong to Clarke; and that he then made the levy on instructions given on behalf of the appellants.

The respondent deposed that he is not the agent of anyone; that when he arrived at the Government Steamer Stelling he found the bailiff and Hubert Beresford making the levy; that he did not ask the bailiff for time to go and fetch the money; that he told the bailiff to stop the levy; and that he paid the money into Court whereupon the lumber levied upon was released to him.

The learned Magistrate states in his reasons of decision:

I did not believe the plaintiff said he was the agent for Clarke. I believed when he asked at the Steamer Stelling for some time, he hoped to be able to realise the money required and to prevent being inconvenienced by the making of a levy.

Not only Hubert Beresford, but also the bailiff Boilers, deposed, that the plaintiff (respondent) said that he was the agent for Clarke. The learned Magistrate has not specifically stated that he did not accept the testimony of the bailiff, neither has he given any reason for not accepting his testimony. The bailiff is an officer of the magistrate's court, and he must be presumed, unless and until the contrary is shown or stated, to be a reliable unbiased and trustworthy witness.

In *MORGAN v. MORGAN* (1943) L.R. B.G. 85, 86 Sir John Verity, Chief Justice, delivering the judgment of the Full Court, said:

While this Court is always reluctant to differ from a Magistrate where his findings of fact are based on his view of conflicting evidence, yet where those findings are contrary to the weight of the evidence, as in the present case, and the Magistrate refrains from furnishing the grounds for his acceptance of the less weighty evidence, this Court is bound to give what effect it thinks should be attached to the evidence as appears upon the record.

In the present case the learned Magistrate accepted the evidence of the bailiff and of Hubert Beresford, in preference to the denial of the respondent, that the respondent did ask for time to go and fetch the money. In his evidence the respondent deposed that he was not the agent of anyone, and the learned Magistrate did not believe the evidence of the bailiff and of Hubert Beresford that the respondent admitted that he was Clarke's agent. Such a finding adversely affects the evidence not only of Hubert Beresford but also of bailiff Boilers. Neither the integrity nor the recollec-

## J. A. BERESFORD v. JASON WARNER

tion of the bailiff, an officer of the magistrate's court, was adversely commented upon by the magistrate. His evidence is therefore of greater weight than that of the respondent, and should have been accepted by the learned Magistrate. His finding that the respondent did not admit that he was Clarke's agent is contrary to the weight of evidence.

The respondent did not call Clarke to support him in his allegation that he was not the agent of Clarke. In the circumstances of this case, on the evidence adduced, the preponderance of probability was not that the lumber levied upon was the property of the respondent, but rather that the lumber levied upon was the property of Clarke.

The appeal is therefore allowed, and the decision of the Magistrate reversed, with costs. Judgment is entered for the defendant in the action with costs and fee to counsel.

*Appeal allowed.*

ANTHONY PHILIPPE,  
Appellant (Opposer),  
v.  
JOSE MENDONCA,  
Respondent (Applicant).

1946. No. 154—DEMERARA.

BEFORE FULL COURT: LUCKHOO, C.J. (Acting) and DUKE, J. (Acting)

1946. JULY 19, 26.

*Appeal—Intoxicating liquor licensing—Specific illegality—What is not—Intoxicating Liquor Licensing Ordinance, cap. 107, section 25 (3) (f).*

*Intoxicating liquor licensing—"Neighbourhood"—Meaning of—Intoxicating Liquor Licensing Ordinance, cap. 107, section 12 (1) (a) (vii).*

*Words—"Neighbourhood"—Meaning of—Intoxicating Liquor Licensing Ordinance, cap. 107, section 12 (1) (a) (vii).*

The respondent applied, to a District Licensing Board for the grant of a certificate for the issue of a spirit shop licence. The appellant objected on the ground that the respondent was a person of bad character. The Board considered the evidence adduced, came to the conclusion that the respondent was not a person of bad character, and granted the application. The appellant appealed on the ground that the respondent was a person of bad character, and that consequently the grant of the certificate was affected by some specific illegality within the meaning of section 25 (3) (f) of the Intoxicating Liquor Licensing Ordinance, Chapter 107.

*Held* that the question whether or not a person is of bad character is a question of fact; and that the conclusion of the Board that the respondent was not a person of bad character does not violate any of the provisions of the Ordinance, or some applicable rule of law, so as to make it a specific illegality.

Meaning of the word "neighbourhood" in section 12 (1) (a) (vii) of the Intoxicating Liquor Licensing Ordinance, Chapter 107, considered.

## ANTHONY PHILIFE v. JOSE MENDONCA

APPEAL by Anthony Philife from the decision of the District Licensing Board for the county of Demerara granting a certificate to the respondent Jose Mendonca for the issue of a spirit shop licence in respect of premises situate at E1/2 lot 71 Light and Fifth Streets, Alberrtown, Georgetown.

*E. G. Woolford*, K.C., for appellant.

*C. Vibart Wight*, for respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by LUCKHOO, C.J. (Acting) as follows: —

The record in this appeal disclosed that the appellant on two grounds opposed the application of the respondent for the grant to him by the Board of a Certificate for the issue of a Spirit Shop Licence in respect of premises situate at E1/2 Lot 71 Light and Fifth Streets, Alberrtown, Georgetown.

Those grounds are —

- (1) That the applicant (respondent) is a person of bad character, and
- (2) That there is a sufficient number of premises already licensed to meet the needs of the neighbourhood.

These are two of the statutory grounds provided for by Section 12 (1) (a) of the Intoxicating Liquor Licensing Ordinance, Chapter 107 (hereinafter referred to as the Ordinance, on which a certificate may be refused.

The Board after a hearing found that there was not sufficient evidence, if any, that the respondent is a person of bad character as envisaged by the section, and that there was need for the pro-posed Spirit Shop and granted the application.

The grounds of appeal relied on are (a) That the Board has taken extraneous matter into consideration in granting the application, and (b) That the grant is affected by some specific illegality, and under each head particulars are fully given.

It is under the second ground that the alleged bad character of the respondent was attempted to be argued.

We are of opinion that the question whether or not a person is of bad character is a question of fact and if the Board, as it did, considered the evidence and came to the conclusion that the applicant is not a person of bad character this Court cannot interfere as such a conclusion does not violate any of the provisions of the Ordinance, or some applicable rule of law, so as to make it a specific illegality.

The fact that a man has been convicted of several offences under the Ordinance does not necessarily brand him a person of bad character, although the convictions may subject his existing licence to be forfeited.

We therefore hold that, on the particulars given, this ground of appeal apart from what we have said cannot be entertained.

The first ground, if the particulars given under it can be said to be extraneous matter, raises a point which has not been previously considered by this Court, and that is the meaning to be given to the word "neighbourhood" appearing in several places in section 12 of the Ordinance.

## ANTHONY PHILIPPE v. JOSE MENDONCA

By three Orders dated the 23rd May 1930, made under the authority of Section 5 of the Intoxicating Liquor Licensing Ordinance 1930, District Licensing Boards in the three counties were directed not to entertain any application for the grant of a certificate for the issue of a spirit shop licence for premises in certain localities unless and until the number of holders of spirit shop licences for premises in those localities was less than the number specified in the respective schedules attached to the Orders. The wards of Alberttown and Queenstown were deemed to be one locality.

On the 13th day of June, 1934, under the powers of the said section 5 these Orders were revoked and in their stead a new Order came into force, the schedule of which provided for all three counties of the Colony. Alberttown and Queenstown wards were again deemed to be one locality and where the number of retail spirit shops must not exceed three.

In that Order and those which have been revoked no mention is made of the word "neighbourhood". The question therefore arises, are the words "neighbourhood" and "locality" synonymous whenever used in the Ordinance and in the Order?

We shall endeavour first of all to ascertain the meaning of the word "neighbourhood" in general use.

In country districts people are said to be neighbours, that is, to live in the same neighbourhood although they may be several miles apart. But can it be said that the same "considerations apply to dwellers in a city when a single street or a single square may constitute a neighbourhood?

The question is entirely one of circumstances.

The physical conditions of some particular area may entitle it to be considered as a matter of law — a neighbourhood within the meaning of a particular section of an enactment where as in the present order the Board is prohibited from entertaining an application where the number of shops must not be exceeded

The two wards Alberttown and Queenstown for the purpose of the municipal division of the city may, generally speaking, be regarded as separate neighbourhoods, although for the purpose of the Order one locality.

Looking at the plan of the city both Alberttown and Queenstown Wards are separated from that of Bourda Ward. The Lamaha Canal, a fixed inland waterway, completely divides Bourda from them. There is a complete geographic division between them by the Municipal Corporation.

When the section under consideration speaks of "the needs of the neighbourhood", "neighbourhood" must have some legal limitation. A reasonable interpretation to the circumstances as they exist in relation to the expression "number of premises" in Section 12 (1) (a) (vii) of the Ordinance must bear some collocation to a similar provision in the Order, unless there is some evidence in those circumstances to show that any surrounding district is to be treated for the purpose of the section as constituting part of the same neighbourhood.

In the administration of section 5 of the Ordinance of 1930 by

a Licensing Board, Georgetown and the East Bank Fiscal (now administration) Districts were divided into several localities restricting the number of licences in each locality and when Section 12 of the Ordinance states that an application may be refused on the ground that there is a sufficient number of premises already licensed to meet the needs of the neighbourhood, "neighbourhood" in our view must be given a meaning to coincide with the area entitled to the benefit of the restriction imposed and not more, maybe less, than the territorial extent as that of locality.

The change in law is obviously to protect the holders of licences in the locality as well as to place a limitation on the number of shops.

Take for instance the County of Essequibo, Supenaam to Charity — provision is made for not more than 16 licences to be granted. It cannot be contended that Charity itself is in the neighbourhood of Supenaam; and scrutinizing the schedule to the Order, in some cases "locality" may be co-extensive with "neighbourhood" whilst in others many neighbourhoods may be embraced therein.

The Board in this case used the word "district" in the following sentence — "The applicant (respondent) proved that the consumption of rum in the district in which he proposed to open his spirit shop had increased during 1938 to 1945 by about 400 per centum and he stated that in his opinion there was need for another spirit shop in the district". There is nothing that we can find on the record which would justify us in saying that the use of the word "district" means more than the particular locality under the provisions of the Order with which the Board was dealing, and that the word "district" was used as meaning some division of the city of Georgetown defined by and known to the law as a locality.

But even if it is doubtful as to what the Board meant, following the judgment in the case of *NORMAN v. KING* (1946) 1 A.E.R. 339 we will construe the language used in a benevolent way so as to give efficiency to the conclusion at which it arrived.

Looking at the provisions and scope of the Order and the Ordinance dealing with the grant or refusal of a certificate it would be wrong to say that a different intention is disclosed by the use of the word "district". The ambit is not necessarily enlarged.

Having regard to the fact that it is always desirable to carry out the intention of an Ordinance we can only presume that the Board must have used the word synonymously, and that the word "district" can be treated as a word of general meaning to be applied as the context requires.

Mr. Woolford contended during the course of his argument under the first ground of appeal that the applicant (respondent) had led no evidence to justify the Board in coming to the conclusion that there was need for the proposed spirit shop. The fact that the sale of rum in the district had increased about 400 per cent on and between 1938 and 1945 was no criterion by which the Board could judge of the necessity for another shop in the neigh-

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bourhood and that there was no evidence before it as to the needs of the neighbourhood before granting the application. Apart from the alleged percentage of increase, which is inaccurate, the only evidence is the opinion of the applicant himself, when he stated that in his opinion there was need for a spirit shop in that district. We must confess that the material before the Board was very flimsy and had the Ordinance provided for additional grounds of appeal to be found under the Summary Jurisdiction (Appeals) Ordinance and this point taken under the appropriate head this appeal might have succeeded, but learned counsel cannot avail himself of this point as it does not fall under either of the two grounds raised in the appeal.

For the reasons which we have given above, we are of the opinion that the appeal must be dismissed with costs.

*Appeal dismissed.*

FERREIRA and GOMES, LIMITED  
Appellants,  
v.  
THE COMMISSIONER OF INCOME TAX,  
Respondent.

1945. No. 495.—DEMERARA.

BEFORE LUCKHOO, C.J. (Acting), IN CHAMBERS:

1946. AUGUST 8, 19.

*Excess profits tax—Voluntary bonuses—Paid out of profits—Not in the nature of accruing liabilities—Not expenses—Meaning of "expenses" —Excess Profits Tax Ordinance, 1941 (No. 1), section 10 (1); First Schedule, Part II, paragraph 3 (2).*

*Excess profits tax — Statutory percentage standard — Controlling interest—Directors remuneration—Deduction in respect of—Discretion of Commissioner to make—Excess Profits Tax Ordinance, 1941 (No. 1), First Schedule, Part I, paragraph 8 (1).*

Voluntary bonuses paid out of profits are not in the nature of accruing liabilities as contemplated by paragraph 3 (2) of Part II of the First Schedule to the Excess Profits Tax Ordinance, 1941 (No. 1).

Voluntary bonuses paid out of profits are not expenses within the meaning of section 10 (1) of the Excess Profits Tax Ordinance 1941 (No. 1).

The expression "expenses" in section 10 (1) of the Excess Profits Tax Ordinance, 1941 (No. 1) means disbursements or expenses wholly exclusively and necessarily incurred for the purpose of earning the profits. It must be a revenue expense before it could be deducted.

The amount to be used for ascertaining the average capital employed for a chargeable accounting period is the sum arrived at as profits without any deduction of voluntary deduction of voluntary bonus payments.

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Paragraph 8 (1) of Part I of the First Schedule to the Excess Profits Tax Ordinance, 1941 (No. 1) is applicable even where a company uses the statutory percentage standard for the purpose of ascertaining the standard profits. In cases falling under paragraph 8 (1) of Part I of the First Schedule to the Excess Profits Tax Ordinance, 1941 (No. 1), the Commissioner has no discretion to allow a deduction in respect of directors' remuneration.

When the directors cease to have a controlling interest throughout the accounting period or any part of it, the case is not one to which sub-paragraph (1) applies, in which case the Commissioner has a discretion to make a deduction in respect of directors' remuneration.

APPEAL by Ferreira and Gomes Limited from an assessment to excess profits tax under the Excess Profits Tax Ordinance, 1941 (No. 1).

*C. Vibart Wight*, for appellant.

*A. V. Crane*, acting Solicitor-General, for the Commissioner.

*Cur. adv. vult.*

LUCKHOO, C.J. (Acting): Two points remain for determination in this appeal, the figures in the other two having been, adjusted between the parties during the hearing of the arguments.

They refer to the disallowance by the respondent of one-half of the bonuses paid, after the profits of the appellant company had been ascertained during the chargeable accounting periods ending 31st day of January, 1942, 1943 and 1944, in the computation of the average capital of the company for the assessment of excess Profits Tax; and a disallowance by the Respondent of monies paid by them as directors' remuneration in computing the profits for the said periods.

The appellants are a company incorporated under the Companies (Consolidation) Ordinance, Chapter 178, and have been carrying on business in the Colony for a number of years prior to 1935 to the present time.

The authorised capital of the Company consisted throughout the whole of the said chargeable accounting periods of 500 6% Cumulative Preference Shares of \$100:- each, and 1,500 ordinary shares of \$100:- each, and the issued share capital during the said periods consisted of all the preference shares and 950 of the ordinary shares.

Save for two short periods of one month and six months, the directors had a controlling interest in the company during the said periods.

For the purpose of assessment under the Excess Profits Tax Ordinance they chose as a means of ascertaining their standard profits for a full year in relation to any chargeable accounting period the statutory percentage referable to them under *section 5 (9)* of the Ordinance of the average amount of the Capital employed in the business in that chargeable accounting period.

They contend that the decision of the Commissioner in assessments Nos. 42|42, 34|43 and 3|44 is erroneous in holding that no portion of the amounts paid to employees by the company as bonuses should be taken into account in arriving at the average

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capital employed for the chargeable accounting periods ending 31st January, 1942, 1943, and 1944, and that the decision of the Commissioner with respect to the said assessments and three previous ones is also erroneous in holding that no deductions whatever should be allowed in respect of Directors' fees and remuneration.

The Commissioner in support of each of his assessments gave as his reason that the bonus paid to the appellants' staff was allowed as additional salary and as such accrued "at an even rata throughout the period", and that the amount of bonus paid in each period had to be deducted from the profits shown by the appellants before the average capital employed in each period could be computed.

In support of his assessments in which he made no allowances for Directors' fees and remuneration save in the case of director Solicitor Gomes, he directed attention to the meaning of "directors' remuneration" in paragraphs 8 (1) and (2) contained in Part I of the First Schedule to the Ordinance, and relied on the fact that throughout the relevant accounting periods, except for the two short periods mentioned above for which adequate deductions were made by him, the directors of the company had a controlling interest therein, and even those who were required to devote substantially the whole of their time to the service of the company in a managerial or technical capacity, were each the beneficial owner of, or able to control more than five per cent., of the ordinary share capital of the company.

In order to determine whether the payment of bonus by the company to its staff is in the nature of additional salary as contended for by the respondent or not, it is necessary to examine the authority for making this payment.

In the Memorandum of Association of the company one of the objects therein mentioned under 3(p) is "to *remunerate* the directors, officers, servants, or employees of the company by salary, wages, commission, bonus, interest in profits or otherwise and to *pay* any such director, officers, servants or employees, any sum by way of bonus or gratuity".

In the former part of this clause the words "to remunerate" and in the latter the words "to pay" are used. Do they mean the same thing and what implications as between the company and those persons do they carry? It will be noted that in each the same classes of persons are mentioned — *to remunerate* by salary, wages, commission, bonus, interest in profits or otherwise — and *to pay* any sum by way of bonus or gratuity. The mode of payment differs under each head and no two are alike. The words "or otherwise" must be construed *ejusdem generis*.

What therefore is the meaning of the word "remunerate"? It means a "quid pro quo".

If a man gives his services, whatever consideration he gets for giving his services seems to be a remuneration for them.

"Pay" might mean the same thing, but does it necessarily follow that its use is always synonymous with "remunerate" or may it not vary with the circumstances in which its use is applied.

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Looking at the wording of the clause it seems to me that the draftsman meant to emphasize a distinction between the use of the words "remunerate" and "pay". The objects to be benefited are the same in each case and if he meant them to bear the same interpretation he would have used the following words: "to remunerate or to pay the directors, officers, servants, or employees of the company by salary, wages, commission basis, interest in profits, bonus, gratuity or otherwise."

In all cases the object is to see what is the intention expressed by the words used.

If there is a special provision for the way in which they are to be paid, you must look to the special provision as evidencing a legal obligation.

The power given by the object in the memorandum to spend the money is two-fold — money which the company is bound to pay according to law, and money which is entirely at its discretion to provide for liberal dealings with its staff.

As a general rule an object clause has these operations. It, affirmatively determines what shall be the powers of the Company, and it limits and restricts the powers of the Company to those thus conferred.

First of all, I ask myself what is the kind of touch-stone or test I have to apply.

It is amply within the powers of the Company to pay any sum by way of bonus to its staff, within certain limits, but it is in the nature of a gratuity.

"To pay any such director, officers, servants or employees, *any sum* by way of bonus or gratuity". To pay any sum by way of bonus or gratuity. Nothing is fixed. The payment is discretionary.

"Bonus" may mean a gift over and above what is nominally due as remuneration, and when used along with the word "gratuity" it lends force to its interpretation as something apart from "remuneration". It may well have been intended and so it seems to me that for services for which you have been employed you are to be remunerated, but at the discretion of the company be-cause of your long service and merit the company would pay you by way of bonus or gratuity, not what you must get, something apart from your remuneration.

The Secretary of the Company in his evidence before me said that the bonuses paid to the staff in each accounting period under review were paid by reason of Clause 3 (p).

I am therefore of opinion that the bonuses paid by the appellants were not in the nature of additional salary.

But is it such a payment by the Company which could be said to have accrued "at an even rate throughout the period"?

This would depend upon the question whether or not under the clause in the memorandum the particular member of the staff could demand payment of the bonus. It is not in the nature of a fixed sum.

The amount of the bonus is uncertain, and is only ascertain-

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able if and when discretion is to be exercised. It could not be a debt which was accruing. Those bonuses would only be paid in the event of the Company having a good year. The principle on which I apprehend these payments of bonuses were made by the appellants is with a view to getting better work from their staff, something given gratuitously by way of encouragement. When such bonuses are given to the staff in a good year, they look forward *not* as a matter of right but as a matter of liberality to this, that they will probably, *not must*, be dealt with in a similar way if by their exertions the company makes a good profit, and that therefore the authority given by the memorandum was a reasonable one for carrying on the business and to make it most profitable.

I am bound to form this opinion for myself from the evidence in this appeal.

The Company by doing this does not bind itself to make such payments in the future, but the mere fact of the payments holds out the hope of something of the kind being done if such another prosperous year should occur by the exertions of the staff.

It is not to be a bargain in the sense of a legal obligation. It was not money expended for the purpose of acquiring the income as contemplated by section 12 (6) of the Income Tax Ordinance.

Further the evidence discloses that it is paid out of the profits made by the Company.

It is not paid from any reserve fund or from any other available fund of the company. It is, as I have held not in the nature of additional salary and therefore not a liability.

Let me clear the ground, because my sympathies are rather with the act of the Commissioner if one could really exercise sympathy in a question where questions of law have to be decided. He has acted most liberally towards the company in reducing the profits on which the excess profits tax can be levied. But as soon as the question as to how the average working capital is to be computed sympathy must be cut adrift, and I have simply to consider what the law is.

By Section 34 (4) of the Finance Act 1940, Schedule VII Pt. II para. 2 (1) of the Act of 1939 was amended by the insertion at the end the following:—

"The debts to be deducted under this sub-paragraph shall include—

- (a) Any such sums in respect of accruing liabilities as are allowable as a deduction in computing profits for, the purposes of excess profits tax, or would have been so allowable if the period for which the amount of capital is being computed had been a chargeable accounting period, and all the said sums shall be deducted notwithstanding that they have not become payable."

This provision is word for word with para. 2 (2) of Pt. II of the First Schedule to the Ordinance.

Note the words "The debts to be deducted under this sub-paragraph *shall include*".

The language is wide enough to include a particular class of debt which was not provided for in para. 2 (1) of the second part

of the Schedule. It must be something in the nature of a debt, an obligation not something *in nubibus*.

It makes provision for a class of debt which but for the subparagraph would have been excluded. It must be a sum "in respect of accruing liabilities" although such sum has not become payable. As *Lord Greene M.R.* said in the Court of Appeal in the very recent case of the *Northern Aluminum Co. Ltd. v. Inland Revenue Commissioner* (1946) 1 A.E.R. p. 546, an appeal from a decision of *Macnaghten J.*,

"What it is contemplating is something which, during the accounting period, is not actually payable, but something which, is an accruing ripening debt under some legal obligation. Unless it is accruing under a legal obligation, it is not a balance sheet deduction."

Can it be said "to pay any sum by way of bonus or gratuity" creates a true legal obligation to pay any particular sum or to pay anything at all as I have previously stated?

In my opinion it would be straining the construction of that part of the paragraph in the memorandum of association to create a legal liability on the Company.

The requirement that the company shall not pay tax in respect of what it has to pay out to its employees is part of the general scheme of deduction of tax at the source, hence the allowance made by the Commissioner before ascertaining the profits for the chargeable accounting period, in which case it cannot be added back to increase the capital employed. But what it has to pay out to its employees must in my view mean compelled to pay, not what it may voluntarily do.

Let me for a moment examine the capital provisions of the Excess Profits Tax legislation in order to ascertain how the actual capital employed, during an accounting period in respect of which a statutory allowance is to be given or imposed, is computed.

Section 6 (2) of the Ordinance provides that "the average amount of the capital employed in a trade or business in the standard period or any chargeable accounting period shall be computed in accordance with Part II of the First Schedule to this Ordinance."

Part II sets out under paragraphs 1 and 2 how assets and debts are to be treated in arriving at the true value of the capital and then paragraph 4 deals with the manner of ascertaining the average amount of capital employed during any period. That paragraph reads:

"For the purpose of ascertaining the average amount of capital employed in a trade or business during any period, the profits or losses made in that period shall, except so far as the contrary is shown, be deemed—

- (a) to have accrued at an even rate throughout the period; and
- (b) to have resulted, as they accrued, in a corresponding increase or decrease, as the case may be, in the capital employed in the trade or business."

The object of this provision is by no means obscure. In computing the average capital regard must be had to the time basis

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for if the company during the accounting period has earned profits, although it might have unevenly accrued, these profits remain in the business, and not being yet distributed, are available to earn profits, and, therefore, are properly treated as being incremental to the capital employed for the period, and the rate at which they are deemed to have accrued is at an even rate, except so far as the contrary is shown, hence a moiety of the same is added back as they were used or available for use in earning the total amount of profits shown.

The appellants contend that half of the profits shown should have been added back to the Capital employed at the beginning of each relevant period because it is upon that increased average capital the statutory percentage *of profits* is to be applied for the purpose of ascertaining the standard profits for the particular accounting period.

The appellants object to the act of the respondent in with-holding the addition to the capital employed of half of the amount paid as bonus to their staff.

Are they correct in their objection?

It therefore becomes necessary to examine the several sections of the Ordinance as to how the net profits of a business should be ascertained.

Section 6 (1): For the purposes of this Ordinance the profits arising from a trade or business in the standard period or in any chargeable accounting period shall be separately computed, and shall be so computed on income tax principles as adapted in, accordance with the provisions of Part 1 of the First Schedule to this Ordinance." Then follows a proviso. "For the purposes of this subsection, the expression "income tax principles" in relation to a trade or business are computed for the purpose of income tax under the Income Tax Ordinance or would be so computed if income tax were chargeable under that Ordinance in respect of the profits so arising."

Section 7 (1) deals with the relief in respect of deficiency of profits.

Section 10 (1) is an important section and too much attention cannot be paid as to its practical operation. It reads:

"In *computing the profits* of any trade or business for any accounting period no deduction shall be allowed *in respect of expenses in excess of the amount* which the Commissioner considers reasonable and necessary having regard to the requirements of the trade or business, and, in the case of directors' fees or *other payment for services*, to the actual services rendered by the person concerned."

How did the Commissioner apply this section to the circumstances of the appellants' three chargeable accounting periods under review.

His reason given in support of his assessments is that the bonus paid to the appellants' staff is allowed as additional salary and therefore reduced the profits earned in each period by the amount of the bonus paid. This is how it is set down in the state-

ment by the Commissioner of the material facts upon the several points in the appeal. "In respect of bonuses paid *out of profits* the appellants *paid out of the profits* of the company to their staff the following sums of money" then follows the amount with respect to each chargeable accounting period.

I have already held that those sums are not in the nature of accruing liabilities as contemplated by paragraph 2 (2) of Part II of the First Schedule to the Ordinance, but voluntary payments made by the appellants and entirely at their discretion by reason of 3 (p) of their memorandum of association.

It was then for the Commissioner to exercise his discretion either to allow or disallow the bonuses paid in each period in computing the profits of the appellants.

Did he act under Section 10 (1) of the Ordinance? It could hardly be so as that section deals with disallowance of certain expenses in computing profits, and I have already held that the payment of bonus was not an accruing liability. The deduction must be in respect of expenses which the Commissioner considers reasonable and necessary having regard to the requirements of the business. Those must be expenses which the company could be called upon to pay.

I doubt the authority of the Commissioner to make allowances for bonus paid in computing the profits of a business. I can find no such authority unless a custom to that effect has grown up in mercantile businesses and has been recognised by the Commissioner.

The object of this section is to restrict deductions in computing profits for excess Profits Tax purposes. The deductions of these fluctuating allowances for bonus can never be justified under the section: "Expenses" from the context in which it is used in that section mean in my opinion disbursements or expenses wholly, exclusively and necessarily incurred for the purpose of earning the profits. It must be a revenue expense before it could be deducted.

These bonus allowances cannot be treated as permissible deductions nor were they made to the staff in order to fulfil any legal obligation of the Company.

In his liberality the Commissioner treated these payments of bonus as revenue items in the ultimate assessments of the profits.

In certain circumstances it might be regarded as a capital expenditure. The truth is as *Scott L. J.* in the case of *Bean v. Doncaster Amalgamated Collieries* (1944) 2 A.E.R. at p. 282, said "That it must of necessity happen very often that the line to be drawn between the two types of item which is distinct in law is made indistinct in the particular case by reason of some of the facts under investigation seeming to point the other way." Between pure white on the one side and jet black on the other side is a penumbra of grey shading off gradually into white and black respectively. Within this penumbra there must, of course, often lie cases where the decision is one of fact for the Commissioners, but in others it will depend on the correct appreciation of the true

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character in law of some one or more of the facts. Where it is clear to the Court that the Commissioners have misread that character, the decision in law rests with the Court. Nearly all the cases I have cited are illustrations of this sort of legal discrimination. "As Justice O. W. Holmes said so often, it is the business of the Courts to decide on which side of the line the particular case must be placed; with the result that the penumbra is always shrinking in width as the law draws the line more and more in clearly."

The Commissioner's vision in my opinion, when he gave as his reason for allowing the amounts paid as bonus to the appellants' staff as additional salary, suffered an eclipse by the kind of penumbra spoke of by Lord Justice Scott, and was unable to focus the true character in law of those payments. He erroneously treated those payments as revenue items.

To be fair to him, however, it would be well to quote a passage in the judgment of *Du Parcq L.J.* as he then was "The question whether a particular item is properly deductible in order to arrive at the required balance is often a matter of controversy. The legislature has not thought it necessary to provide any guidance for its solution. The intention of Parliament clearly is that such items should be deducted as the trader should normally deduct in order to ascertain his profits or gains." and if the Commissioner treated it as additional salaries he would in view of what I have already adverted upon be wrong.

What amount therefore should be used for ascertaining the average capital employed for the chargeable accounting period of each of those years?

In my view the sum arrived at as profits without any deduction of the bonus payments.

I repeat the relevant provision relating to the computation of amount of capital "the debts to be deducted shall include" to quote the observations of Lord Greene in the case quoted above that language appears to indicate not that those new words are bringing into the computation something which is not a debt during the accounting period, but that a particular class of debt is to be brought in which it might have been thought was not included in the debts mentioned in the original paragraph of the. Schedule to the Finance (No. 2) Act of 1939.

"The debts to be deducted shall include any such sums in respect of *accruing liabilities* as are allowable as a deduction in computing profits for the purposes of excess profits tax, or would have been *so* allowable if the period for which the amount of capital is being computed had been a chargeable accounting period and all the *said sums* shall be deducted notwithstanding that they have not become payable". Note the words used "accruing liabilities as are allowable as a deduction", not every allowance.

There are two qualifications to be observed.

It must be a "legal obligation existing during the accounting period", and it must be "allowable as a deduction in computing profits for the purposes of excess profits tax".

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The keynote to the real point involved must depend upon the source of payment. Was it a payment actually out of the: ascertained profits or was it a payment from funds to meet current expenditure, in other words a revenue payment.

Mr. Gomes himself in his evidence has supplied the answer. The matter, at once, becomes plain and obvious and it is not wrapped up in any kind of obscurity.

Even if it could be urged that the appellants themselves in the domestic operation of their business paid the bonuses, and under the authority of 3 (p) of their memorandum, although not legally compellable to do so, yet the point at issue is not the ascertainment of profits but the ascertainment and adjustment of the capital employed in the business. This must necessarily be governed by the strict wording of the provisions in the Schedule to the Ordinance.

I am, in the circumstances, constrained to hold that the average amount of capital employed during the chargeable accounting periods involved has not been correctly ascertained and should be adjusted.

There will therefore be an order for the re-opening of the assessments made in respect of those three periods for such purpose.

I may add that the success of the appeal on this point and the re-opening of the assessments may be fraught with a repercussion more disadvantageous to the appellants, in cases where no assessments have yet been made.

A case not unlike the present appeal in one of its features is that of *Lever Bros and Unilever Ltd. v. Inland Revenue Commissioners* (1944) 2 A.E.R. 285, where the average amount of the capital employed in the trade or business in the chargeable accounting period had to be calculated.

The question arose with regard to the assessments to excess profits tax made upon the appellant, Lever Bros and Unilever Ltd. for the chargeable accounting period, January 1 to December 31, 1940.

The respondents contended—and their contention had been upheld by the Special Commissioners—that, in consequence of certain payments made by the appellant in that year to the trustees of a superannuation fund, the average amount of the capital employed in the business of the appellant during 1940 was less than the average amount of the capital employed therein in the standard period, and that the profits in that year must, therefore, for the purposes of the assessment in question be decreased by the prescribed percentage of the decrease in the average amount of the capital employed.

On the other hand the appellant contended that, since it obtained value for the payments made to the superannuation fund, there was no decrease at all of the capital employed in its business in the year 1940.

It was provided by the Finance (No. 2) Act, 1939, s. 14 (1), that, for the purpose of the excess profits tax, the profits of a

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trade or business should be computed on income tax principles as adapted in accordance with the provisions of Part 1 of Schedule 7, to that Act.

This section corresponds with section 6 (1) of the Excess Profits Tax Ordinance.

By the Finance Act, 1921, s. 32 (1) it was provided that, for the purposes of income tax, any sum paid by an employer or employee by way of contribution towards a superannuation fund approved by the Commissioners of Inland revenue should, in computing the profits or gains for the purpose of assessment to income tax be *allowed to be deducted as an expense* incurred in the year in which the sum was paid.

It will be observed that the Commissioners have, it would seem, no option in the matter.

They must allow the payment to be deducted as an expense in the computation of the profits of the business.

There is no such provision for deducting payments made in respect of bonus allowances in the local ordinances dealing with income tax.

The question at issue was: Was the average amount of the capital employed in the business of the appellant during the year 1940 any less than the average amount employed in the standard period by reason of the payments which it made to the trustees of the superannuation fund?

If it were less, the standard profits for that year must be diminished, with the result that the amount of tax payable by the appellant will be increased by the amount of the diminution in the standard profits.

The Finance (No. 2) Act, 1939, Schedule 7, Pt. II, para 1 from which paragraph 1 of Part II of the First Schedule to the Ordinance was taken provides as follows: —

" (1) Subject to the provisions of this Part of this Schedule, the amount of the Capital employed in a trade or business (so far as it does not consist of money) shall be taken to be (a) so far as it consists of assets acquired by purchase on or after the commencement of the trade or business, the price at which those assets were acquired; (b) so far as it consists of assets being debts due to the person carrying on the trade or business, the nominal amount of those debts; (d) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the trade or business."

The payments in question were made by the appellant to obtain for its employees increased benefits from the superannuation fund.

It was said on behalf of the appellant that, by the *payments* in question the appellant acquired *an asset of like value* in the enhanced loyalty and contentment of its employees. The Special Commissioners rejected this contention and formed the opinion that the appellant did not get value for its payments. *Macnaghten*

J. before whom the appeal was heard held that the view expressed by the Commissioners could not be maintained.

It cannot be suggested, said the learned Judge, that the word "asset" in Pt. II of Schedule 7 to the Act, as applied to a trade or business, is restricted to material things that you can touch and see, because it includes debts. It obviously includes rights of every sort, and even such an intangible possession as goodwill.

I adopt the words of the judgment and say that by the payments of bonus to their staff the appellants acquired an asset of like value in their enhanced loyalty and contentment. That kind of liberal dealing in my view kindles a desire on the part of any servant to give of his best with a resultant benefit to the Company.

That case however differs in this respect from the present appeal in that, under the Finance Act, 1921, s. 32 for which there is no corresponding provision in this colony, the Commissioners of Inland Revenue were bound to allow these payments as a trading expense whilst as I have already held the Commissioner here had no authority so to do.

The other point for determination is whether the Commissioner in the said assessments is wrong in law when he held that no deduction should be allowed to the Company in respect of Directors' fees and remuneration for the chargeable accounting periods for the years 1940, to 1944, inclusive, on the ground that those fees and remuneration did not fall within the scope of the provisions contained in paragraph 8 (1) of the First Schedule to the Ordinance, as the standard profits of the Company for the said years were not computable by reference to any standard period, but to a statutory percentage. It was on that promise that counsel for the appellants urged before me that the respondent failed to observe the discretion vested in him under Section 10 (1) of the Ordinance when in computing the profits of any trade or business for any accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Commissioner considers reasonable and necessary having regard to the requirements of the trade or business, and in the case of *directors' fees* or *other payments for services*, to the actual services rendered by the persons concerned.

There is a misapprehension on part of learned Counsel for the appellants as to when the discretion vested in the Commissioner under this section can be exercised. The object of this section is to restrict deductions. The relevant provisions which govern the present appeal are those to be found in paragraph 8 (1) and 8 (2) of Part 1 of the First Schedule. It is admitted that save for two very brief periods, the directors of the business of the appellants throughout those chargeable accounting periods had a controlling interest therein, and those who were required to devote substantially the whole of their time to the service of the company in a managerial or technical capacity were the beneficial owners of more than five per cent., of the ordinary share capital of the company.

I have had occasion to examine at length in the appeal of The

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British Guiana Pawnbroking and Trading Company Limited heard by me in the month of April last the legal implications of section 8 (1) but as the appellants have raised the question in another form it would be well to set down the relevant sub-paragraphs dealing with the matter.

Sub-paragraph 1 of the paragraph reads as follows:

8 (1) In the case of a trade or business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company the directors whereof have, throughout that accounting period, a controlling interest therein,

- (a) In computing the profits for that accounting period; and
- (b) if the standard profits of the trade or business are computed by reference to the profits of a standard period, also in computing, in relation to any such chargeable accounting period, the profits for the standard period,

no deduction shall be made in respect of directors' remuneration.

In this sub-paragraph the expression "directors' remuneration" does not include the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity, and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control, more than five per cent., of the ordinary share capital of the company.

(2) If, in the case of a trade or business carried on by a company in any accounting period which constitutes or includes a chargeable accounting period the directors of the company—

- (a) have, in any part of that accounting period; or
- (b) had during the whole or any part of any previous accounting period which includes the whole or any part of any chargeable accounting period or the whole or any part of the standard period (if any),

a controlling interest therein, and the case is not one to which subparagraph (1) of this paragraph applies, then except in so far as the Commissioner otherwise directs, no deduction shall be made in respect of directors' remuneration either in computing the profits for the first mentioned accounting period or in computing, in relation to any chargeable accounting period wholly or partly included in that accounting period, the profits of the standard period (if any).

This sub-paragraph 1 is identical in language with paragraph 10 (1) of Part 1 of Schedule vii of the Finance (No. 2) Act, 1939, as amended by Section 33 (5) of the Finance Act, 1940, and permits of no discretion being exercised by the Commissioner in cases falling under it.

Great stress was laid on the words in the latter sub-paragraph" and the case is not one to which sub-paragraph (1) of this paragraph applies".

It was urged on behalf of the appellants that standard profits of the trade or business computed with reference to the profits of a standard period cannot have any reference to profits computed on a statutory percentage basis. This contention is based on a fallacy, inasmuch as a statutory percentage basis is only one of the modes of ascertaining the standard profits laid down by section 5 (8) in which in the standard period there were no profits, or the profits were less than the statutory percentage of the average

amount of the capital employed in the trade or business in that period.

The distinction to be drawn between the two sub-paragraphs is to be found in the words "throughout that accounting period" appearing in paragraph 8 (1).

It is only when the directors cease to have a controlling interest throughout the accounting period or any part of it, that the case is not one to which sub-paragraph 1 applies, in which case the commissioner has discretion to make an allowance. Under sub-paragraph 1 he is fettered by reason of the mandatory nature of the provision.

I accordingly hold that on the admitted facts save in the two periods mentioned under paragraph 10 (v) (a) of the respondent's statement paragraph 8 (1) of Part 1 of the First Schedule is applicable even where a company uses the statutory percentage standard.

It was stressed by Mr. Wight that the appellants would be hard hit unless some concession was given them and their choice of the statutory percentage in circumstances purely "Hobsonian" places them in an infinitely worse position in relation to those Companies which had several choices open to them under Section 5 of the Ordinance.

Whilst this may be true the provisions of the law as they exist admit of no alleviation.

On the other hand, the cases falling within sub-paragraph 8 (2) cannot be dealt with by a general rule. The Commissioner can direct the adjustments which should be made in the amounts of directors' remuneration. Sub-paragraph 2 is a relieving provision for cases which are not within sub-paragraph 1.

I agree with the result of the ruling of the Commissioner as stated in paragraph 10 (v) (a) of his statement of the material facts under this head of appeal which have not been challenged and of the allowances he made where during the accounting periods in question the directors had not a controlling interest.

For the reasons which I have given this point must be determined in favour of the respondent, and his assessments in this respect confirmed.

As both the appellants and the respondents have partly succeeded in this appeal, I make no order as to costs.

*Appeal allowed in part and dismissed in part.*

*Note by the acting Chief Justice:*

Since the above judgment was given, the House of Lords has dismissed the appeal from the judgment of the Court of Appeal reversing the decision of Macnaghten, J. in the case of *Lever Bros. and Unilever Limited v. Inland Revenue Commissioners* referred to by me.

The reversal of Macnaghten's decision in no way, however, affects my judgment as to how the average capital of the Company must be ascertained and adjusted, which is based upon the wording of the provisions in the Schedule to the Ordinance and supported

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by the judgment of the Court of Appeal in the case of *Northern Aluminium Company, Limited, v. Inland Revenue Commissioners* quoted by me.

Solicitors: *Carlos Gomes; Vivian C. Dias*, acting Crown Solicitor.

## DORIS IFILL v. EUNICE AND GRACE IFILL

DORIS IFILL,

Plaintiff,

v.

EUNICE IFILL and GRACE IFILL,

Defendants.

1945. No. 422—DEMERARA.

Before BOLAND, J. In Chambers:

1945. NOVEMBER 5; 1946. JANUARY 19.

*Will—Construction—Lapsing of legacies—Death of residuary legatee in lifetime of testator—Disposition of bequest—Assets undisposed of by will.*

*Executor and administrator—Expenses incurred by executor—In making application for probate of will—Not to be paid out of estate— Where executor was witness to will.*

The testator devised two-thirds of a half lot of land to his daughter B, and one-third of the said half lot to his son. N. The residuary estate of the testator was bequeathed to his two daughters I. and B. share and share alike. B. predeceased the testator unmarried intestate and without issue.

*Held* (1) that B.'s specific devise of two-thirds share in the half lot having lapsed, it falls into the devise of the residue, and that I. is entitled to one half of such two-thirds share; and

(2) that B.'s share of the residuary estate, which lapsed because of her prior death and which would have included a one-third share (being one-half of two-thirds) in the half lot, must be regarded at the death of the testator as assets undisposed of by the will and goes to the next of kin of the testator as under an intestacy.

*Bagwell v. Dry* (1812) 1 P.W. 700 and *Page v. Page* (1728) 2 P.W. 489 considered.

The expenses incurred by an executor in making application for probate of a will are not to be paid out of the estate of the deceased where the executor was a witness to the will.

Originating summons by Doris Ifill, the administrator with the will annexed of the estate of William Thomas Shepherd deceased for the construction of certain clauses of the will, and for directions relating to the administration of the deceased.

*J. Edward de Freitas*, solicitor, for the plaintiff.

*Cur. adv. vult.*

BOLAND, J: By this summons the plaintiff who obtained Letters of Administration with the will annexed applies for the construction of certain clauses of the Will and for directions relating to the administration of the estate. In one clause of the will Mrs. Barrow the daughter of the testator is given a devise of a two-thirds share of and in a property known as W1/2 lot M Wortmanville the remaining third being devised to Nathan the son of the testator.

The rest and residue of property both real and personal, of which the testator may die possessed, after certain other devises and bequests, the testator gives and bequeathes to his two daughters Mrs. Ifill and Mrs. Barrow and share alike,

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Mrs. Barrow predeceased the testator unmarried intestate and without issue. The questions submitted are (1) whether Mrs. Barrow's lapsed share in the 1/2 lot M Wortmanville falls into the residuary estate of the deceased and (2) whether Mrs. Barrow's lapsed share in the residue goes to Mrs. Ifill the other residuary legatee or to the next-of-kin of the deceased as an asset undisposed of by the Will.

As to (1) Mrs. Barrow's specific devise of two-thirds share in the Wortmanville property having lapsed it would fall into the devise of the residue. This is in accordance with the provisions of Section 25 of the Wills Act of 1837 which, as our Wills Ordinance, Chapter 148 is silent on the point, is expressly part of the law of this colony by section 8 of The Civil Law of British Guiana Ordinance Chapter 7.

In the residuary clause of this will which expressly relates to property both real and personal a gift of residue is made to Mrs. Ifill and to Mrs. Barrow share and share alike. By this Mrs. Ifill is given only a half of the residue. Therefore Mrs. Ifill would be entitled to one-half of the two-thirds of the Wortmanville property because of the lapse of Mrs. Barrow's specific devise therein, that is, one-third of the Wortmanville property.

As to (2) regarding Mrs. Barrow's share of the residue which lapsed because of her prior death and which would have included like Mrs. Ifill's a one-third share in the Wortmanville property, I hold that the whole of her lapsed residuary share, which must be regarded at the death of the testator as assets undisposed of by the will, goes to the next-of-kin of the testator as under an intestacy — realty and personalty both devolving in the same way as personalty by the law of this colony. The rule that a lapsed share of a bequest of residue falls to the next-of-kin as on an intestacy and does not accrue to the other share or shares is based upon the view that the testator's intention was to give each share holder named the specific fraction of the residue in the will, unless some contrary intention appears in the will. In this case it does not appear that the testator intended to benefit Mrs. Ifill in the residue of his estate beyond a half share. Vide *Jarman on Wills* (17th Edition) Vol. 2 p. 1016 and the cases *Bagwell v. Dry* (1721) 1 P.W. 700 and *Page v. Page* (1728) 2 P.W. 489).

A third question submitted for decision is, how and in what manner and out of what assets the debts of the deceased are to be paid? The testator himself has indicated that the debts should be paid out of personal property but if this is insufficient for the purpose then it should be shared by the legatees and devisees. That clearly means that the residuary personal estate is in the first instance burdened with the payment of debts — the legatees share then being deducted from personalty and called upon to share in the discharge of indebtedness with devisees if the balance remaining is insufficient. The residuary devise to Mrs. Ifill would rank as a specific devise.

As to the question whether the expenses incurred by Philip Nathaniel Yard, the executor named in the will should be borne by the estate I am clearly of opinion that Philip Nathaniel Yard is not entitled to have such expenses paid out of the estate. He

## DORIS IFILL v. EUNICE AND GRACE IFILL

ought not to have undertaken to act as such executor since he should have known that his nomination as executor was void because of his being a witness to the will. He cannot claim that it was the testator's act in nominating him as executor which forced him to apply for probate. He is in no better position than a witness to a will who seeks to get the Court to enforce a gift made to him under the will and is made to pay the costs brought about by his unsuccessful claim.

In the exercise of my discretion I agreed to hear and determine this application in the absence of Nathan Shepherd whose whereabouts out of the colony are unknown. But it is ordered that his share in this estate arising from my construction of the will and of any sale and conversion of reality into money — and I authorise the applicant, as administratrix to sell Nathan Shepherd's share for this purpose — shall be deposited in the Post Office Savings Bank to the credit of the Public Trustee as trustee for him until further application.

Costs of this application shall be paid out of the testator's estate to be taxed as between solicitor and client.

*Directions given.*

KALAMADEEN, Plaintiff,  
v.  
BADRUDEEN KHAN, Defendant.

[1946. No. 217. DEMERARA.]

BEFORE DUKE, J. (Acting) IN CHAMBERS:

1946. June 24; July 8, 9, 11, 15, 16, 22, 23; August 21.

*Practice and procedure—Receiver—Sawmill in possession of defendant—Under agreement between plaintiff and defendant—Application for appointment—Refused.*

Application by plaintiff for an order for the appointment of a receiver of a saw-mill in the possession of defendant under and by virtue of an agreement between the plaintiff and the defendant refused.

SUMMONS by the plaintiff Kalamadeen for an order for the appointment of a receiver of certain property in the possession of the property of the defendant Badrudeen Khan under and by virtue of an agreement between the plaintiff and the defendant.

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

*S. L. van B. Stafford*, K.C., for the respondent (defendant).

*Cur. adv. vult.*

DUKE, J. (Acting):

This is a summons filed by the plaintiff Kalamadeen on the 18th June, 1946, for an order that Abdool Kadir Kalamadeen or such other person as the Court thinks fit be appointed receiver of the Sawmills and Shop at Aruka, North West District on such terms as the Court thinks fit, and that the costs of this application be costs in the cause.

On the 23rd April, 1946 the plaintiff issued against the defendant Badrudeen Khan the writ of summons herein claiming —

- (a) the return and recovery of possession of the items of property described in the Schedule to the agreement made between the plaintiff and the defendant and dated 30th January, 1946;
- (b) the sum of \$500 being the instalment which became due under the said agreement on the 31st day of March, 1946 with interest thereon at seven per cent., per annum;
- (c) an injunction restraining the defendant from selling or otherwise disposing of any of the said items of property;

## KALAMADEEN v. BADRUDEEN KHAN

- (d) a receiver;
- (e) such further or other relief as to the Court may seem fit;
- (f) costs.

The main basis of the application made in this action is that the defendant Badrudeen Khan has committed a breach of clause 5 of the hereinbefore mentioned agreement by selling certain lumber to one Vernon Stoll on the 2nd April, 1946, that the agreement between the plaintiff and the defendant is at an end by virtue of a notice served by the plaintiff under clause 13 of the agreement, and that the defendant is therefore no longer entitled to possession of any of the items of property described in the schedule to the agreement which items the defendant had, under the agreement, agreed to purchase from the plaintiff. The defendant admits that he did sell lumber as alleged, but it is submitted on his behalf that such sale did not constitute a breach of clause 5 of the agreement, and further that if there was in fact a breach it was excused because the plaintiff had neglected and refused to supply the defendant with foodstuffs. The questions raised by the defendant are not without difficulty, and can only be determined at the trial of the action. There is no agreement between the parties that the hearing of this application shall have effect as if it were the trial of the action; and I cannot assume that the questions raised by the defendant will be determined in favour of the plaintiff.

It is further submitted on behalf of the plaintiff that, if an order is not made for the appointment of a receiver, irreparable harm will be suffered by the plaintiff. The appointment of a receiver will, however, have the effect of depriving the business (now in the possession of the defendant under and by virtue of the hereinbefore mentioned agreement) of the personal knowledge and experience of the defendant in relation to the running of a sawmill. The receiver suggested by the plaintiff is not shown to have any such personal knowledge and experience, and he would merely be marking time or perhaps acting in an improvident manner. The Court has no knowledge and experience of the art of running a sawmill, and would be unable to supervise the receiver's work.

On the principles indicated by me in *SINGH v. JAUNDOO* (1942) L.R. B.G. 221 the application for the appointment of a receiver will be refused with costs and I certify for counsel. I crave leave to refer to my judgment which I delivered on the 13th May, 1946 in Action No. 195 of 1946 Demerara.

Had the pleadings in this action been closed and the action placed on the hearing list, I would have fixed an early day for hearing. It is observed, however, that although appearance was entered on the 30th April, 1946, that is to say, nearly 4 months ago, the plaintiff has not, up to the present, filed his statement of claim.

*Application refused.*

Solicitors: *J. Edward de Freitas*, for the applicant (plaintiff); *W. D. Dinally*, for the respondent (defendant).

## EDWARD SEECHARRAN v. KUNTI

EDWARD SEECHARRAN, Appellant (Defendant),

v.

KUNTI, Respondent (Complainant).

[1946. No. 280. DEMERARA.]

BEFORE FULL COURT: LUCKHOO, C.J. (Acting) and BOLAND, J.

1946. August 16, 23.

*Appeal—Notice that copy of proceedings ready—Receipt thereof by appellant—On a Sunday—Notice of grounds of appeal—To be served—Within 14 days after such Sunday—Otherwise out of time—Summary Jurisdiction (Appeals) Ordinance, cap. 16, section 8 (2), (3).*

Where receipt of the notice under section 8 (2) of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, takes place on a Sunday, the notice of the grounds of appeal must be served within 14 days after such Sunday.

APPEAL by the defendant Edward Seecharran from a decision of the Magistrate of the Courantyne Judicial District.

*C. Lloyd Luckhoo*, for the appellant.

*W. J. Gilchrist*, for the respondent, took a preliminary objection.

*Cur. adv. vult.*

The judgment of the Court was delivered by LUCKHOO, C.J. (acting) as follows: —

For the first time, since the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, was passed in the year 1929, the question has arisen under the provisions of section 8 (3) whether the receipt of the notice therein stated on a Sunday by an appellant gives him the right to disregard that day in computing the fourteen days within which he is required after the receipt of the notice to draw up, lodge and serve his grounds of appeal as provided for in the said sub-section.

This point arose at the hearing of this appeal when in answer to the objection taken by Mr. Gilchrist on behalf of the respondent that the grounds of appeal were served one day out of time, learned counsel for the appellant drew our attention to the fact that the appellant received the notice on Sunday the 19th May and that the fourteen days could only be properly counted as from Monday the 20th day of May, 1946.

In support of his argument he urged that the Ordinance gave an appellant a statutory right of appeal and allowed him fourteen days from the time of the receipt of the notice sent by the Clerk of Court notifying him that a copy of the proceedings in the matter is ready to lodge and serve his grounds of appeal.

That on such a receipt he is entitled to demand, forthwith, delivery of the copy of the proceeding on payment of the proper fees, and that it was impossible for him to exercise this right, the day being a Sunday when the Magistrate's Office was closed to the transaction of business.

## EDWARD SEECHARRAN v. KUNTI

At common law Sunday is not a dies non, and it requires a statutory authority in order to make it so.

By section 3 of the Public Holidays Ordinance, Chapter 270, Sunday among other days therein mentioned shall be a public holiday and means by section 2 a day which (subject to the provisions of section 4 of the Ordinance which has no application to this case) is dies non and is kept as a holiday by public offices and Government Departments.

In *D'AGUIAR v. MONTEIRO*, Appellate Jurisdiction, 5th November, 1901, the Court in interpreting section 3 of the Public Holidays Ordinance, 1875, held that that section did not apply to the exercise of rights or privileges, but to the *performance* of obligations or the doing of acts the performance or doing of which can be compelled by others, or the non-performance or nonfeasance of which gives to others a cause of action.

An appeal is not a matter of common right but of special provision and a party wishing to avail himself of a right of appeal must strictly comply with the provisions of the statute giving such right.

We therefore have to examine the provisions of section 8 of the Summary Jurisdiction (Appeals) Ordinance in order to ascertain in the words of the judgment in *D'AGUIAR v MONTEIRO* whether there was the performance of an obligation or the doing of an act by the Clerk of Court, the performance or the doing of which could be compelled by the appellant.

The first part of the section deals with the compliance by the appellant with the requirements of sections 4 and 5. He is required by sub-section 2 to pay the proper fees when a copy of the proceedings will be delivered to him. He is not bound to do so. He may or may not exercise that right to obtain a copy of the proceedings, but if he desires to prosecute his appeal he must draw up a notice of the grounds thereof in Form 3, and lodge it with the Clerk and serve a copy thereof on the opposite party. The performance of that act is not compulsory and cannot be compelled by others.

The giving of notification by the Clerk that a copy of the proceedings is ready is required by the section.

It is one of the formal steps required by law in the course of the appeal, a judicial proceeding. The appellant could compel the performance of that obligation.

That notification was posted on the 17th day of May, not dies non, but was received by the appellant on the 19th day of May, Sunday, a dies non. The appellant could have declined to receive it, but he did not. He paid the fees in consequence of that notice and therefore time began to run against him from the receipt of the notice.

Unless Sunday is expressly excluded in the computation of time, which it is not, and the Ordinance prescribes a given number of days for doing an act, in this instance fourteen days, the days mentioned are to be reckoned consecutively.

The appellant received and accepted the notification on Sunday the 19th May, 1946,

## EDWARD SEECHARRAN v. KUNTI

In computing the fourteen days allowed Sunday the 19th May would be excluded, not because it is a dies non, but in the computation of time, when an act is to be done within a certain time, the first day is excluded but the last day is included.

The grounds of appeal should have been served on the respondent on the 2nd day of June. Service by registered post was only effected on the respondent on the 3rd day of June, one day too late.

The objection taken by Mr. Gilchrist must therefore be upheld. In consequence there is no jurisdiction to hear the appeal which is dismissed with costs.

*Preliminary Objection upheld;  
appeal dismissed.*

CRAMAT ALI McDOOM and SULTAN ALI McDOOM,  
Appellants (Plaintiffs),

v.

JAMES FUNG, Respondent (Defendant).

[1946. No. 299. DEMERARA.]

BEFORE FULL COURT: LUCKHOO, C.J. (Acting) and BOLAND, J.

1946. August 23,30.

*Rent restriction—Recovery of possession—Whether reasonable to make the order—Only relevant circumstances to be considered—Rent Restriction Ordinance, 1941 (No. 23), section 7 (1) (f).*

In determining whether or not an order for possession should under section 7 (1) (f) of the Rent Restriction Ordinance, 1941 (No. 23), be made, a Magistrate is not entitled to take into consideration every circumstance affecting the interest of the parties but only every relevant circumstance. It is not a relevant circumstance that, if the tenant were ousted, he would lose the goodwill which he had acquired by reason of his carrying on his profession as a dentist on the premises let.

APPEAL by the plaintiffs Cramat Ali McDoom and Sultan Ali McDoom from the decision of a Magistrate of the Georgetown Judicial District dismissing a plaint brought by them against the defendant James Fung for the recovery of possession of certain premises let by the plaintiffs to the defendant. The premises were subject to the provisions of the Rent Restriction Ordinance, 1941 (No. 23).

*S. I. Cyrus*, for appellants.

*T. Lee*, for respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by LUCKHOO, C.J. (acting) as follows: —

This appeal arose out of a complaint brought by the appellants against the respondent claiming possession of a two-storey build-

ing situate on the *EI/2* of lot 190 Church Street, Georgetown, under section 7 (1) (d) of the Rent Restriction Ordinance, No. 23 of 1941, after due notice to quit was given on the 27th day of February, 1945.

The respondent is a Dental Surgeon by profession, and for the past fourteen years by himself and with his family occupied; those premises as a residence, wherein, in addition, he fitted out and improved from time to time a surgery in the practice of his profession.

These premises were formerly in the ownership of one Dr. Browne from whom the appellants purchased the same in the month of October, 1944, and received transport therefor in December of the said year.

After such purchase the respondent attorned tenant to the appellants under a monthly tenancy of \$55: —

One of the appellants, Sultan Ali McDoom, hereinafter referred to as 'Sultan', is the father of eleven children of whom ten along with a son's wife and child and Sultan's mother lived prior to the destruction by fire on the 6th October, 1944 in premises at McDoom Village, on the east bank of the Demerara River.

Those premises had contained three bedrooms, living room and hall, downstairs. In consequence of the fire, Sultan and his family of thirteen had to seek shelter for a few months with his brother Cramat Ali Mc Doom at Brickdam, Georgetown, until he secured at the beginning of November, under an agreement of short duration, the second and upper flats of a building situate at lot 52 Fifth Street, Alberttown, Georgetown, for residential purpose, to which place his family and he removed.

Those two flats have three small bedrooms; the dimensions of each were given in evidence.

In them, six, five and three persons respectively, slept. On account of the paucity of space, Sultan was compelled to keep his wardrobes in the lower flat.

The building in Church Street contains two big bedrooms larger than those in Fifth Street, a small bedroom and a dressing room.

The evidence which has not been disputed by the respondent shows that the house in Fifth Street is greatly overcrowded. Six of the occupants have to sleep in one of the small bedrooms, and at one time were all affected with cough, and, in the words of Dr. Frederick Kerry, the medical attendant of the family, they would not be expected to maintain perfect health at all times. The doctor stated that Sultan was ill and it was impossible to nurse him in those surroundings.

We gather from the evidence on the record given by the Doctor and by Sultan that in consequence of the rooms being overcrowded and cramped for space, the health of the whole family, which necessitated the attendance of the doctor every month, has been seriously affected and has caused the internal surroundings to become insanitary and uncongenial.

## C. A. McDoom &amp; ANR. v. J. FUNG

On the other hand, the occupants of the Church Street premises number eight, including two nieces, a sister-in-law of the respondent and a maid.

When the appellants purchased the Church Street property from Dr. Browne, the respondent was informed that it was for the purpose of procuring a suitable house for Sultan and his family.

He (respondent) who owns two buildings on premises at lot 69 Main Street, Georgetown, one of which is let by him to one Dr. Jagan as a dwelling but in which Dr. Jagan has a surgery in the practice of his profession as a Dentist, knew for some years that the Church Street property was for sale, and told one of the appellants before appellants negotiated with Dr. Browne that he did not intend to purchase same because it was not a business proposition and that if it was sold he appreciated that he might have to vacate.

As a fact in apparent anticipation of this he had some time in June, 1944, determined the tenancy of Dr. Jagan to the Main Street building and applied for possession. The other building was tenanted by one Craig to whom the respondent had given notice to quit on the 31st day of May, 1944, stating as his reason that he needed it for residence for his family. Craig it would appear vacated at the end of July, but the respondent and his family did not remove thereto, but instead respondent rented the building to one Dr. Schuler who is an optician with his surgery on the lower flat and carries on a boarding house in the upper flat.

In his evidence the respondent stated that he was quite willing to vacate the Church Street premises if he could obtain possession of the Main Street one tenanted by Dr. Jagan and that he would not take temporary residence at Fifth Street which Sultan was willing to exchange with him, because he has his own property and Fifth Street property was not suitable for him. He further said that he had bought Main Street property so that if he had to leave Church Street, he could go there.

Dr. Jagan who was called on behalf of the respondent admitted he had received a notice to quit and had tried to get another place but could not get a suitable one for his practice. He stated he has been in practice for two years and considered Main, Water, Camp and Regent Streets, suitable localities for his practice as a dental surgeon and for transportation of patients thereto. He was aware of the notice to quit given by the respondent to Craig and the time when Craig vacated the building which was formerly occupied by a dental surgeon, one Dr. Fox. That building which adjoins his tenancy he admitted is suitable for this purpose.

There is no evidence by the respondent or Dr. Jagan that any attempt was made by either one to secure premises as a dwelling house; Dr. Jagan contenting himself with the statement that he could not find a suitable place for his practice in the localities mentioned above, whilst the respondent assumed a negative attitude and made no effort to secure for himself the tenancy of a dwelling-house.

It was on the above undisputed facts the learned magistrate had to apply the legal principles to a claim for possession under section 7 (1) (d) of the Ordinance in which two issues are involved.

The appellants have to establish that the dwelling-house is reasonably required by Sultan for occupation as a residence for himself and members of his family; and the Court must find that it was reasonable to make the order.

It would be well to point out that section 7(1) (d) is somewhat similar in its provisions to that contained in paragraphs (g) and (h) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, save that under (h) thereof, an order or judgment shall not be made or given if the Court is satisfied that having regard to the circumstances of the case, including the question whether accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.

In cases coming under the First Schedule to the Act proof of alternative accommodation is not required. The question of availability of alternative accommodation forms no necessary element in any case within the Ordinance, whilst under the Act in cases not falling under the First Schedule the Court must be satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the Order or Judgment takes effect.

Prior to the Act of 1933, section 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by section 4 of the Act of 1923 enacted that in cases where a dwelling house was reasonably required by the landlord for occupation as a residence for himself or for his family or for some person engaged in his whole time employment proof satisfactory to the Court had to be given that alternative accommodation was available which was reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent, character and proximity to place of work and which consisted either of a dwelling-house to which the Act applied, or of premises let as a separate dwelling on terms which afforded the tenant security of tenure.

The law has been substantially altered in certain respects by the passing of the Act of 1933, and great care must be exercised in applying some of the decided cases under the sections since amended.

The learned magistrate in considering the two issues before him misapplied or did not apply, in our view, the undisputed facts in coming to a conclusion on each of them.

On the issue that the dwelling house is reasonably required by Sultan, he states "The plaintiff Sultan's case is that his residence at 52 Fifth Street, Alberttown, is too small for the comfort of his family. This house consists of three small bedrooms which he states cannot accommodate his family as they should be accommodated. Dr. Kerry the family physician stated that he was unable to examine any one of them privately in case of illness;

nor was it possible to examine plaintiff's wife when she was ill" "Plaintiff alleges that the Church Street house is larger although it has the same three bedrooms and it would be more convenient in case of illness." "That is one of the grounds on which the plaintiff based the reasonableness of his claim. In my opinion there is nothing reasonable in his contention because his grounds are based chiefly on the possibility of future and continued illness which is far fetched."

He never gave consideration to the material evidence, undisputed, as set out above on that issue.

The overcrowding and cramped condition of the three small bedrooms to accommodate fourteen persons, the decline in health of its occupants which necessitated the attendance of a doctor once per month, and the insanitary and uncongenial surroundings are material factors which should have received the learned magistrate's consideration before he negated the reasonableness of Sultan's claim to possession.

We can find no evidence on the record on which he came to the conclusion that the appellant Sultan based his reasonableness to possession because he is the owner of the Church Street house and therefore was entitled to live in it.

The correct approach to the first question is not the reasonableness of his claim which involves a wider issue which is pertinent only when the Court has to consider whether it is reasonable or not to make the order, but whether the dwelling-house is reasonably required by the landlord for occupation as a residence.

Passages from the judgments in two cases were cited by the learned magistrate in respect of the view he took. *SHRIMPTON v. RABBITS* 131 Law Times at p. 479, and *WILLIAMSON v. BALLANT* 131 Law Times, p. 474. Both of those cases were decided under the 1920 Act as amended, referred to above.

In *WILLIAMSON v. BALLANT* the earlier of the two cases it was held that in considering whether it was reasonable to make the order for possession the County Court Judge ought to take into account every circumstance that might affect the interest of the landlord or the tenant in the premises, and therefore the County Court Judge ought to have taken into account the financial hardship which would be inflicted on the tenant if an order for possession was made.

That judgment was founded on section 5(1) (d) of the Act of 1923, the provisions in favour of the tenant being far wider than that contained in section 7(1) (d) of the Ordinance. The later case was decided on the same provisions and they both really bear upon the second issue.

In considering the circumstances upon which the Court would consider it reasonable to make the order, the learned magistrate referred to a factor in our opinion not applicable, and not established by evidence, that the respondent who has been a tenant of the Church Street building for the past fourteen years and who resides in and practices his profession there must be presumed to have established a goodwill at that location and to oust him with-

out good or satisfactory reasons would not be in all the circumstances reasonable.

There we are of opinion without referring to the extraneous evidence complained of by the appellants, the learned magistrate took into consideration a matter which was not relevant in considering reasonableness.

In BRIDDON v. GEORGE (1946) I A.E.R. 609 it was held that the dwelling house itself was the unit throughout the Rent Restriction Acts, even in a case where provision is made for suitable alternative accommodation, much more we think where there is no such provision in the Ordinance. The question of goodwill is one purely referable to the carrying on of a business and not to residence in a dwelling-house.

It is clear to us that, at the very threshold of his consideration on this issue, the learned magistrate himself created a difficulty and determined that very important issue on a wrong construction of the local enactment.

It is not for him *a priori* to consider under this particular provision whether greater hardship would be caused by granting the Order or Judgment than by refusing to grant it. If the question is approached that way in order to find that it was reasonable to make the order, the whole foundation for the conclusion would be wrong. He must in considering reasonableness under the section take into account not every circumstance but only relevant circumstances, which he did not do, as he wrongly in our opinion found that the Church Street building was not reasonably required by the appellant Sultan.

But under the Act of 1923 in considering whether or not it was reasonable to make an order, every circumstance affecting the interest of the parties had to be taken into account and, not only every relevant circumstance.

The distinction can readily be apprehended.

Counsel for the appellant complains that extraneous matters were taken into consideration by the magistrate when deciding the issue of reasonableness for making the order inasmuch as the decision in the case of Dr. Fung v. Dr. Jagan in which Dr. Fung claimed possession of the Main Street building could or should not influence his findings.

The learned magistrate in his last paragraph of his reasons said "I did not decide the present case in favour of the defendant because of any possible adverse decision in the case of Fung versus Jagan, because as I have already stated there was ample evidence in this present case from which I could and did find that it was not reasonable in all the circumstances to make the order for possession."

Does the statement really reflect his true state of mind or is it reasonable to believe that he was influenced by the decision he had to give in that case when he said a little earlier "I agreed with the submission and gave the decision whether the two cases should be considered together or not is a matter of argument, but it seems equitable that the decisions should be given together, because as

## C. A. McDOOM &amp; ANR. v. J. FUNG

the cases tied up one with the other, to be effective the case of Mc Doom versus Fung must have gone against the defendant, in which case he would expect to be protected in his case against Jagan. Dr. Jagan who is also a dental practitioner and who gave evidence satisfied me that he was unable to find suitable alternative accommodation and that it would be a hardship if an order for delivery of possession were made against him".

The magistrate, in our view, created for himself a situation resembling a "*pons asinorum*" which it was difficult to surmount and took into account matter which must have affected his mind in all the circumstances.

The question we have now to consider is whether in view of our findings the case should be sent back to the magistrate with directions how to determine the two issues upon the undisputed facts of the case.

The powers of this Court are contained in section 28 of the Summary Jurisdiction (Appeals) Ordinance, and among them it may enter any judgment or make an order which the magistrate ought to have made, or make any order for the disposal of the case which justice requires.

The magistrate would be in no better position than we are in applying the legal principles to the facts. They are in no way disputed and the question of more than one finding thereon does not arise.

We have given anxious consideration to the positions of both parties and we find that the appellants have established that the building in Church Street is reasonably required for Sultan and his family for occupation as a residence. In addition taking all the relevant circumstances into consideration based upon the facts detailed above, we hold that it is reasonable to make the Order for possession.

In considering what length of time we should direct the magistrate to give the respondent within which he should vacate the premises, we will take into account, only for that purpose, in order to alleviate any hardship immediate ejection may cause, the respondent, that some time should be at his disposal to negotiate for possession with one of the tenants of his Main Street: property.

The complaint was filed over a year ago and we feel it would be just if the respondent be allowed a period of three months, to the 30th day of November, 1946, within which to do so.

The appeal is therefore allowed with costs here and in the Court below. The decision of the magistrate is reversed and directions are hereby given to him to enter judgment on the record in his Court that the respondent do give up possession to the appellants of the premises situate at lot 190 Church Street, Georgetown, on or before the 30th day of November, 1946.

*Appeal allowed.*

BIDDESSIE v. S. A. HOSSANAH, L.Cpl. 3857

BIDDESSIE,

Appellant (Defendant).

v.

SAMUEL A. HOSSANAH, L.Cpl. 3857,

Respondent (Complainant).

1945. No. 117.—DEMERARA.

BEFORE FULL COURT: LUCKHOO C.J. (ACTING), AND BOLAND, J.

1946. AUGUST 16, 30.

*Criminal law and procedure—Unlawful and malicious killing of a sheep—Unlawful—Not unlawful where act necessary and done in the bona fide belief that only by such an act could one's own property be protected—Malice—Meaning of—Summary Jurisdiction (Offences) Ordinance, Cap. 13, section 59.*

For the protection of one's own property, or the property of one's employer, it is not unlawful to maim or even kill an animal, provided that such an act is necessary and there was at the time a bona fide belief that only by such an act could the property be protected.

*Gonsalves v. Stephen* (1922) L.R.B.G. 177, W.I.C.A., applied.

Malice, under section 59 of the Summary Conviction (Offences) Ordinance, Chapter 13, does not necessarily import spite or ill-will against the owner of the animal; it is sufficient if the defendant intends to do injury to the animal without lawful justification or excuse.

APPEAL by the defendant Biddessie from a decision of the Magistrate of the East Demerara Judicial District convicting him of the offence of unlawfully and maliciously killing a sheep contrary to section 59 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, and sentencing him to undergo one month's imprisonment with hard labour.

*W. J. Gilchrist*, for appellant.

*A. C. Brazao*, acting Legal Draftsman, for Respondent.

*Cur. adv. vult.*

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

The appellant was convicted by the Magistrate for the offence of unlawfully and maliciously killing a sheep and was sentenced to undergo one month's imprisonment with hard labour.

At the hearing on appeal counsel for the appellant was content to rest his submissions on the contention that the learned magistrate was wrong in holding that the evidence for the prosecution, which he accepted, had established that the appellant had acted unlawfully and maliciously in inflicting the wound on the sheep which resulted in its death. Although appellant in his evidence had insisted that he knew nothing about the sheep being in his rice field and denied driving or wounding it, counsel was forced to (admit that there was ample evidence to support the learned Magistrate's finding that the appellant had pelted a grass knife at the animal causing it to receive a severe wound on its leg from which it died shortly afterwards.

On the prosecution, it is clear, falls the burden of establishing that the wounding or killing was both unlawful and malicious,

## BIDDESSIE v. S. A. HOSSANAH, L.Cpl. 3857

and this they may do from evidence furnished by the surrounding circumstances.

Malice, it may be here stated, does not necessarily import spite or ill will against the owner of the animal; it is sufficient if the defendant intended to do injury to the animal without lawful justification or excuse.

In assessing the value of the inference to be drawn from the evidence of the surrounding circumstances it is necessary to keep in mind two cardinal principles of English Criminal Jurisprudence; the first is that a person is presumed to intend the natural and probable consequences of his act, and the second — that for the protection of one's own property or that of his employer it is not unlawful to maim or even kill an animal, provided such an act is necessary and there was at the time a bona fide belief that, only by such an act could the property be protected. That was laid down by the West Indian Court of Appeal in *GONSALVES v. STEPHEN* reported in 1922 L.R.B.G. at p. 177, which Court refused to disturb the judgment of this Court when it upheld the conviction of a magistrate who had found that "the defendant had acted maliciously because in no sense could he have acted under the bona fide belief that what he did was for the protection of his master's property".

In that case the defendant, a shop clerk, had struck the dog on its back with a huge wooden bar, because, as he stated, it had stolen salt fish.

In the present case the facts given in evidence by the prosecution, which, as stated, the magistrate accepted in spite of the appellant's evidence that he knew nothing about it, were that the appellant was in his grass field cutting rice. For the purposes of this case it is immaterial whether it was his own rice field or whether he was merely employed there by the owner of the field. Whilst in the act of cutting the rice with his grass knife his attention was drawn to three sheep in the field eating some padi already out. He flung the grass knife at the sheep and one of them received a blow from the knife on its left hind leg which caused such a severe wound that the animal fell, and died some time after it was taken up by its owner.

On those facts, although there was no evidence of the distance at which the knife was thrown, the prosecution would seem to have made out a strong prima facie case of an intention to wound the animal, since the defendant must have known or ought to have known that a blow from a grass knife would very likely wound the animal.

As it was admitted by the prosecution that the sheep was eating the padi it must be conceded that the appellant was entitled to take steps to protect the padi from further destruction.

Had the prosecution satisfactorily established that such an act as throwing a grass knife at the animals was not necessary and also that defendant at the time could have had no bona fide belief that such an act was necessary?

We are in agreement with counsel for the respondent that the prosecution was entitled to ask the Court to take into con-

sideration the well known natural disposition of sheep to scamper off when chased and that accordingly the prosecution had made out a case of the absence of bona fides in the defendant who instead of chasing the sheep flung a knife at them.

Perhaps this prima facie case of malice may have been rebutted by the appellant if he had testified that having the grass knife in his hand he acted on a sudden impulse to protect the rice field without intending or considering the reasonable probability of injury to one of the sheep. But the appellant in his evidence denied that any such act of throwing the knife had occurred, and with this prima facie case made out by the prosecution, we cannot say that the magistrate was wrong in holding that the appellant had acted maliciously.

In the circumstances we hold that the conviction must be affirmed. The appellant, we have been told, has had no previous convictions for any offence, and as we realise how exasperating it must have been to him to find his padi being destroyed by the sheep, and considering also that he did not directly strike at but threw the knife at the animal and that the result most probably was more serious than he anticipated, we are inclined to vary the sentence, as we are empowered to do, although there is no ground of appeal against the severity of sentence.

Under the section the magistrate had no power to impose a fine, the offence being made punishable by imprisonment without the option of a fine. We think, however, this is a case for the exercise of the powers given to courts under the Probation of Offenders Ordinance, and we shall accordingly vary the sentence of one month's imprisonment imposed by the learned magistrate, and order to be substituted therefor, that the appellant shall within seven days enter into his own recognisance in the sum of \$120.00 to be of good behaviour and to come up for sentence if called upon within one year; in default of his giving this recognisance he will serve one month's imprisonment with hard labour.

Appellant will pay the costs of this appeal.

*Appeal dismissed*

HARRY WONG,

Plaintiff.

v.

CECELIA FUNG,

Defendant.

(1944. No. 162 and 1944. No. 269.—DEMERARA).

BEFORE JACKSON, J. (ACTING) .

1945. DECEMBER 13, 14, 20; 1946. MAY 21, 22, 23; SEPTEMBER 10.

*Specific performance—Agreement for lease—Date on which lease is to commence not agreed upon—Specific performance cannot be decreed.*

An agreement for a lease cannot be specifically enforced where there is no term in the agreement as to the date on which the lease is to commence.

*Brilliant v. Michaels* (1945) 1 A.E.R. 121, 126, applied

## HARRY WONG v. CECELIA FUNG

CONSOLIDATED ACTIONS by the plaintiff Harry Wong against the defendant Cecelia Fung claiming (1) rectification of an agreement and specific performance thereof as rectified, and in the alternative, damages; and (3) that an opposition to a transport was just legal and well-founded, and consequential relief.

*S.L. vanB. Stafford*, K.C., for plaintiff.

*H. C. Humphrys*, K.C. and *J. A. Luckhoo*, junior, for defendant.

*Cur. adv. vult.*

JACKSON, J. (ACTING):

On the application of Counsel for the plaintiff and with the acquiescence of Counsel for the defendant the actions were consolidated. It was agreed that the only point to be considered in the second action would be whether the right of opposition would lie in view of the claim for damages in the first action.

Plaintiff is a shop-keeper and carried on what is commonly known as a salt goods shop at La Grange, West Bank, Demerara. Defendant is the owner of lot 4 Anna Catherina, West Coast, Demerara with the buildings and erections thereon. She carries on a grocery and Spirit Shop in one of these buildings.

Plaintiff alleges that on the 21st February, 1944, he entered into and concluded an agreement with defendant for the lease of her Retail Spirit Shop at lot 4 Anna Catherina known as the Flying Dragon on certain terms and conditions, that the terms were reduced into writing, and signed by them. Plaintiff further alleges that by some mischance all the terms were not embodied in the writing, principal among the omissions being —

- (a) "that the premises should be demised for 5 (five) years with a right of renewal in the plaintiff for a further period of 5 (five) years.
- (b) the date at which the plaintiff was to be given possession under the said agreement, which said terms had been agreed upon by the parties."

Plaintiff therefore asks for —

- (i) Rectification of the agreement—marked at the trial J.E.T.C. 2—to include the terms as to the duration of the said lease and renewal thereof, and the insertion of the date of possession.
- (ii) Specific performance of the agreement so rectified, and in the alternative \$3,000.00 damages for breach of the agreement.

The defence denies that the facts are correctly stated in the Statement of Claim and alleges that the agreement was signed in escrow and was not to take effect until the plaintiff had executed a further document intended to be a power of attorney which was prepared at the same time and had provided security in respect of the Retail Spirit Shop Licence and that that power of attorney was never executed. Defendant further pleads that section 20 of the Civil Law of British Guiana Ordinance, Chapter 7, has not been complied with and contends that the plaintiff is not entitled to have the agreement rectified in order to effect such compliance. The section is as follows: —

"No action shall be brought whereby to charge any heir, executor or administrator, upon any special promise to answer damages out

## HARRY WONG v. CECELIA FUNG

of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another or to charge anyone upon any agreement made upon consideration of marriage, or upon any agreement which is not to be performed within the space of one year from the making thereof unless the agreement upon which the action is brought or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

On the 15th May, 1944, the defendant purported to sell to her daughter Evelina Chung the said property Lot 4 Anna Catherina with the buildings and erections thereon and in pursuance thereof advertised the conveyance by way of transport in the *Official Gazette* of the 17th June, 24th June and 1st July, 1944 respectively; on the 1st July, plaintiff entered opposition to the transport; that resulted in the second action, No. 269 of 1944.

I propose first to deal with the document J.E.T.C.2; it was submitted by counsel for the plaintiff that the document could not be described as an escrow, that such a term could only be applied to a deed of conveyance and that an agreement signed by the parties and not given to a person other than a grantee could not be so termed; he further contended that an agreement which preceded a conveyance could not be an escrow; that in the instant case the parties had put into formal shape the matters on which, they had agreed and that a binding and unconditional contract came into existence notwithstanding the power of attorney had not been executed. This contention I find not to be appropriate; it is I think settled law that if two parties entered into a written contract on the condition or with the understanding that it should not take effect until some other document prepared contemporaneously be executed, the first document cannot ordinarily take effect until the second document is executed. Any discussion as to the competitive efficiency in the employment of the word escrow in my view would be idle. Parol evidence was offered to show that agreement J.E.T.C.2 which purported to be unconditional; was executed with the intention that it should only take effect as a contract on the due execution of the power of attorney; and moreover that both parties knew that and agreed to that. (*PATTLE v. TORNBROOK* 1897 1 Ch. 25). The evidence as I have heard and considered it, leaves no room for doubt that the parties agreed that before J.E.T.C.2 could be acted upon by either party the plaintiff and defendant should execute and sign a "power of attorney", so called by them, empowering the defendant to re-transfer the Spirit shop licence to herself on the happening of) certain events.

Mr. J. E. Too Chung acted as solicitor for both parties; strangely enough a copy of this "power of attorney" was submitted by a layman, a nephew of the defendant; it is one which this trained solicitor was instructed by this layman to follow and he did so; this document provided for the signature of both plaintiff and defendant. On the afternoon of the 21st February, 1944, after the agreement J.E.T.C.2 was signed, Mr. Too Chung and the parties repaired to the office of Messrs. Cameron and Shep-

## HARRY WONG v. CECELIA FUNG

herd, Solicitors, and there requested Mr. J. E. de Freitas, a solicitor of the firm and a notary public to have the power executed before him. On inquiry by defendant Mr. de Freitas opined that the power should provide for security for the licence to be furnished by the plaintiff; inspired by this expression of opinion defendant declined to be a party to the execution of the document until the plaintiff provided security in the sum of \$5,000, It is common ground that that was the first occasion on which the question of security had been raised; the terms in the power of attorney were furnished by the defendant, were considered all-embracing and the plaintiff accepted them. Plaintiff thereafter made efforts to get sureties but failed. What is germane, however, is at the time when all but the execution of the "power of attorney" remained to be effected, the defendant repented of her bargain and decided not to carry out her part of the transaction. It has been pressed upon this court by the defence that there was no need for defendant to put her signature to the document, it was for the plaintiff who was charged with the duty of giving the power of attorney to do so, and that until he had done so no obligation was cast on the defendant to carry out the contract; the court is unprovoked by such argument, for if a defendant by both act and word should make it unmistakably manifest that he would not adhere to a contract unless something hitherto undreamt of or was not at all in the contemplation of the parties be provided I can see no improvement in the position if a plaintiff should go through the farce of signing the document alone when by previous agreement it was intended that both should sign; nor would the situation be relieved if it was contemplated that plaintiff alone should sign. The present case is distinguishable from the line of cases down to SPOTTISWOODE v. DOREEN APPLIANCES LTD., 1942 2 A.E.R.65 where it was held by the Court of Appeal that the expression "subject to a formal lease to be prepared by their solicitors" kept the transaction open until the formal lease was signed and exchanged by the parties; here the formal lease had been both signed and exchanged, nay more, the form of the power of attorney was drawn up and presented by the defendant with a resultant adoption by the plaintiff. The defendant had then and subsequently clearly evinced an intention no longer to be bound unless plaintiff had furnished the required security; this latter was a new condition and the conduct of the defendant was by anticipation a breach of the original arrangement for the execution of the "power of attorney" thereby emancipating the plaintiff from what would otherwise have been an inescapable necessity to perform his part of the bargain. (PLANCHE v. COLBURN (1831) 8 Bing 14; MERSEY STEEL & IRON CO. v. NAYLOR 1884 A.C. at p.642).

It has been for a long time established that the court will correct and reform any instrument if it is convinced there has been some mistake in the written expression of the parties; in that their real intention had not been accurately recorded; parol evidence is admissible to satisfy the court as to the omission or mistake even though the effect may be to grant specific perform-

## HARRY WONG v. CECELIA FUNG

ance of the written agreement with a parol variation. (JOHNSON v. BRAGGE 1901 1 Ch. 28). As to the question raised by the defence by pleading s.20 of the Civil Law of British Guiana Ordinance, Chapter 7, the equivalent of s.4 of the Statute of Frauds the answer is supplied by the Earl of Birkenhead in UNI-TED STATES OF AMERICA v. MOTOR TRUCKS LTD., 1924 A.C. 196; at p.200 he says:

"It was further suggested that the present action involved an attempt to enforce a parol contract inconsistently with the principle of the Statute of Frauds. It is, however, well settled by a series of familiar authorities that the Statute of Frauds is not allowed by any Court administering the doctrine of equity to become an instrument for enabling sharp practice to be committed. And indeed the power of the Court to rectify mutual mistake implies that this power may be exercised notwithstanding that the true agreement of the parties has not been expressed in writing. Nor does the rule make any inroad upon another principle, that the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified; and secondly, that such agreement has been inaccurately represented in the instrument. When this is proved either party may claim, in spite of the Statute of Frauds, that the instrument on which the other insists does not represent the real agreement. The Statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on; but when the written instrument is rectified there is a writing which satisfies the Statute, the jurisdiction of the Court to rectify being outside the prohibition of the Statute."

Mr. Too Chung, solicitor, in course of his evidence stated that he typed the document J.E.T.C.2, that the parties had agreed on the duration of the lease for a term of 5 years and that they were haggling as to the right of renewal for a further term of 5 years; he proceeded

"I would ordinarily have put the term immediately after the \$40 rent but as they did not agree as to the rental I left that part about the term out for the time being and proceeded to complete the agreement. Sue-A-Quan had agreed about the stock-taking and I put it in. Every completed paragraph in the agreement was an agreed term; they gave me no particular date as to possession. I left it blank for them to fill in, While I was typing the two parties were discussing about the renewal; plaintiff ultimately said he would take the agreement for 5 years without the renewal. I told the parties that I would put in the term of 5 years at the end of the agreement;" under cross-examination he further said, "they agreed on that while I was typing the clause about the licence; plaintiff told me, 'All right I will take the five years.' I stopped to listen to him. After the licence clause I have only six more lines; between the licence clause and the finish of those 6 lines I omitted to put in the term of 5 years; I had forgotten to insert a most important term of the lease and one which was the subject of much discussion; I read the lease over to the parties; I do not know if defendant can read or write; defendant appeared to understand the document; I read out the document aloud; even then I did not notice nor did anyone say anything about the omission of the term of 5 years."

This statement about an agreement for 5 years was contested by the defence and defendant and her witness Sue-A-Quan were

## HARRY WONG v. CECELIA FUNG

positive that defendant had declined to agree to let the premises for a term of 5 years but that the agreement was for a monthly tenancy of \$40.00 (Forty dollars) as the rental thereof, same to be paid in advance as stated in J.E.T.C.2. Let it be remarked at this stage that the evidence establishes that not only was the document read over by the solicitor, but also by Sue-A-Quan, nephew of defendant, and by Theodore Chung who was present at the express request of the plaintiff to see plaintiff's rights preserved; moreover, they were all present during the discussion as to the length of time the contract should run; it is in the circumstances wholly incredible that the results of a discussion which was vigorously pursued, a topic the subject of so much argument, one on which agreement had not been hastily reached but awaited with anxious urgency, should at the vital moment have suddenly fled their memory. The solicitor excuses it on the ground that the parties were in a hurry to go home. This seeming lack of awareness is only paralleled by the rarity of any sign of a practised hand in the agreement J.E.T.C.2 or in the power of attorney so called and by the absence of any indication of appreciation by the draftsman of the salient points to be kept in mind in the preparation of such documents. It is unfortunate that I cannot describe as accurate the evidence of the solicitor; I have had the advantage of seeing him in the witness box and I am convinced that lapse of time has had a deleterious effect on his memory and has caused his recollection of what occurred to be very grievously impaired. The evidence on the whole has failed to establish *en* this point the case of the plaintiff; I do not find there was ever at the material times any agreement for a letting for the term of 5 years.

One of the points taken by the defence was that the commencement of the term was not defined, that the time when possession should take place was left blank; and finally it was contended that there was no evidence from which the commencement of the term might be indicated. In *re LANDER & BAYLEY'S CONTRACT 1892* 3 Ch. at p.47 Chitty, J. referring to another case said:

"But the Court laid down the proposition which is obvious, that the commencement of the term may be collected from the agreement as a whole, so that the question is whether I can collect, from the language of this agreement the date from which the term is to begin. I think I can and I think I can ascertain it without any question."

I think I can also look to the evidence adduced for aid provided it discloses matter relevant to the specific subject now under review. Mr. Too Chung testified that he left the space for the date when possession was to be given to be filled in later on by the parties themselves; he stated that he had told them he wanted a definite date and was informed that the stock was to be taken on the Sunday following, after which possession would be given plaintiff. It is curious that nowhere in the agreement J.E.T.C. 2 is any reference to when the stock was to be taken; provision is however made for the stock of the grocery and spirit shop to be taken over at the current market rate; plaintiff said it was arranged that the stock was to be taken on Sunday 27th February

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and narrates some incidents in support of his story; defendant denied that any date was fixed for stocktaking; on the contrary she stated that on Saturday the 26th February plaintiff told her he was taking men to the shop the next day to take stock; defendant replied that she had not arranged for it and how could he take people for stocktaking when nothing had been fixed. Sue-A-Quan is positive that the time for stocktaking was never discussed. The evidence of Mr. Too Chung and the plaintiff on this question of time for stocktaking is in direct conflict with the letter under date 3rd March, 1944, written to defendant by Mr. Sharples, plaintiff's solicitor in the action. The matter was then more recent. Paragraph 2 of the letter is as follows:

"My client instructs me that it was agreed that the lease should be given for a period of 5 (five) years to commence immediately after the taking of stock and his purchase thereof and that such stocktaking was to be executed within a reasonable time. The length of time, i.e. 5 years was however omitted by error in the agreement as well as the right of renewal for a further period of 5 years."

I have come to the conclusion that no time was fixed for stocktaking; the evidence of the defendant and her witnesses being more reliable and more consistent with that what is recorded in J.E.T.C.2 and with the events as they occurred. Reflection has not improved on my assessment of the value of the solicitor's evidence, and I can place the plaintiff's evidence in no better category; I am, therefore, afforded no assistance from the evidence whereby I may be enabled to ascertain that a time certain as to when possession was to be given or of the time when the term was to begin. What is the effect, if any, of such omission? But for authority, I might have been inclined to regard the agreement as enforceable; the point was raised in *BRILLIANT v. MICHAELS* 1945 1 A.E.R. 121; at p.126, Evershed, J. says:

"The point is, or may be briefly put thus, that it is essential for the enforceability of a contract relating to the letting of land that the date of the commencement of the term should be certain or, at any rate, certainly ascertainable and should not be dependent upon the happening of some event which may be called a wholly casual event. I should like to refer to the passage in *FRY ON SPECIFIC PERFORMANCE*, 6th Edn., para. 378, where he says at p. 177:

Again a material term may well be supplied by construction or inference where the circumstances justify it: but if neither supplied by expression, construction, nor inference, the contract is incapable of performance. In a contract for the grant of a lease the date of the commencement of the lease is a material term, and if it does not appear in the contract, by expression or reference, it is incomplete: nor can it be inferred to begin at the date borne by the memorandum of agreement, though it may, of course, be collected from the agreement read as a whole.

I should also like to refer to the well known passage in the judgment of Lush, L.J., in *MARSHALL v. BERRIDGE*, 1881 19 Ch. D. 233 where the Lord Justice says, at p. 245:

There must be a certain beginning and a certain ending, otherwise it is not a perfect lease."

The commencement of the term of a lease it is admitted is an essential term; the time for possession it has been said, was to be inserted by the parties later after they had determined about it ;

## HARRY WONG v. CECELIA FUNG

no finality was ever reached. A reasonable inference is that on Saturday, 26th February the question of the time for stocktaking was not yet settled and that was first to be done before the time for possession could be fixed. I have found there was no agreement as to when stock was to be taken or of when the lease was to begin to run or when possession was to be given. In *ROSSITER v. MILLER* 1878 3 A.C. 1124, at p. 1151, Lord Blackburn says

"though the parties may have agreed on all the cardinal points of the intended contract, yet if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation."

In *JOHNSON v. HUMPHREY*, 1946 1 A.E.R. 460 the question received some attention. There the defendant agreed orally on the 9th November, 1944, to sell her bungalow to the plaintiff for the sum of £ 750. It was a term of the contract that vacant possession should not be given until the defendant could make other suitable arrangements for herself and her furniture. On the following day the plaintiff paid a deposit of £ 20 to the defendant who, at the request of the plaintiff, signed a memorandum in these terms "10th November, 1944: I hereby agree to sell my bungalow Seaby's Croft Waring, Selsey, to Mr. E. G. Johnson, Jeweller, High Street, Selsey, for the agreed sum of £750, and for which he has paid a deposit of £20, the balance to be paid immediately on possession;" on the 25th November, 1944, the defendant by a letter addressed to the plaintiff, repudiated the contract and returned the deposit. The plaintiff claimed specific performance of the alleged contract of sale.

Roxburgh, J. held that the condition as to vacant possession was a material term of the agreement, and that the contract was unenforceable because it omitted to deal with the vital question of when possession was to be given.

There can therefore for the reasons hereinbefore stated be no rectification; specific performance cannot be ordered; the agreement entered into on the 21st February, 1944, is found to be unenforceable and there can be no damages. Judgment must therefore be entered for the defendant and the action No. 162 of 1944 dismissed with costs. As a result of the findings the opposition entered against the conveyance of lot 4 Anna Catherina is declared unjust and ill-founded. The action No. 269 of 1944 is also dismissed with costs.

*Judgment for defendant in each action.*

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

SANICHARI KAMALL, Plaintiff,

v.

RAJMAT, Defendant.

[1945. No. 88.—DEMERARA.]

BEFORE LUCKHOO, C.J. (Acting): 1946. JANUARY 10, 22.

*Solicitor—Right of audience of—In Supreme Court—No such right—Where damages to an unspecified amount are claimed—Trial of action—Legal Practitioners (Definition of Functions) Ordinance. 1931 (No. 15), section 3.*

Where a plaintiff in his statement of claim claims damages to an unspecified amount, a solicitor has no right of audience, at the trial of the action, in the Supreme Court in relation to such claim.

*Sanichari v. Etwar and Dool* (1945) L.R B.G. , 4th September, 1945, distinguished.

ACTION by the plaintiff Sanichari Kamall against the defendant Rajmat claiming, *inter alia*, damages to an unspecified amount. At the trial of the action, a solicitor appeared on behalf of the plaintiff. Counsel for the defendant objected that the solicitor had no right of audience.

*D. P. Debidin*, solicitor, for the plaintiff.

*C. Lloyd Luckhoo*; for the defendant.

*Cur. adv. vult.*

LUCKHOO, C.J. (Acting): The indorsement on the writ of summons in this action which was filed on the 7th day of March 1945, was for possession of a two storeyed building, mesne profits

## SANICHARI KAMALL v. RAJMAT.

damages and costs, and was issued by Mr. Debidin, solicitor, duly authorised by the plaintiff to act as her solicitor. The defendant entered appearance by her solicitor, Mr. Sharpies, on the 8th day of March.

The statement of claim repeating the several claims set out in the writ and signed by Mr. Debidin alone was served and filed on the 17th day of March, and the defendant delivered her defence duly signed by counsel and solicitor on the 27th March. Thereafter the solicitor for the plaintiff delivered a reply signed by him on the 30th day of April. On the 6th of June application was made to enter the action on the hearing list.

On the action coming on for hearing on the 10th of January, 1946, counsel for the defendant raised an objection to the action being entertained inasmuch as the solicitor for the plaintiff had no right of audience on the ground that the value of the thing in dispute exceeded the sum of five hundred dollars. He contended that the right to possession as claimed was in dispute and concerned property the value of which is \$6,500:— and that the plaintiff was not entitled to possession as there is a contract of tenancy existing between them. Counsel also contended that the plaintiff alleged a breach of the agreement above referred to and claimed damages without specifying any sum of money. He relied on the recent judgment of Chief Justice Verity delivered on the 4th September, 1945, in the matter of *Sanichari v. Etwar and Dool* and asked that the present proceedings be dealt with accordingly.

Solicitor for the plaintiff submitted that he had a right of audience as the claim of the plaintiff is for vacant possession of the premises which the plaintiff purchased from the defendant and received transport on the 27th day of November, 1944, and the ownership of which was never in dispute. He also submitted that the damages claimed for breach of agreement are in respect of the non-delivery of a two storeyed building included in the said transport and can be gauged by the amount of the mesne profits claimed in para. 7 (b) and (c) of the Statement of Claim, and not only was the Writ of Summons properly issued by him but that all subsequent proceedings were properly, under the Rules of Court, signed by him and that his right of audience was unchallengeable.

If the circumstances in the present case were similar to those in *Sanichari v. Etwar and Dool* and had the writ been issued by a barrister-at-law acting as a solicitor, I would have felt myself constrained to follow that decision although by a single judge and would have hesitated to differ from a judgment of that learned Chief Justice. However I must still consider the forceful objections of counsel for the defendant as to whether or not on the proceedings as they stand the same result should ensue.

For that purpose it would be well to set out briefly the course of the proceedings in *Sanichari v. Etwar and Dool* in order to appreciate the difference, if any, between that case and the instant case. In that action the plaintiff by his writ, issued by a barrister acting as a solicitor, claimed (a) possession of certain immovable property; (b) \$250:—damages for trespass and illegal

occupation; and (c) costs. Those claims were repeated in the Statement of Claim which was signed by the barrister acting as solicitor. In their Defence the defendants pleaded *inter alia* that they had purchased the premises for the sum of \$280:— from a person alleged to be the agent of the plaintiff, had paid \$100 on account of the purchase price and had been placed in possession of the premises. The plaintiff in her Reply denied the alleged agency. At the hearing counsel for the defendants contended that the Writ, Statement of Claim and all proceedings taken by the plaintiff were signed by a barrister purporting to act as a solicitor but that the grounds upon which the barrister was so entitled to act were not disclosed therein and referred to the provisions of sections 3 and 5 of the Legal Practitioners (Definition of Functions) Ordinance. No. 15 of 1931, *in support of his contention.*

The former section provides that “a barrister.....shall be entitled to act alone and have audience.....” in certain matters described in paragraphs (a) and (b) of part B of subsection (1) and “(c) in any other “cause or matter when the writ is not specially indorsed in which the sum “of money claimed or the value of the land or thing in dispute as alleged in “the statement of claim does not exceed the sum of five hundred dollars.”

Section 5 provides that “a barrister shall be entitled to practise as a “solicitor in respect of all proceedings, including the issuing of writs of “summons and other proceedings in any of the matters specified in section “three.....”

In considering the issue raised in that case the learned Chief Justice stated that the first question to be decided was whether it was incumbent upon a barrister purporting to act as a solicitor under section 5 to show on the face of the proceedings the grounds upon which he is so entitled to act or whether it was sufficient that he should purport so to act and be deemed to be properly so acting until the contrary appeared.

“It is undisputed”, said the learned Chief Justice, “that by the Rules of “this Court, as by the common rule and custom governing the functions of “solicitors and barristers, a barrister is not entitled to issue a writ or to “practise as a solicitor in any way in the course of contentious matters, “and that the right to do so is a right conferred by statute within the limits “of “certain prescribed conditions. The condition applicable to the present “matter is that the sum of money claimed or the value of the land or thing “in dispute as alleged in the statement of claim must not exceed the sum “of five hundred dollars. It is clear from the words of the statute that the “right of the barrister to practise as a solicitor does not depend upon the “actual “value of the land or thing in dispute but upon the value as alleged “in the statement of claim. If, therefore, no value were alleged in the “statement of claim and the absence of such an allegation did not “determine the matter it would be impossible to determine whether or not “the barrister was entitled to practise as a solicitor in relation to the “proceedings. But his right so to act depends entirely upon the existence “of the statutory conditions on which the right is conferred and, in the “absence

## SANICHARI KAMALL v. RAJMAT.

"of an essential condition, in this case the allegation in the statement of claim that the value of the land or thing in dispute does not exceed the sum of five hundred dollars, the right to practise as a solicitor cannot be conferred. It could not be acquired by any subsequent proof of the value as not exceeding \$500 nor, it would seem, could it be taken away by any subsequent proof that the value in fact exceeded \$500 once the right had been acquired by an allegation in the statement of claim that it did not exceed that sum. While therefore it would seem that the value of the claim need not be stated in the indorsement on the writ, yet it appears to me beyond doubt that it is essential that it should be stated in the statement of claim and that it should be alleged not to exceed \$500 if the barrister is to be entitled to act as a solicitor in relation to the proceedings. It would appear also that if the statement of claim alleges a sum exceeding \$500 or fails to allege a sum not exceeding \$500 then the barrister is disentitled *ab initio* to act as a solicitor and this will relate back to the issue of the writ which will become a nullity having been issued neither by the plaintiff, nor by his solicitor or barrister entitled to act as such."

The above applies to a barrister acting as a solicitor but can it ever apply to a solicitor who under Order III, rule 7, is entitled in any matter whether contentious or non-contentious to issue a writ. It is clear it cannot apply. The writ therefore in this case was properly issued.

It was argued in the case referred to that the claim for possession was ancillary to and consequential upon the finding that the defendant was guilty of a tort in trespassing upon and remaining in occupation of plaintiff's property, but the learned Chief Justice rejected that argument and came to the conclusion that an action to recover possession of land (immovable property) must obviously be based upon the fact that the plaintiff is out of possession, and that the two causes of action must therefore be based upon two distinct sets of circumstances and in no case could the relief claimed in the one be consequential upon or ancillary to the right to relief claimed in the other.

In the present case the right to possession is based upon the agreement alleged in para. 2 of the Statement of Claim and mesne profits are claimed in consequence of the defendant remaining in possession. Are these two causes of action based on two distinct sets of circumstances or are mesne profits only consequential upon the possession still being retained until given up and flows directly from the breach of the agreement? I am of opinion that in law the two cases differ and I am prepared to hold that the claim for mesne profits is consequential upon the breach.

But there is still a further point to be considered. Counsel for the defendant contends that the tenancy of the building is in dispute and therefore the right to possession is in dispute and that such right being claimed along with mesne profits the solicitor is deprived of the right of being heard and that in addition the claim for damages for breach of agreement set out in paragraph 2 of the

Statement of Claim puts it beyond doubt that the solicitor is debarred from appearing as an advocate in this action.

The success of this contention must be founded on the interpretation to be placed on the words "the value of the thing in dispute" appearing in the subsection above quoted. What is in dispute in this case, the right to possession? The ownership of the property is not in dispute. Transport was passed by the defendant to the plaintiff in terms of the first part of the agreement set out in para. 2 of the Statement of Claim. It is with respect to the second part of the agreement — possession of the property sold to the plaintiff, a two storeyed building, and the claim for mesne profits — that there is a dispute.

It is clear that in an action by a landlord to recover possession from a tenant holding over the value of the thing in dispute is not that of the property itself, the ownership of which is not in question, but merely of the right of the tenant to remain in possession. Such a case must be kept distinct from that in which a person claiming to be the owner of the property seeks to recover its possession from one who has wrongfully entered into occupation thereof.

In the present case there is no wrongful entry into occupation but only the right of the purchaser to be given possession by the vendor and the vendor remaining in possession after the passing of transport. The Statement of Claim by its fifth paragraph puts the matter in dispute as the wrongful occupation of the two-storeyed building, since the passing of the transport. The defendant's story is that the occupation is not wrongful but is due to a tenancy subsisting between her and the plaintiff. In other words these are the matters in difference between the parties.

The value of the claim to possession is measured by the mesne profits claimed and not by the value of the property, the ownership of which is not in dispute. Where, however, the plaintiff has overstepped the bounds and so deprived her solicitor of the right of audience is when she further claimed damages for breach of agreement with respect to the possession of property the value of which is stated in para. 2 of the Statement of Claim to be \$6,500: — I am not satisfied and I am not convinced by the arguments advanced by the solicitor that damages claimed for breach of the agreement mean the same thing as mesne profits. They are in my opinion in addition to them. The claim is not even framed in the alternative.

Whilst it is true that in England where damages claimed are unliquidated it is not necessary or usual to insert any specific figure yet one will find in every such case counsel appears instructed by a solicitor at the hearing. In the present case the rule of court requires the writ to be issued either by the plaintiff or his solicitor. That has been done. Order XVII rule 6 of the Rules of Court, 1900, as amended by O. 9 of the Rules of 1932, makes it clear that the signature of Counsel is not necessary to a pleading unless the same was settled by him. There is nothing to show that counsel settled the pleadings of the plaintiff in this action.

## SANICHARI KAMALL v. RAJMAT.

The solicitor's right to be heard by the Court is not dependent upon any rule which could be waived by the opposite party. It is governed by statute to which he is bound.

I therefore hold that the matters in difference or the matters in dispute between the parties in this case do not permit of the solicitor for the plaintiff being heard by the Court. The plaintiff must appear by counsel instructed by her solicitor or ask leave of the Court to amend her pleadings by striking out that portion of her claim for damages for breach of agreement.

As the adjournment of the trial has been caused by the inattention of the plaintiff and as counsel for the defendant has succeeded in his objection the plaintiff must pay the costs of the day of the defendant which I fix at \$28.

*Preliminary objection upheld.*

Solicitors: *D. P. Debidin*, for plaintiff;  
*R. G. Sharples*, for defendant.

SHIWMANGAL v. J. JAIKARAN & SONS LTD.  
SHIWMANGAL,

Plaintiff,

v.

J. JAIKARAN & SONS LIMITED,

Defendants.

1945. No. 192.—DEMERARA.  
MANGROO,

Plaintiff,

v.

J. JAIKARAN & SONS LIMITED,

Defendants.

1945: No. 402.—DEMERARA.

BEFORE LUCKHOO, C.J. (ACTING):

1946. SEPTEMBER 9, 10, 11, 12, 13, 16, 30.

*Defence Regulations—Defence (Restriction of Eviction of Rice Farmers) Regulations, 1942—Object and effect of.*

*Trespass to land—Action against lawful owner of land—Necessary ingredient of action—Title derived from defendant.*

*False imprisonment—Person arrested charged—Charge dismissed—Innocence of such person—Conclusively presumed.*

*False imprisonment—Arrest by private individual—When justifiable—Where felony committed, and suspicion that person arrested committed it.*

*Malicious prosecution—Want of reasonable and probable cause—Meaning of.*

*Malicious prosecution—Malice—meaning of.*

Where rice lands in Wakenaam were let from May to December, the period during which the land could be tilled, planted and the big crop reaped, and the landlords permitted the tenant, if they thought fit, to reap the drop seed or small crop in the Spring months of the following year, it was held that the tenant could not be evicted from the rice lands except in accordance with the provisions of the Defence (Restriction of Eviction of Rice Farmers) Regulations, 1942.

Where such a tenant died intestate and the person in whose favour Letters of Administration are granted is evicted from the rice lands before he obtains such a grant, it was held that such person could not bring an action against the landlord in respect of such act of eviction. *Mellows v. Low* (1923) 1 K.B. 522, distinguished.

In order to maintain an action for trespass to land against the lawful owner of the land, the plaintiff must at some stage of the proceedings set up a title derived from the defendant.

*Delaney v. T. P. Smith Ltd.* (1946) 1 K.B. 397. per Tucker, L.J. applied.

The plaintiff was arrested by the defendants for trespass to land. He was charged for such offence and convicted thereof. On appeal however, the conviction was set aside and the charge dismissed.

*Held* that the plaintiff's innocence must be conclusively presumed on the charge on which he was arrested.

*Horniman v. Smith* (1938) A.C. 305, applied,

## SHIWMANGAL v. J. JAIKARAN &amp; SONS LTD.

A private individual cannot in an action for false imprisonment justify the arrest of another on suspicion of having committed an offence unless the offence is a felony and unless he proves that the particular felony in respect of which he arrested such person was in fact committed.

*Walters v. W. H. Smith & Son Ltd.* (1914) 110 Law Times 345, per Isaacs, C.J.

Where in an action for malicious prosecution there was no honest belief in the guilt of the plaintiff based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which would reasonably lead any ordinary prudent and cautious man, placed in the position of the defendant, to the conclusion that the plaintiff was probably guilty of the crime imputed, there is a want of reasonable and probable cause for the prosecution.

*Hicks v. Faulkner* (1878) 8 Q.B.D. 171, per Hawkins, J. and *Horniman v. Smith* (1938) A.C. 305, per Lord Atkin, applied.

In an action of malicious prosecution, malice was inferred where the proceedings were initiated from an indirect and improper motive and not with the mere intention of carrying the law into effect.

CONSOLIDATED ACTIONS by Shiw Mangal, individually and as the administrator of the estate of Ramki, deceased and by Mangroo against J. Jaikaran & Sons Limited for wrongful eviction from rice lands, false imprisonment and malicious prosecution.

A. *J. Parkes*, for the plaintiff Shiw Mangal.

*J. Garter* for the plaintiff Mangroo.

C. *Lloyd Luckhoo*, for the defendants.

*Cur. adv. vult.*

LUCKHOO, C.J. (ACTING).

Alleging that they were wrongfully evicted from certain rice lands at Plantation Sarah, Wakenaam, rented by their deceased mother and on which they had worked, falsely imprisoned for trespassing thereon, and maliciously prosecuted for the offence of wilful trespass, the plaintiffs seek to recover from the defendants the sum of \$1,000:—each for those actionable wrongs in two actions which by consent were consolidated for the purpose of the hearing.

Plantation Sarah is a rice estate of about 250 acres in extent and was owned by the defendants up to the end of December 1943, when it was sold to one M. Y. Bacchus.

From the year 1931, Mr. Joseph Jaikaran was the sole owner thereof until it was transported to the defendants in the year 1941.

It was during their ownership that the matters which gave rise to the above actions occurred.

Ramki the mother of the plaintiffs was a tenant of 41/2 acres of rice lands at Plantation Sarah, and save for three years when her son Shiw Mangal and she shared the tenancy, she remained as such over a period of 10 years prior to her death on the 15th day of May, 1943, and herself cultivated the same except for the last four years of her life.

The plaintiff Shiwmandal has instituted this action in his own right and as the administrator of the Estate of the said Ramki, Letters of administration having been granted to him on the 16th day of August, 1943.

The essence of the plaintiffs' claim is that the tenancy of their mother was from year to year beginning on the 1st day of January and ending on the 31st day of December, that on her death they were entitled, as her heirs to continue the tenancy and to occupy and cultivate the lands as they did for some time past when their mother through indisposition was unable herself to do so.

The defendants on the other hand assert that the tenancy was one extending from May to December, a fixed period, in each year, and came to an end on the 31st day of December, 1942, was never renewed, and that any such renewal was at their option which they were never called upon to exercise.

In the circumstances they contend that both plaintiffs were unlawfully on the lands after having been warned on several occasions not to enter thereon, and that they were justified in the exercise of all the acts attributed to them.

From the nature of the pleas and the evidence led in support thereof, a fasciculus of points has arisen, one novel and *res integra*, another the decision of which rests on authorities which have not yet stood the test of time, and others the principles of which have been well settled but sometimes not easy to apply to a particular set of circumstances.

From the oral and documentary evidence I have come to the conclusion after much examination that the tenancy was for a fixed period in each year, from May to December the period during which the land could be tilled, planted and the big crop reaped, and that the landlords at their discretion which has always been favourably exercised would permit the tenant to reap what is commonly known as the "drop seed" or small crop in the Spring months of the following year.

It has been disclosed by the evidence that this arrangement entirely at the will of the landlords did not make for security of tenure for rice-farmers. In consequence a commission which was appointed by the Governor in 1942 took evidence from several parties including the Secretary of the defendant Company who tendered a specimen copy of the agreement then existing between them and their tenants; the material parts of which read as follows:—

"The 'tenant' agrees to pay to the 'landlords' the sum of..... representing the rent for the said land from the..... This rent is to be payable on or before the 31st day of October, 194.

"The 'tenant' agrees that after he has reaped his padi grown on the lands hereby leased, he will notify the 'landlord' who shall cause the said padi to be conveyed to "their 'the landlords' factory, and the tenant agrees to pay to the landlords four cents for each bag transported."

"The 'tenant' agrees to give to the 'landlords' the first refusal

## SHIWMANGAL v. J. JAIKARAN &amp; SONS LTD.

to purchase at the current market rate the padi grown on the lands hereby leased."

"This agreement shall commence as from the.....and terminate on the 31st day of December, 194 ."

This agreement was an amplification of the terms and conditions contained in a document produced at the hearing.

On the 6th day of May, 1942, the Governor made under the Emergency Powers (Defence) Acts 1939 and 1940, and promulgated in the *Gazette* on the 9th day of May, 1942, Regulations giving certain protection to rice farm tenants in the Islands of Wakenaam and Leguan. These Regulations are known as the Defence (Restriction of Eviction of Rice Farmers) Regulations, 1942, the principal measure being contained in Regulations 4(1) and 5 thereof which read as follows: —

4(1) "Any statutory or common law provision or any provision of any contract or agreement to the contrary notwithstanding, where the tenant is in occupation of any land, part or all of which is used for the cultivation of rice, no notice of termination of tenancy shall be valid or have effect or be enforceable by any Court of Law unless it complies with the provisions of the regulation next following."

5 "All notices of termination of tenancies intended to be served under this regulation shall be in writing and shall have endorsed thereon either the word "approved" followed by the signature of the District Commissioner and the date on which any such in-dorsement is made or the decision of the Governor as hereinafter provided." It is contended on behalf of the defendants that these Regulations do not apply to a tenancy for a fixed period which comes to an end by effluxion of time. It is on that basis having already found that the tenancy of Ramki was for a fixed period. May to December — for which she paid the sum of \$6:— per acre per crop, that I have to consider the applicability of those Regulations.

It is well laid down by authorities extending over a period of a century that where a demise is for a time certain, no notice to quit is necessary at or before the end of the term to put an end to; the tenancy, but the landlord must not do any act to recognise the tenant as continuing to be his tenant.

The question therefore arises, did the defendants by permitting their tenants to reap the Spring crop in the year following do any act in recognition of the continuance of the tenancy which by effluxion of time came to an end?

This is not an easy question to determine and it may hinge upon whether or not there is a cleavage between the exercise of rights as a tenant and a bare licensee.

Where on the expiration of a lease, and in my view it is not confined to leases for a term of years, the lessee is expressly authorised, and in the instant case at the discretion of the defendants, to continue in possession even for the purpose of reaping the Spring or "drop seed" crop, that tenant becomes a tenant at will, and the terms and conditions of the original lease would

apply to the tenancy at will so created, in so far as they are consistent with such tenancy. That that has been recognised by the defendants themselves is reflected in the purchase by them of the padi reaped from the land and credited to the tenant's general account. The account kept by the defendants is in no way characterised by any differentiation in its entries.

It is not denied that the plaintiff Shiw Mangal reaped 16 bags of padi in either March or April 1943 which he sold elsewhere, and his presence on the land was by licence from the defendants.

From 1941 to March or April 1943, both plaintiffs cultivated and occupied the land as agents of their mother during her tenancy with the defendants.

By regulation 3 of the Regulations under discussion "contract" and "agreement" respectively mean *all kinds* of contracts and agreements, whether under seal, in writing, oral or implied, made between a landlord and tenant and relating to the tenancy.

These words in my opinion are comprehensive enough to meet the case set up by the defendants to bring the tenancy of Ramki, despite the fixed period, under the scrutiny of these regulations.

Perhaps it may not be prudent to allow to remain impercipient the definition of tenant in these regulations in the discussion in which I am about to embark.

"Tenant" means the person, not being the landlord, in actual, occupation of any lands and includes licensee and the expression "tenancy" shall be construed accordingly.

This is the first time since these Regulations were published that they have come up for judicial examination and interpretation.

The intention undoubtedly is to provide security of tenure for rice farmers in both those Islands and subsequently they were extended by a later provision to the Essequibo coast.

That intention before it can prevail must be expressed by the language used, and however much the draftsmanship of them may be open to criticism, the Court must endeavour to place a, reasonable interpretation upon them, if the language used admits of such an interpretation.

Mr. Luckhoo for the defendants bases his argument in a gallant attempt to convince me they do not apply by reference to the words "where a tenant is in occupation of any land" and "no notice of termination of tenancy shall be valid or have any effect" prefacing his remarks that before a landlord's common law rights relating to the determination of a tenancy can be abrogated the effective provision should be clear and precise, and that "no notice of termination" cannot possibly refer to an agreement where the term expires by effluxion of time.

Let me examine the contention in the light of the language used in the regulations.

Regulation 3 makes it clear that all kinds of agreement are contemplated, oral or implied relating to the tenancy. A tenancy for a fixed period is not excluded. There is nothing in the regulation which states that the tenancy must be a continuing one

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end not a tenancy for a fixed term. That would mean reading into the regulation "except where the letting is for a fixed term". I do not think any such limitation could be placed on it.

As was said by *Lord Sterndale* M.R. in the case of *Cruise v. Terrell* (1922) 1 K.B. 664 at p. 669 "It is contended that the Act does not apply (referring to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920) in any way to a tenancy for a term certain, and therefore the letting was not within the Act." "I cannot" (continued the Master of the Rolls) "see how it can be said that the sections of the Act which apply to all lettings do not apply to a letting for a term certain. Such a contention is contradicted by expressions which occur in various parts of the Act",

Likewise there are in these regulations expressions which clearly demonstrate that they apply to all kinds of letting. They subject the Common law rights of a landlord in so far as determination of the tenancy is concerned to certain procedure laid down by the Governor. Until the regulations are complied with a *tenant* cannot legally be dispossessed.

Though not expressed the intention of the regulations is to be inevitably inferred that he who is a tenant should, except in pursuance of certain specified mode for terminating the tenancy, *remain* undisturbed.

To accept the contention that it does not include the agreement of tenancy in this case as found by me would be to rule out a large number, if not all, of the cases which the Regulations must have intended to include, and to allow a landlord to give out lands for a fixed period only without being brought within their range would defeat and render nugatory the object and scope of those regulations.

There was never any repudiation by the defendants of the licence given to Ramki or her agents to be in the actual occupation of the lands for the purpose of reaping the Spring crop.

The evidence leaves no room for doubt that, consistently for a number of years prior to and during the ownership of Plantation Sarah by the defendants, Ramki and her sons exercised rights of occupation of the lands, nor was there any intimation given to her by the defendants that they were not going to renew the-tenancy in the month of May, 1943. The non-request by Ramki for the renewal of the lease for another term, in view of the applicability of the Regulations to her tenancy cannot in my opinion deprive her of the right to continue in occupation.

I accordingly hold that Ramki until her death was lawfully in occupation and as such was entitled to the protection which the Regulations afforded her.

But by their own plea in paragraph 3 of the defence in action No. 402 of 1945 (plaintiff Mangroo's suit) the defendants admit that Ramki was a tenant of the lands in 1943, presumably up to the time of her death, on the 15th day of May, 1943.

The important point for determination is the right of the plaintiffs or either of them to occupy the lands, thereafter, without first being armed with a legal authority so to do, their previous

occupation being as agents of their deceased mother, which agency terminated on her death.

The definition of the word "tenant" places in my opinion a limitation to the meaning of the word for purposes of these regulations. It does not make provision to include any person deriving title under the original tenant, nor a transmission of title by death in which case the law dealing with the administration of a deceased person's estate must be resorted to.

Ramki died intestate and it was not until the 16th day of August, 1943, a month after the alleged eviction of the plaintiffs from the lands in question that Letters of Administration were granted to the plaintiff Shiwmandal.

It is on this part of the case, the claims based on the alleged eviction that the plaintiffs must satisfy the Court of their respective cause of action.

The authorities to which I shall hereafter refer bearing on the question whether possession or occupation of the premises is a *sine qua non* to found such a cause of action are not altogether uniform.

In the case of an executor, that he gets his title from the original tenant is clear, and whose tenancy whether long or short *vests fully* and *at once* in his executor from the moment of his death.

There is a manifest distinction, however, between that case and an administrator who derives his title wholly from the Supreme (formerly the Ecclesiastical) Court. He has none until the Letters of Administration are granted, and the property of the deceased vests in him only from the time of the grant.

In the recent case of *Lawrence v. Hartwell* (1946) 62 T.L.R. 491, the defendant who was in occupation of the premises was the step-niece of a tenant with whom she had resided at the premises prior to the latter's death. Subsequent to this event the landlord gave the defendant a notice to quit and thereby brought the contractual tenancy to an end. The premises were, however, within the Rent Restrictions Acts in value and the question was whether the defendant was in a position to claim the protection of the Acts as executrix and sole beneficiary under the will of the former tenant.

The Court of Appeal held that she was, on two grounds. First the interest of the testatrix in the property was vested in the defendant on the death of the testatrix. The defendant became a person deriving title under the original tenant and, therefore, herself became a tenant under the Acts and the whole legal and beneficial interest in the house was in fact vested in her.

It must, however, be noted that under the Acts "tenant" includes any person deriving title under the original tenant.

In coming to this conclusion *Morton L.J.* indicated that, while there was no direct authority on the point, he derived support from certain passages in the judgment of *Scrutton L.J.* in *Skinner v. Geary* (1931) 2 K.B. 546. But that learned Lord Justice in commenting on *Collis v. Flower* (1921) 1 K.B. 408 held "that an executor who had the Common Law tenancy which had been terminated by a notice to quit was not in occupation, and in his

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opinion the original tenant having no right to dispose of the property by will could give (no statutory right to the executor, who did not live in the house, and who therefore could not claim to be its statutory tenant".

*L.J. Morton* said that *Scrutton L.J.*'s observation to the effect that the original tenant had no right to dispose of the property appeared to overlook the fact that at the time of the death of the tenant no notice to quit had been served. The vital point was that *Scrutton L.J.* thought the reason why the executor was not en-titled to protection was *that he was not in occupation* and that if the executor in *Collis v. Flower* had been living in the house he would have been entitled to the protection of the Acts.

In *Lawrence v. Hartwell* the executor was a person deriving title from the original tenant, and was in actual occupation of the premises.

In the Regulations "tenant" has a limited meaning and they only make provision for the mode by which a tenancy could be determined. No statutory tenancy is created, and the right and power of the administrator being derived wholly from the Letters commence from the date of the grant.

Assuming that the plaintiff Shiwmandal was in actual occupation of the lands at the time of the death of his mother which fact I do not however so find for the reasons hereinafter given, such occupation was in my opinion that of a stranger his agency having been determined by the death of his mother and therefore he had no *locus standi* to maintain against the defendant, the owners of the plantation, an action based on eviction from the premises.

Even if the action so founded is sustainable without actual possession, the interest and legal right to possession must be *in praesenti* and not *in futuro*.

The onus is on the plaintiff Shiwmandal as administrator to establish all the elements necessary to support the cause of action. This is in my opinion he has failed to do.

He must show that he had a legal interest in the premises and a right to possession which he could only do by Letters being granted to him.

The mere "apparent possession" of a person in de facto possession gives him all the remedies of a possession as against strangers, but not as against the lawful owner of the land.

To test the matter could the plaintiff have succeeded in an action against the defendants for possession without having the legal interest in him at the time?

The answer is to be found in a passage in the judgment of *Tucker L.J.* in the case of *Delaney v. T. P. Smith Ltd.* (1946) 1 K.B. at p. 397 where he said "It is no doubt true that a plaintiff in an action of trespass to land need only in the first instance allege possession. This is sufficient to support his action against a wrong-doer, but is not sufficient as against the lawful owner, and in an action against the free-holder the plaintiff must at some stage of the pleadings set up a title derived from the

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In the 3rd edition of Bullen and Leake's precedents at p. 417 there appears the statement that "In order to maintain an action for this wrong, the plaintiff must have a present possessory title".

The case of *Mellows v. Low & ors* (1923) 1 K.B. 522 quoted by Mr. Carter can be distinguished from the present one. There the landlord sued for the recovery of the possession of the house which he had let on the ground that on the death of the tenant intestate with no member of her family residing with her in the house, the tenancy lapsed, and that he was entitled to recover possession.

It was held by a Divisional Court consisting of McCardie and Bailhache JJ. that the administratrix was a person who derived: title under the original tenant within s. 12 sub-s. 1 paragraph (f) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. Paragraph (f) is as follows:—"tenant" includes any person from time to time deriving title under the original tenant.

Upon the Letters of Administration being granted the title of the Administrator related back to the date of the death of the tenant, and, *prima facie*, the administrator acquired the continuing interest of the tenant in the absence of any notice to quit. But that case did not decide that, pending the Grant of Letters, the Administrator could successfully bring an action for trespass by eviction against the landlord. He may have some other cause of action. To hold that this case applies would, in my opinion, be straining the construction of the definition of tenant in the Regulations.

In order to deal with the claims for false imprisonment and malicious prosecution, it is necessary to ascertain what are the true facts there being a conflict of testimony as to whether or not the plaintiffs were arrested on the instructions of the defendants' manager who signed the charge sheet in each case.

I have carefully examined all the evidence led on this point and make the following findings.

On the morning of the 16th day of July, 1943, Rahaman, the then manager of Plantation Sarah interviewed Sergt-Major Mentore of Wakenaam Police Station and asked to be given the services of a policeman for the purpose of proceeding on to the plantation to arrest the plaintiffs who were warned on repeated occasions not to go on to the lands, should they or either of them be found there. This request the Sergt-Major did not entertain. He was then advised by the Sergt-Major to proceed by way of summons after he had asked if he could take with him a Rural Constable. He paid he had specific instructions to arrest and charge the plaintiffs with trespass.

On the afternoon of that day Rural Constable Sookraj and he proceeded aback to Plantation Sarah where they found Mangroo and he instructed the constable to arrest Mangroo and take him to the Police Station where a charge for trespass was prepared by the Sergt.-Major and signed by him Rahaman. Mangroo was put on his own bail.

On the following day, 17th July, accompanied by Rural Constable Seenarain, Rahaman again visited the rice lands at Sarah

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where he found the plaintiff Shiwmgal. He instructed the constable to arrest .Shiwmgal for trespassing on those lands and to take him to the police station where he was charged and let out on his own bail.

Thereafter the plaintiffs attended the Magistrate's Court at Wakenaam on the 21st day of July, on the 18th day of August, and on the 12th day of October, 1943, to answer the said charges laid against them for trespassing on lands at Plantation Sarah of which their mother Ramki was a tenant up to the day of her death. They were each convicted and fined. From the orders of conviction the plaintiffs appealed to the Full Court of Appeal and on the 9th day of March, 1945, the said Court allowed both appeals and quashed the convictions.

On the authority of *Horniman v. Smith* (1938) A.C. 305 upon such an event no question any longer would remain as to the plaintiffs' innocence which must be conclusively presumed on the charges on which they were arrested.

That being the case can the defendants successfully justify in law the arrest of the plaintiffs ?

The law has been clearly laid down that a private person cannot in an action for false imprisonment justify the arrest of another on suspicion of having committed a felony unless he proves that the particular felony in respect of which he arrested such person was in fact committed. The plaintiffs' innocence being conclusively presumed negatives the commission of the offence charged against them.

The offence of wilful trespass is not a felony, at most, if at all, it is in the (nature of a misdemeanour for which class of offence a private person can never justify an arrest. So jealous is the law of the liberty of the subject that a private person cannot properly arrest another for an offence which is a misdemeanour without going to a Magistrate and first obtaining a warrant.

In the second edition of Halsbury's Laws of England Vol. 33 page 39, it is said "At common law the power of a private person to arrest is limited to cases where treason or felony has been actually committed or attempted, or where there is immediate danger of treason or felony being committed, or where a breach of the peace has been actually committed or is apprehended".

In *Walters v. W. H. Smith Son Ltd.* (1914) 110 L.T. 345, *Isaacs* C.J. said "It is true that very often there is a duty cast upon a person to put the law in motion in order to bring offenders to justice, and it is no doubt for reasons of public policy that some excuse limited in character, is permissible in an action for damages at civil law for false imprisonment when a private person has wrongly caused the arrest of another. But be it observed that this concession is limited to felonies, and although a misdemeanour may have been committed, which is in truth a more serious crime than some felonies, or may be a more serious crime than some felonies, yet if a person cause a wrongful arrest, however serious the misdemeanour may be, it cannot be made the basis of any legal excuse if the person has been wrongfully arrested".

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From the foregoing it is clear that the defendants cannot possibly justify the arrest of the plaintiffs. Instead of taking proceedings by way of summons or applying for a judicial warrant for arrest they took a risk upon themselves by which they must abide, and if as it has turned out that the plaintiffs have been found to be innocent, and therefore their arrest was wrongful, they cannot plead any lawful excuse for they have not brought themselves within the protection afforded by the proposition of law which I have stated above, and they are therefore liable to the plaintiffs.

To sustain their claims for malicious prosecution there are certain essentials of proof which the plaintiffs have to establish.

Two of them admit of no dispute, the institution of the proceedings at the instance of the defendants, and the termination of them in favour of the plaintiffs.

The want of reasonable and probable cause, malice, and damages have been put in issue.

The plaintiffs rely upon certain proved facts to establish this negative averment of want of reasonable and probable cause. Those facts may be summarised as follows : — For two years prior to the death of their mother, they ploughed and cultivated the lands at Plantation Sarah for her with the knowledge and consent of the defendants, and whilst it is true that at the end of 1941 the tenancy of the plaintiff Shiwmandal in respect of 21/2 acres was not renewed, as both his brother and he were not considered desirable persons to be on the estate for reasons which John Jaikaran mentioned in his evidence and admitted by the plaintiffs, yet they were permitted thereafter to cultivate the lands for their mother and for that purpose were not deemed persons unlawfully on the lands.

At the end of the big crop in 1942, the plaintiffs did not carry in all of the padi reaped but only a small quantity, the greater portion they sold to a rice miller by the name of Ramjohn at a price per bag higher than that paid by the defendants.

The value of the padi delivered to the defendants was insufficient to liquidate the indebtedness of Ramki to them. Sixteen bags of padi reaped from the Spring crop 1943, were also sold elsewhere.

One of the conditions of the tenancy was that all padi reaped should be taken to the defendants' mill

Ramki's tenancy was not renewed because she owed money and had not taken in sufficient padi to the defendants' factory or paid money to discharge her indebtedness. No intimation was given her that the defendants were not going to renew the tenancy, nor were the plaintiffs requested not to go on to the lands. Both plaintiffs after their mother's death mentioned to the defendants' manager Rahaman that they had their labour on the land, and on the 17th day of July Shiwmandal just before he was arrested told Rahaman that whatever his mother died and left belonged to him having previously requested the manager to transfer the tenancy of the lands to him undertaking to pay off the mother's indebtedness to the Estate.

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Rahaman told Shiwmandal he could not do that as the lands were already given to someone.

Prior to this on the 15th June, Rahaman mentioned to Shiwmandal that he understood he was preventing other people from working the rice lands, and if he continued to do so legal proceedings would be taken against him. Again on the 28th June, on the middle walk dam of the Plantation the attention of Shiwmandal was directed to a notice-board warning all trespassers, and that he will be charged if found again on the lands.

It was after these things had happened that on the 16th and 17th days of July 1943, the plaintiffs were arrested, charged and prosecuted.

I have therefore to find from those facts, the plaintiffs having been acquitted of the offence for which they were tried, whether there was or was not a want of reasonable and probable cause for the prosecution, or the circumstances were such as to be inconsistent with the existence of reasonable and probable cause. There must also be proof that the proceedings were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice.

It is sometimes said that, where a man is prosecuted for a criminal offence and is acquitted either by the verdict of a jury or by an appellate court, it is sufficient *prima facie* proof there was an absence of reasonable and probable cause for instituting the prosecution.

This statement is not quite accurate. The effect of an acquittal is that no question any longer remains as to the innocence of the person which must be conclusively presumed.

In dealing with this aspect of a suit for malicious prosecution, *Bowen L.J.* in *Abrath v. North Eastern Railway Co.* (1883) 11 Q.B.D. p. 462, observed "when mere innocence wears that aspect it is because the fact of innocence involves with it other circumstances which show that there was want of reasonable and probable cause. Or if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent there must have been a want of reasonable and proper care. Except in cases of that kind, it never is true that mere innocence is proof of want of reasonable and probable cause. It must be innocence accompanied by *such circumstances* as raise the presumption that there was a want of reasonable and probable cause".

From the *catena*, of proved facts set out above and the circumstances in conjunction therewith I find in the words of *Hawkins J.* in *Hicks v. Faulkner* (1878) 8 Q.B.D. 171 that there was no honest belief in the guilt of the plaintiffs based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which would reasonably lead any ordinary prudent and cautious man placed in the position of the defendants to the conclusion that the plaintiffs were probably guilty of the crime imputed.

## SHIWMANGAL v. J. JAIKARAN &amp; SONS LTD.

The defendants did not act reasonably in pursuing the hasty action they took moreso after Letters of Administration had been granted to the plaintiff Shiwmandal, and if they made a mistake on the character of the crime charged and what must be proved to establish it they took the risk.

In *Horniman v. Smith* (1938) 1 A.E.R. p. 1. (1938) A.C. 305), the topic of reasonable and probable cause was carefully considered by the House of Lords, the leading judgment of which was delivered by Lord Atkin who quoted with approval the definition of *Hawkins J.* in *Hicks v. Faulkner* and applying that was of opinion that the truly relevant evidence consisted of the facts on which the prosecutor did act.

It is upon this finding that the issue has to be decided by me.

The plaintiffs have in my opinion discharged the burden of proof which lay upon them.

On the question of malice which is a necessary appendage of proof Mr. Parkes urged in his address that the real object of the defendants in arresting and prosecuting the plaintiffs was to obtain possession of the lands which the evidence satisfies me they occupied sometime in the month of June when they began to set the seeds for rice plants and thereafter started to plough and plant the lands, and not to punish them for any criminal offence.

Malice may be implied from the want of reasonable and probable cause. The plaintiffs however rely upon additional facts in proof thereof and point to certain evidence which I have already related above which indicate that the proceedings were initiated from an indirect and improper motive to secure the tenancy for one Ramnauth and not with the mere intention of carrying the law into effect.

That argument seems to me reasonable, and I find as a fact that the plaintiffs have established that necessary issue in the case.

The only other question I have to determine is one of the amounts of damages each plaintiff should be awarded on their respective claims for which I have found in their favour.

They have satisfied me that each of them paid the sum of \$50: -for defending himself and in prosecuting his appeal.

Taking into account all the relevant circumstances on which damages in such actions could properly be assessed, and I may here mention that the plaintiffs have become tenants of the same rice lands from the present owners of Plantation Sarah since the beginning of 1944, I award to each an inclusive amount of \$250.00.

They are entitled to the costs of their action which I certify fit for Counsel.

*Judgment for plaintiffs.*

*Solicitors: H. B. Fraser, for plaintiff Shiwmandal;*

*M. A. Charles, for plaintiff Mangroo;*

*V. C. Dias, for defendants.*

## SEERPAUL v. GRACE DENNISON

SEERPAUL,  
Plaintiff,

v.

GRACE DENNISON,  
Defendant.

1946. No. 379.—DEMERARA

Before BOLAND, J. IN CHAMBERS:

1946. SEPTEMBER 5; OCTOBER 1; NOVEMBER 1.

*Practice and procedure—Opposition entered to transport—Action to enforce opposition not filed within prescribed time—Opposition declared by Court to be abandoned—Writ of summons filed for an injunction restraining passing of transport—Application to set aside—Granted—Rules of the Supreme Court (Deeds Registry), 1921, rules 7, 11.*

*Opposition to transport—Action to enforce not filed within prescribed time—Opposition declared by Court to be abandoned—Not lawful to file writ of summons for an injunction restraining the passing of transport—Rules of the Supreme Court (Deeds Registry), 1921, rules 7, 11.*

D. caused the Registrar to advertise in the Gazette of the 29th June, and the 6th and 13th July, 1946, notice of his intention to pass transport of certain land to B. On the 13th July, 1946, S. entered opposition to the passing of the transport, and on the 16th July, 1946, he filed his reasons of opposition. He, however, did not file an action to enforce the opposition within the time limited by Rule 7 of the Rules of the Supreme Court (Deeds Registry), 1921. S. did not in any way advance fraud on the part of D. by way of excuse for his not filing the action within the prescribed time. On the 2nd August, 1946, D. made an *ex parte* application to the Court, under Rule 11 of the Rules of the Supreme Court (Deeds Registry), 1921, for an order that the opposition be declared abandoned, and an order to that effect was made by the Court.

Subsequent to the date of that order, S. filed a writ of summons against D. claiming: (a) specific performance of a contract whereby the defendant agreed to sell to the plaintiff and one K. a certain parcel of land, being the land referred to in the advertisement, (b) a declaration that the aforesaid contract is valid and subsisting and ought to be specifically enforced, (c) damages for breach of the contract, (d) an injunction restraining D. from passing the said transport to B.

The defendant applied to set aside the writ of summons.

*Held* that the plaintiff was, by Rule 7 of the Rules of the Supreme Court (Deeds Registry), 1921, debarred from proceeding further with his proceedings by way of opposition in which an injunction could have been granted at the trial; that an injunction restraining the passing of the transport would not be granted at the trial of the present action; and that the claim for the injunction and all subsequent proceedings thereunder must be set aside.

SUMMONS by the defendant Grace Dennison for an order setting aside the writ of summons filed by the plaintiff Seerpaul. The necessary facts and arguments appear from the judgment.

*H. C. Humphrys, K.C.*, for the applicant (defendant).

*S. L. van B. Stafford, K.C.*, for the respondent (plaintiff).

*Cur. adv. Vult*

## SEERPAUL v. GRACE DENNISON

BOLAND, J: By his Writ in this action which appears to have been originally dated July 1946 but changed to the 12th August 1946, which was the actual date of its filing in the Registry the plaintiff claims —

- (a) Specific performance of a certain contract made on the 24th December, 1945, between the defendant of the one part and the plaintiff and one Kolladai of the other part whereby the defendant agreed to sell and, the plaintiff and Kolladai agreed to buy a certain parcel of land in the Island of Leguan, Essequibo;
- (b) Alternatively a declaration that the aforesaid contract is valid and subsisting and ought to be specifically enforced;
- (c) An injunction restraining the defendant from passing a certain conveyance by way of transport advertised in the Official Gazette of the 29th June and the 6th and 13th July, 1946, between the defendant and one Biram;
- (d) Costs.

In view of the submissions made by Counsel for the defence at the hearing of this summons which is an application by the defendant to set aside the claim for the injunction and all subsequent proceedings thereunder, it is of special importance to note that originally the writ appears to have been drafted with the date therein given "—July 1946". It is significant also that on the endorsement of the writ immediately under the signature 'R. G. Sharples' Solicitor for Plaintiff there is the date 16th July 1946 (which remains uncorrected), which would seem to indicate the date at which the Solicitor for plaintiff settled and signed same. Moreover the signed authority of the plaintiff to his solicitor authorising him to act for him in the suit is, it may be observed, also dated the 16th July 1946.

During the course of the hearing of the summons defendant's counsel obtained leave to amend the summons so as to include in the application that the claim for specific performance and the declaration relating to the same be also set aside, whilst the plaintiff was given permission to amend the endorsement of the writ by the addition of a clause C1 with a claim for damages for breach of the said contract of the 24th December alleged to be in writing and signed by the parties thereto.

The transport referred to as advertised in the *Official Gazette* the passing of which the plaintiff claims to restrain by injunction is admitted to be a contemplated transport which had been the subject of Opposition Proceedings instituted by the plaintiff in the Deeds Registry under Rules of the Supreme Court (Deeds Registry) 1921 applicable to such matters wherein the plaintiff by due Notice of Opposition filed and served on 13th July 1946 had given notification of his intention to oppose the said transport relating to the said land as advertised in the *Official Gazette* on the said dates abovementioned. In compliance with the provisions of the said Rules of Court the plaintiff duly filed within the prescribed time, namely on the 16th July 1946, Reasons for his said Notice of Opposition, and the Registrar thereupon certified that the opposition was perfected. The substance of the Reasons advanced for the opposition was that the defendant had already contracted to sell to the plaintiff and Kolladai and that there had been part performance by payment of part of the purchase price

## SEERPAUL v. GRACE DENNISON

and entry into possession so that it was not competent for the defendant to pass transport to any other person than to plaintiff and Kooladai.

By Rule 7, the plaintiff, if he desired to proceed with his opposition, was under obligation to bring what is called an opposition action within 10 days from the Registrar's certificate, in which action, in addition to claiming an order that his opposition be declared to be good and well founded plaintiff could ask for any other relief to which he would be entitled arising from the alleged breach of the contract for the sale of the land to him and Kolladai.

The plaintiff failing to bring his opposition action within the time prescribed by Rule 7, the defendant on the 2nd August applied ex parte to the Court for an order under Rule 11, that the opposition be declared void and abandoned, and this order the Court accordingly made.

It was after the Court had made this order declaring that plaintiff's opposition was abandoned, that the plaintiff on the 12th August filed the writ in this action, obtaining on the same date on his ex parte application, which was supported by his affidavit alleging the same facts which he had set out as Reasons for his opposition, an interim order by way of an injunction restraining the defendant, his servants and each and every one of them from proceeding with the conveyance by way of transport advertised in the *Official Gazette* of the 29th June and the 6th and 13th July 1946 between the defendant and one Biram.

It would seem therefore that the declaration by the Court of the abandonment of the opposition notwithstanding, plaintiff has contrived successfully to stay the passing of the transport to Biram, and is seeking in these Proceedings to get a further stay of the passing of the transport till the determination of this Action which as stated he filed subsequent to the Court's order declaring the abandonment of opposition.

In the meantime the defendant has taken out this Summons to set aside the claim for the injunction and all subsequent proceedings relating thereto on the ground (a) that the *cause of action* to restrain the passing of the transport has become non-existent by plaintiff's failure to bring an action to enforce the opposition within the time limited by Rule 7 and (b) that the declaration by the Court that the said opposition was abandoned estops the plaintiff from bringing an action for an injunction based on the same grounds as declared in his Reasons for opposition.

The hearing of the plaintiff's summons for the interlocutory injunction has, by consent, been adjourned pending the determination of this application by defendant to set aside the claim for the injunction and specific performance.

In support of his application to set aside Counsel for defendant has cited two decisions of this Court namely — *Wills v. Eleazer* (1941) L.R. B.G. 56 and *Sooklall v. Gourisankar and Lachu* (1942) L.R. BG.

In the former case the defendant Eleazer, a Solicitor, was sued by the plaintiff therein for negligence. In January 1936, he had, acting as the plaintiff's solicitor, entered opposition to transport on behalf of the plaintiff and thereafter, within the prescribed

time, instituted an action to enforce the opposition, but his neglect to proceed with this action caused it to be deemed abandoned and incapable of being revived. A certificate to this effect was issued in pursuance of Order 32 Rule 5, after the lapse of more than one year since the last step in the proceedings. In June 1937, subsequent to this order of abandonment, the solicitor filed a writ in a new Proceeding seeking to obtain *inter alia* the same remedies as those raised in the abandoned opposition action, which the Court had declared to be incapable of revival. In due course the matter came on for trial but the learned trial judge had no hesitation in deciding that the paragraphs in the Statement of Claim raising the same issues as in the abandoned opposition action should be deleted, and he ultimately dismissed the suit with the result that the plaintiff was mulcted in costs. In giving judgment for negligence against the Solicitor, Camacho C.J. observes at page 17 of the report "The writ in the 1937 "action was issued on the 4th June 1937 more than a year after the time "allowed by Rule 7. The rule is mandatory and must be rendered "effective, otherwise after opposition entered, an opponent will be free to "hold up the passing of transport indefinitely by a mere threat of litigation. "In my view if the claim is not brought within the prescribed time the right "to bring the action on the stated grounds of opposition is extinguished — "that is to say, the cause of action founded on the notice of opposition "disappears and he added later in the judgment The effect of the certificate "under Order 32 Rule 5 was to determine for the time being the right to "enforce the cause of action based on the notice of opposition, whether it "did or did not altogether destroy it; and Rule 7 of the 1921 Rules finally "extinguished the right. I therefore hold that it was not competent for the "defendant to institute the 1937 suit or to allege in that suit the same cause "of action on grounds of opposition he had set forth in the earlier suit, and "in doing so he was negligent".

In the latter case *Sooklall v. Gaurisankar* and *Lachu Luckhoo J.* whilst agreeing with the decision in *Eleazer v. Wills*, nevertheless held that when proceedings by way of opposition to transport are abandoned the opponent is not debarred from seeking to restrain the passing of another transport of the same land by the same proponent even to the same intending purchaser on his withdrawal from completing the passing of the advertised transport. Luckhoo J. distinguishes the latter case from *Eleazer v. Wills* where the subsequent action instituted beyond the time allowed by Rule 7 was founded on the same grounds and against the specified transport as advertised.

"A *right of action*" says Luckhoo J. in his judgment "should be distinguished from a "*cause of action*". Whilst a cause of action may be extinguished under certain circumstances yet the right of a person to claim might still remain, and the learned judge was at pains to explain that it was the *cause of action* for an injunction on the same grounds, not the *right of action* which Camacho C.J. had declared to be extinguished.

With every respect it seems to me that it is somewhat confusing to use either the term cause of action or right of action in this connection. Obviously what Camacho C. J. intended to

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convey by his remarks was that the *right to the remedy* of an injunction against the passing of the said transport for the same reasons given in the opposition proceedings had been lost or extinguished by the lapse of the time prescribed by Rule 7. He certainly could never have intended his words to be a declaration against for instance the validity of an action for a liquidated debt because the plaintiff prior thereto had abandoned an attempt in opposition proceedings to oppose the passing of a transport by his debtor.

These two decisions were put forward by counsel for the defence in support of his submission that whilst the plaintiff's right of action against the defendant for an alleged breach of contract for the sale of the lands was not extinguished by the abandonment of the opposition Proceedings, he was thereafter forever debarred from claiming the remedy of an injunction to restrain the passing of the same advertised transport specified in the Opposition Proceedings on the same grounds advanced therein. Counsel for the defendant-applicant has pointed out that the Writ filed in this action is identically that which the plaintiff-respondent intended to file to enforce his opposition, and that this was so, he contended, is borne out by the date 16th July 1946 on the endorsement which appears to be the date at which the writ was originally drafted for filing. In an affidavit by the plaintiff's solicitor Mr. R. G. Sharples filed after the first hearing of this Summons, the admission is made that a Writ to enforce the opposition was prepared for filing on the 16th July but through inadvertence was not then filed. It seems clear that subsequently discovering that this writ would be out of time under Rule 7 and that the Order of abandonment had already been made by the Court, the plaintiff's solicitor used this same document, intended for the writ in the Opposition Proceedings and containing the same endorsement with the same allegations, and filed it as the writ in these new Proceedings in an effort thereby to circumvent the Court's declaration of abandonment.

The submissions of Counsel for the Plaintiff-Respondent, as I understood them may be summarised as follows —

1. In this Colony there are two independent rights available to a person who desires to oppose a transport
  - (a) The summary proceedings under the Rules of Supreme(Deeds Registry) 1921, which gives him the right to oppose on grounds more extensive than he would get in an action claiming an injunction against the intended transport
  - (b) An action claiming an injunction against any transport including the advertised transport.
2. Either of these two rights may be enforced at his option and it is always open to a plaintiff to discontinue a proceeding before trial and judgment and, subject perhaps to the payment of costs, to institute fresh proceedings for the same right of action provided that right of action is not extinguished by some Statute of Limitation, and no defence of estoppel can be successfully raised against such a plaintiff.
3. Rule 7 limits the time for the bringing of the action to

enforce the opposition which action is imperatively directed to be brought by the Rules of Court (Deeds Registry) 1921, if it is intended to pursue the opposition; but Rule 7 does not control proceedings by writ *de hors* the opposition proceedings.

4. In *Wills v. Eleazer* the second writ was held to be in pursuance of opposition proceedings and accordingly the claim for the injunction therein was declared barred and extinguished as being out of time under Rule 7. The remarks of Camacho, C.J., if intended to apply to all proceedings for an injunction against the passing of the transport as advertised were mere *obiter dicta* and not an authority.

5. That as the defendant applicant does not seek to set aside the whole of the Writ, the question whether the remedy of specific performance and/or the injunction is or is not available to the plaintiff-respondent because of estoppel or otherwise should be left to the trial judge to determine.

As to (1), it is true that the proceeding by way of opposition under the Rules of Court (Deeds Registry) 1921 furnishes a remedy at law distinct from the remedy of an injunction which as an equitable remedy is granted or withheld in accordance with well-recognised principles of equity. Its origin may be traced to the provisions of the old Roman Dutch Law. and no doubt, as Mr. Stafford stated in his argument, its original purpose may not have been identical with that which led to the creation and development of the remedy by way of injunction. But a decision in the opponent's favour in the action which in compliance with those Rules he brings to enforce his opposition has the same effect as an injunction to restrain the passing of the particular transport advertised, for although the order may not take the form of an injunction, the Court's declaration that the opposition is just, legal and well-founded is for all practical purposes an injunction as the Registrar has no power thereafter to register such transport.

As to submissions 2, 3 and 4 it is conceded that the mere striking out of a proceeding does not preclude the institution of fresh proceedings for the same relief, if not barred by the Statute of Limitations and I may add that I incline to the view that this Court can never be entirely shut out from the exercise of its jurisdiction to grant an injunction in a proper case merely because of a certificate issued or an order made in Opposition Proceedings unless such order was one made in the action to enforce the opposition upon which a plea of *res judicata* can successfully be based. The order made on the 2nd August declaring the opposition abandoned is certainly not such an order.

But when the Court is invoked to issue an injunction, which is a discretionary remedy, it must be satisfied that the plaintiff; comes within the class of those in whose favour this remedy ought in equity to be granted. Prima facie, because damages are seldom in such cases an adequate remedy, equity grants to a plaintiff not only specific performance of the contract, but also an injunction to restrain a vendor from selling land which he contracted in writing to sell to the plaintiff, and also when there is even no written contract where there was some payment or some other

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part performance of the contract. But as the well known maxim puts it, equity follows the law, and accordingly it is a rule of equity not to accord its remedies when a Statute of Limitation would debar a suitor from bringing an action at law unless there is some fraud on the part of the defendant causing the lapse of time beyond the period prescribed by the Statute of Limitation, or where there is such a fiduciary relationship between the plaintiff and defendant from which it will be presumed that plaintiff acted to his prejudice by the undue influence of the defendant. Equity acts in analogy to the Statute of Limitations except in cases of gross fraud or constructive fraud such as mentioned above: "When the remedy is "correspondent to the remedy at law, and the latter is subject to a limit in "point of time by the Statute of Limitations, a court of equity acts by "analogy to the Statute, and imposes on the remedy it affords the same limitation" *Knox v. Gye* 1872 L.R. H.L. 656 per Lord Westbury at p. 674. Now the remedy under the rules to prohibit the passing of an advertised transport by opposition Proceedings under Rules of Supreme Court (Deeds Registry) 1921 is a remedy at law since those Rules are made under powers given by the Supreme Court of Judicature Ordinance and as such have the force of a statute. The limit of time fixed by Rule 7 regarding the bringing of an action to enforce the opposition is therefore a limitation imposed by Statute which is in this sense a provision of a Statute of Limitation as regards the bringing of such actions. Equity will by analogy to such a statutory provision refuse to accord to a suitor such a remedy that is barred to him by the Statute because of lapse of time, unless, as I have stated, he can show that he has been the victim of such fraud that has caused him to be out of time.

In the affidavit filed by the solicitor for the plaintiff after the first hearing of the summons on an adjournment which was granted to the plaintiff so that he might on my suggestion put forward any special grounds for invoking the Court's jurisdiction after the order of abandonment of his opposition proceedings, the only facts alleged are that through inadvertence the writ to enforce the opposition was not filed in time. Mere inadvertence on the part of a plaintiff or his solicitor is not sufficient to cause the Court to refuse to act by analogy to a Statute of Limitation. Moreover as a general rule the Court will not give the equitable remedy of an injunction after a suitor had elected to get that same remedy by a proceeding sanctioned by a Statute, and then either abandons it or by neglect or inadvertence fails to pursue it. In this case, the plaintiff will not suffer any undue hardship by the Court's refusal to entertain his claim for injunction since as his contract is alleged to be in writing there is still available to him his claim for damages for the alleged breach of contract by the amendment of the writ applied for and granted.

I should like to make it clear that I base my decision against the plaintiff's claim for the injunction not because either his *cause of action* or *right of action* was lost as stated in the decisions of *Wills v. Eleazer* and *Sooklall v. Gaurisankar* and *Lachu* nor because of any estoppel by reason of the Court's declaration of

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the abandonment of the opposition but because this Court, invoked to exercise its equitable jurisdiction of granting an injunction would act, by analogy to the limitation imposed by Statute and refuse to assist the plaintiff who had found himself, through lapse of the prescribed period, debarred from proceeding with what was in essence an injunction in opposition proceedings which he had already elected to pursue, and because he is unable to advance fraud on the part of the defendant by way of excuse for the passing of the time.

As regards submission (5) it is well established that on an application to set aside a claim endorsed on a writ, if it is manifest that the plaintiff could never succeed at the trial in establishing his right to the remedy claimed, that claim would be summarily struck out and the defendant saved the anxiety of having further to meet that claim. I am satisfied that the plaintiff would never at the trial get the injunction claimed and a refusal to make the order setting it aside and the granting to the plaintiff of the interlocutory injunction would hold up the transport to Biram for a long period; and this would work a considerable hardship on the defendant. It is exactly this mischief that Camacho, C.J., feared would result when he said in his judgment in *Wills v. Eleazer* "The rule is mandatory (that is Rule 7) and must be rendered effective, otherwise after opposition entered an opponent will be free to hold up the passing of transport indefinitely by a mere threat of litigation".

So far as the claim for specific performance and the ancillary alternative declaration is concerned, I was at first inclined to strike out these claims as well, because the Court would be stultifying itself to make an order for specific performance which if the transport to Biram is duly passed, it could never enforce. But on further consideration, I have conceived the possibility of the transport to Biram being abandoned before the trial of these proceedings; in which event the plaintiff might wish to advance his claim against the defendant for specific performance. That remedy for specific performance for which the plaintiff makes claim by his amendment can well be left to the trial judge who will then know if the circumstances are such as would allow the Court to make the order for specific performance or the declaration asked for.

For the reasons given above I make the order setting aside the claim for the injunction and all subsequent proceedings thereunder. There will be costs for defendant. I certify fit for counsel.

*Application granted.*

Solicitors: *H. C. B. Humphrys*, for applicant (defendant);  
*R. G. Sharples*, for respondent (plaintiff).

## LUCIE CHATTERTON v. AGNES ROBERTS &amp; ORS.

LUCIE CHATTERTON,  
Plaintiffv.  
AGNES ROBERTS, ALICE JOHNSON, MARGARET L. I. RODWAY,  
and HUBERT E. RODWAY

Defendants.

1946. No. 439.—DEMERARA.

Before JACKSON, J. (Acting) IN CHAMBERS.

1946. OCTOBER 21, NOVEMBER 18.

*Will—Construction—"Surviving children"—To be ascertained—As at period when division among them is required to be made.**Will—Bequest to wife—Husband witness to will—Bequest void—Wills Ordinance, cap. 148, S. 7.*

J. R. made a will as follows: "Everything that I may possess at the time of my death, after paying my liabilities, I desire to remain undivided in the hands of my wife Keturah Johanna Rodway and my daughters Lucie Rodway to be administered by them for the benefit of the unmarried children but mainly to keep a home for my wife for the remainder of her life. So long as she lives I desire that the real property may not be divided or alienated. The above-named Keturah Johanna Rodway and Lucie Rodway are authorised to administer this will and to do their best to prevent loss or deterioration of the properties." Immediately after, he added the following codicil: "After the death of my wife, and if my daughter Lucie should be married any remaining property must be sold and equally divided among my surviving children."

J. R. died on the 19th November, 1926. The daughter Lucie was then unmarried. The widow of J. R. died on the 8th August, 1946: at that time Lucie was a married woman. Two children died after their father's death, but before the death of their mother: one of the children left a widow and issue him surviving.

The husband of Alice, one of the children of J. R., was one of the witnesses to the will and codicil. She was alive at the time of the death of the widow of J. R.

*Held* (1) that as the daughter Lucie was a married woman prior to the death of her mother, the estate of J. R. was distributable at the time of the death of the widow of J. R.;

(2) that the estate was distributable among those children who were alive when the estate fell to be distributed, that is to say, at the death of the widow;

*Cripps v. Wolcott* (1819) 4 Mad. 14, *Re Gregson's Estate* (1864) 2 De G, J. & S. 423, and *Poultney v. Poultney* (1912) 2 Ch. 545, applied.

(3) that, as Alice's husband was a witness to the will and codicil, the gift to her was void by reason of section 7 of the Wills Ordinance, Chapter 148.

ORIGINATING SUMMONS by Lucie Chatterton (born Rodway), in her capacity as the surviving executrix of James Rodway deceased, for the determination of certain points which arose in connection with the distribution of the estate of the said deceased.

*S. L. van B. Stafford*, K.C., for the plaintiff.

The defendants appeared in person.

*Cur. adv. vult.*

## LUCIE CHATTERTON v. AGNES ROBERTS &amp; ORS.

JACKSON, J. (Acting): The applicant Lucie Chatterton seeks by way of originating summons the true construction to be placed on certain terms of the will and codicil of James Rodway, her father, who died on the 19th November, 1926. The will and the codicil bear the date 16th March, 1924 and probate of the will with the codicil was granted by the Court on the 10th January, 1927 to the widow Keturah Johanna Rodway and the applicant, executrices named therein. The applicant was then unmarried; her mother, the other executrix died on the 8th day of August, 1946; the applicant was at this date already married.

The will and codicil are both short and I set them out for convenience:—

“The Last Will of James Rodway of Georgetown, British Guiana. March  
“16th 1924.

“Everything that I may possess at the time of my death, after paying any  
“liabilities, I desire to remain undivided in the hands of my wife Keturah  
“Johanna Rodway and my daughter Lucie Rodway to be administered by  
“them for the benefit of the unmarried children but mainly to keep a home  
“for my wife for the remainder of her life. So long as she lives I desire that  
“the real property may not be divided or alienated.

“The abovenamed Keturah Johanna Rodway and Lucie Rodway are  
authorised to administer this will and to do their best to prevent loss or  
deterioration of the properties.’

“Signed in the presence of the following witnesses. March 16th. 1924.”

“J. Rodway,  
“16.3.24.”

"Witnesses

"Chas. O'Donnell

"E. F. Johnson

"16.3.24."

"March 16th 1924".

“Codicil. After the death of my wife, and if my daughter Lucie should be  
“married any remaining property must be sold and equally divided among  
“my surviving children.”

"J. Rodway,  
"16.3.24."

"Witnesses

"Chas. O'Donnell

"E. F. Johnson

"16.3.24."

The testator had eleven children; they are named and described in the affidavit of the applicant as follows: —

(1) Alice now the widow of Edward Field Johnson. Edward Field Johnson was a witness to my father's will and codicil.

(2) Agnes now the widow of Percival Roberts.

(3) Albert, who died after his father and before his mother, leaving a widow Margaret Louise Isabel Rodway and children.

(4) Ethel, the wife of Arthur Millard, and who resides in England.

(5) Lorna, who is unmarried and is living in England.

Alfred, who left the colony many years ago and has not returned and of whom nothing has been heard for about 40 years and whose whereabouts are not known.

## LUCIE CHATTERTON v. AGNES ROBERTS &amp; ORS.

- (7) Myself, Lucie, the wife of Edward Dunstan Chatterton.
- (8) Francis Joseph, who is married and in England.
- (9) Hubert Ernest.
- (10) Hilda, who was the wife of John Henry Peach. Hilda died after her father, and before the death of her mother.
- (11) Vanda, who was unmarried and childless and who predeceased her father the deceased.

By an order of the Court bearing date 3rd April, 1942 the immovable property was sold and the proceeds belonging to the estate were deposited in the Royal Bank of Canada and now aggregate \$4,238.96; this sum represents the only asset of the estate.

The questions submitted for determination are as follows: —

- (a) As to whether Alice Johnson the widow of E. F. Johnson who was one of the witnesses to the said Will and codicil of the said James Rodway, on an intelligible and a true interpretation of the said Will and codicil is precluded by Chapter 148, section 7 from any interest in the estate of the said James Rodway and whether such interest is null and void.
- (b) As to what the said, James Rodway meant when in his codicil he stated "After the death of my wife and if my daughter Lucie should be married any remaining property must be sold and equally divided among my surviving children." Whether he meant the children surviving him or those surviving his wife.
- (c) That four of the children namely, Ethel, Lorna, Alfred, and Francis Joseph and a son-in-law John Henry Peach, the husband of Hilda Peach, deceased, a daughter of the said James Rodway having been out of the colony for a very long time, any interest they may have in the Estate of the said James Rodway be paid over by the executrix to them so soon as their respective whereabouts are known.

Section 7 of the Wills Ordinance Chapter 148 is as follows: "If anyone attests the execution of a will to whom, or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any property (other than and except charges and directions for the payment of any debt or debts) is thereby given or made that devise, or legacy, interest, gift or appointment, shall so far only as concerns the person attesting the execution of that will, or the wife or husband of that person, or anyone claiming under that person, or wife or husband, be null and void, but the execution of the will shall not be affected thereby."

The language of this section is clear and leaves no room for argument; there can be no doubt that the gift to Alice the wife of E. F. Johnson as one of the children of the testator is void. Had the marriage been subsequent to the attestation of the will the position would have been different.

The second question is in effect an inquiry as to what time surviving children may be reckoned, at the making of the will, at the death of the testator, or at the death of the life tenant? As a will cannot have effect until after the testator dies, it cannot refer to children living at the making` except there are words

which make it manifest that those living at that time or that their issue should take; in this case there is no such limitation. It has been suggested that "among my surviving children" may mean the children which survived the testator at his death; this aspect is important as there were two children Albert and Hilda who survived the testator but were outlived by their mother the life tenant; Albert has left a widow Louise Isabel Rodway and Hilda, a widower John Henry Peach. It is conceded that the testator by his codicil intended that the property should remain undivided until two conditions were fulfilled, the death of his wife and the marriage of his daughter, the applicant, Lucie Chatterton; there-after the property was to be divided "among my surviving children;" surely the testator was then providing for children who would be alive at the time of the fulfilment of the two conditions; he wished to make it reasonably certain that his widow, and his unmarried daughter who would have neither father nor husband would be provided for, and that when the necessity to look after them should have ceased to exist the corpus should be divided among those children who were then alive. This question of survivorship is not devoid of authority it had engaged the attention of judges for over a hundred years, and although it was acknowledged difficult to reconcile every case on the subject Vice Chancellor, Sir John Leach, in the case of *Cripps v. Wolcott and others* (1819) 4 Mad. at p 14 states the rule in the following words:

"I consider it to be now settled that if a legacy be given to two or more, equally to be divided between them, or to the survivors. or survivors of them, and there be no special intent to be found in the will, that the survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period is the death of the testator, and the survivors at his death will take the whole legacy; but if a previous life estate be given then the period of division is the death of the tenant for life and the survivors at his death shall take the whole legacy."

In re Gregson's estate (1864) 2 D.J. & S. 428 it was held that the rule laid down in *Cripps v. Wolcott* applied to both real and) personal estate. In *Poultney v. Poultney* (1912) 2 Ch.D at p. 545 Farwell L.J says "The rule in *Cripps v. Wolcott* is too well settled to be whittled away now." It follows therefore that in the matter under review there being no special intent either in the will or the codicil the period of division must accordingly be referred to the death of the widow, the life tenant, Lucie Chatterton having been previously married, and that the class to take the beneficial interest would be the children then surviving, if not debarred by statute. Although it may be unfortunate for some, the conclusion that Albert and Hilda and anyone claiming through them cannot take is inescapable so also is the fact that the statute prevents Alice the widow of E. F. Johnson from having any beneficial interest.

As respects the last question it remains only for me to say the executrix is responsible for the distribution of the assets; she may, if she is prevented from closing the estate because of lack of sufficient information of the whereabouts of the absent beneficiaries, deposit the shares of such beneficiaries with the proper authority and proceed with the winding up of the estate.

## LUCIE CHATTERTON v. AGNES ROBERTS &amp; ORS.

On application I fix the costs of and incidental to this application in the sum of \$240: such sum to be paid out of the estate.

*Directions given.*

Solicitor for applicant: *E. A. W. Sampson*

SARAH GARNETT Appellant (Defendant)

v.

WALTER GORDON, P.C. No. 4133, Respondent (Complainant).

[1946. No. 260.—DEMERARA]

Before LUCKHOO, C.J. (Acting) and JACKSON, J. (Acting):

1946. November 29; December 6.

*Criminal law and procedure—Larceny—Animus furandi—How constituted. Appeal—Conviction—Amendment of—Summary Jurisdiction (Offences) Ordinance, cap. 13, section 86 (a).*

Where a woman took a fowl against the will of the owner and without any claim of right, and carried it away with the intention permanently to deprive the owner of possession, she is guilty of larceny of the fowl, and it is immaterial that the taking be not *lucri causa*, or that the reason for the removal of the fowl was to prevent its discovery or to shield her son from a charge for cruelty to the fowl.

*R. v. Jones* (1846), 1 Den. C. C. 188. *R. v. Privett* (1846), 1 Den. C. C. 193, and *R. v. A.B.* (1941) 1 K. B. 454; 461, applied.

The appellant was convicted of larceny of a fowl.

The appellant's son took a stick and struck the fowl of B. which was then in front of his kitchen door causing it to bleed through the mouth. B. went to take possession of the fowl, but the appellant did so before B. could reach it and she went with it into her son's kitchen. B. then informed the appellant that the fowl was hers, but the appellant made no answer. After the lapse of 5 minutes the appellant came out of the kitchen with the fowl in her hand and hid it between some bushes on the land of another person. Later, it was there found dead, and a pig was eating the remains of the carcass of the fowl.

It was urged on behalf of the appellant that there was no *animus furandi* inasmuch as the openness of the appellant's act and her apparent desire to shield her son from the consequences of his act of cruelty by the non-production of the fowl negated *mens rea*.

*Held* that the appellant was properly convicted of larceny of the fowl.

By section 86 (a) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, every person who steals any bird, beast or other animal (not being an animal mentioned in Title 7) which is either the subject of larceny at common law or is ordinarily kept in a state of confinement for the purpose of observation show or amusement or for any domestic purpose, is guilty of a summary conviction offence.

The appellant was charged under section 86 (a) with the larceny of a fowl, such fowl being kept in a state of confinement for domestic purpose, and was convicted. The defence, which the Magistrate did not believe, was a total denial of the story for the prosecution.

It was urged on behalf of the appellant that the fowl was already dead when the appellant took possession of it

## SARAH GARNETT, v. WALTER GORDON

Held (1) that even if that was established by the evidence, an offence under section 86 (a) would still have been maintainable for in that case the stealing of the carcase would have amounted to larceny at common law which is one of the ways in which an offence under section 86 (a) could be committed;

(2) that the conviction could be amended accordingly, as the appellant would not, by reason of her defence, have been prejudiced by such amendment.

APPEAL by Sarah Garnett from a decision of the Magistrate of the East Demerara Judicial District convicting her of the larceny of a brown fowl valued at 72 cents the property of May Blenman such fowl being kept in a state of confinement for domestic purposes, contrary to section 86 (a) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13. The facts and arguments sufficiently appear from the judgment.

*S. I. Cyrus*, for the appellant.

*E. M. Duke*, Solicitor-General, for the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by LUCKHOO, C.J. (Acting), as follows: —

Mr. Cyrus for the appellant has questioned the decision of the learned Magistrate on two grounds, the first of which involves a consideration of the elements of proof necessary to sustain the offence of larceny, and the other that no person ought to be convicted of an alternative offence contained in a section under which the charge was laid unless particulars of that offence were brought home to such person and that he had an opportunity of meeting that charge in which case he submitted the conviction could not be amended to meet the charge so proved.

The appellant was charged under the provisions of section 86(a) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, with the larceny of a brown fowl valued at 72 cents, the property of one May Blenman, such fowl being kept in a state of confinement for domestic purpose. That section also provides for a charge being laid against any person who steals any bird which could be the subject of larceny at common law.

The learned Magistrate found as a fact that the fowl was killed by Tommy Garnett, son of the appellant; he also found that the appellant picked up the fowl, and after she had made some attempt to hide it she threw it away when she apprehended that Blenman, the owner, had decided to report to the Police the cruelty which her son had perpetrated.

The evidence of Blenman, which the learned magistrate accepted, was to the effect that Tommy Garnett took a stick and struck the fowl which was then in front of his kitchen door causing it to bleed through the mouth. She went to take possession of the fowl when the appellant did so before she could reach it and went with it into her (the appellant's) son's kitchen. She then informed the appellant, who made no answer, that the fowl was hers. After the lapse of five minutes the appellant came out of the kitchen with the fowl in her hand and hid it between some bushes on another person's land, where later, on the information

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of one Ramsammy, P.C. Gordon searched a spot and there discovered a pig eating the remains of the carcass of the fowl.

It has been urged that in the circumstances there was no animus furandi inasmuch as the openness of the appellant's act and her apparent desire to shield her son from the consequences of his act of cruelty by the non-production of the fowl negated *mens rea*.

The appellant and her son, however, denied in their evidence before the magistrate all knowledge of the occurrence and their presence at the scene, the son even repudiating the statement he made to P.C. Gordon which would have lent colour to a defence not raised that the appellant acted foolishly and not criminally when she disposed of the fowl as above mentioned.

We are of opinion that we cannot at this stage compose in appellant's favour a defence which the learned magistrate sitting as a jury would have had to consider, so that the case is left for this Court to decide the two issues raised by Mr. Cyrus on the evidence of the owner of the fowl and those witnesses who saw the removal and disposal of the same.

If a person takes the goods of another knowingly against the will of the owner and without a colour of title or of authority, with intent to deprive the owner of his property therein, the object being to apply the thing stolen in a way inconsistent with the rights of the owner, that would amount to larceny, and it makes no difference that the taking be not *lucri causa*.

This statement of the law is fortified by two judgments delivered by a bench of Judges exactly a hundred years ago in the cases of *The Queen against Elizabeth Jones* and *The Queen against William Privett and another* (1846) 1 Den. C.C. pages 188 and 193 which have been followed ever since.

Among the reasons the appellant had for removing the fowl might have been the intention to prevent its discovery or to shield her son from the wrong he did, nevertheless she took it against the will of the owner without any claim of right, carried it away with the intention permanently to deprive the owner of possession. In those circumstances it would be larceny. As was said by the Court of Criminal Appeal in the case of *Rex v. A.B.* (1941) 1 K.B. 454 at p. 461. "The next point which is taken by the appellant is that he was not guilty of larceny in law. The argument upon that point was that inasmuch as the document which he was found guilty of stealing was a copy of another document, and that the copy would in the ordinary course have been discarded, and was taken by him after it was discarded, he could not be found guilty of stealing it. The definition in s.1 of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), which the learned judge read to the jury, makes it quite plain that the jury were within their rights in coming to the conclusion on the facts of this case, that the appellant had committed the offence of stealing this document. He took it with the intention, as he says, perhaps of destroying it, perhaps of keeping it. There is no doubt that he took it and retained it with the intention of depriving the owner of the document of its possession and, in those circumstances, the direction to the jury being perfectly accurate, the point that he was not guilty of larceny in law cannot be sustained."

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We are of opinion that the Magistrate had ample material before him for coming to the conclusion that larceny had been committed and we are not convinced that he was wrong.

We agree with Mr. Cyrus, and the Solicitor-General does not dispute the fact, that section 86 (a) provides for different things which could be the subject matter of the offence therein specified; but even if it could be successfully urged from the evidence that The fowl was already dead when the appellant took possession of it, an offence under the section would still have been maintainable for in that case the stealing of the carcass would have amounted to larceny at common law which is one of the ways in which an offence under section 86 (a) could be committed and the conviction could be amended accordingly. The appellant could not have been prejudiced whether the fowl was alive or dead as the defence, which the learned magistrate did not believe, was a total denial of the story of the prosecution.

The appeal is therefore dismissed with costs, and the conviction and sentence affirmed.

*Appeal dismissed.*

HASSAN ALI, Appellant (Defendant),  
v.  
HERBERT WALCOTT, Detective Constable No. 4299,  
Respondent (Complainant).

[1946. No. 140—DEMERARA.]

BEFORE FULL COURT: LUCKHOO, C.J. (Acting), BOLAND, J. and JACKSON,  
J. (Acting).

[1946. November 22; December 20.]

*Criminal law and procedure—Receiving—Conviction for—No proof that article subject matter thereof was stolen—Conviction set aside.*

*Criminal law and procedure—Larceny—By finding—Meaning of.*

On appeal, a conviction for receiving was set aside where the Full Court (Boland, J. dissenting) was not satisfied that it was proved that the article which was the subject matter of the conviction had been stolen.

Meaning of "larceny by finding" discussed.

APPEAL by the defendant HASSAN ALI from a decision of a Magistrate of the Georgetown Judicial District convicting him of receiving a gent's Elgin wrist watch and gold band of the value of \$60, the property of Jim Folkard, knowing it to have been stolen. The facts sufficiently appear from the judgments.

*C. Vibart Wight*, for the appellant.

*E. M. Duke*, Solicitor-General, for the respondent.

*Cur. adv. vult.*

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The judgment of Luckhoo, C.J. Acting and Jackson, J. (Acting) was delivered by the acting Chief Justice as follows: —

In view of a rare feature which arises in this case, the Court is called upon critically to examine the evidence on which the conviction is based.

The appellant Hassan Ali was convicted for the offence of receiving stolen property knowing it to have been stolen. He, along with two others, was first charged with the larceny between the 22nd and 23rd days of March, 1945, of a gent's Elgin wrist watch and gold band of the Value of \$60:—the property of one Jim Folkard.

At the close of the case for the prosecution the learned Magistrate called upon the defendants to answer a charge of receiving after a submission by the appellant's solicitor that there was no evidence of larceny in so far as his client was concerned. Thereupon, on the application of Mr. Simon, assistant Superintendent of Police the charge was amended to read between the 22nd and 31st days of March, 1945, instead of between the 22nd and 23rd days of March, 1945. The defence was then taken and the appellant was thereafter convicted for the offence of receiving stolen property and fined. The charge against his co-defendants, Ascensao and Cletus was dismissed.

The main grounds of appeal advanced by learned Counsel for the appellant are, there was no proof that the said watch was stolen and that there was no evidence on which the Magistrate could find that the appellant received the watch, knowing it to have been stolen.

The law has been clearly laid down and admits of no dispute that before there can be a conviction for receiving, larceny of the goods found in the possession of a defendant must be established, as a matter of law, the proof whereof lies upon the prosecution. It does not require direct evidence to establish this fact. It may be gathered from the circumstances of the receipt and conduct of the defendant that the goods were stolen. In the comparatively recent case of the *King against Fuschillo* (1940) 27 C.A.R. p. 193, it was laid down following the judgment of the Court in the *King against Sbarra* (1918) 12 C.A.R. at p. 120, that "the circumstances in which property is received may in themselves be sufficient proof that it was stolen and that the defendant knew the fact."

To quote from the undisputed facts of Fuschillo's case the appellant was the manager of a small general shop in Bermondsey, which was owned by his mother. The allowance of sugar granted to him by the Food Executive Officer was 13/4 cwt. per week. Police Officers searched the premises in the absence of the appellant and found in the scullery and in a side passage leading from the scullery to the side door 26 cwt. of sugar in sacks, which they believed to be stolen. The appellant on entering the shop said "My God, I'm a bloody fool. Don't bring the old lady into this, she knows nothing about it." A police officer then cautioned the appellant and pointing to the sugar said, "You have here 26 cwt. of sugar which I have reason to believe has been stolen." The appellant then said "I don't know why I took it in. I'm a bloody fool. This

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means going away" and "Be satisfied and take it away, but don't take me." The appellant was then arrested, and on his way to the police station said "Can't we do something about this? For the old lay's sake take the stuff away and don't charge me." Apart from the appellant's own statement there was no evidence of the ownership of the sugar or of the fact that it had been stolen. The appellant was convicted of receiving the sugar well knowing it to have been stolen. It was held that the evidence of larceny was sufficient.

By reason of the nature of the evidence in the present appeal we have to examine the first ground raised by learned counsel in the light of that decision. The owner of the watch it would appear had been drinking with some friends at two different hotels and at a Club in Georgetown until the first hour of the morning of the 23rd March from whence he left for his home, but apparently changed his mind and decided to spend the remainder of his nocturnal peregrination at the house of a lady friend in Regent Street. On waking up at the break of day he discovered that his watch which he had been wearing was missing. He was of the opinion that he had dropped the watch on his way to the Regent Street house; he did not see it again until the 16th April when he observed it on the wrist of Cletus who stated he had purchased same from a man named Ali (meaning the appellant). From the record of the proceedings it does not appear that he had made any report of his loss to the police.

The evidence which the learned Magistrate accepted shows that on the 31st day of March the appellant was in possession of the said watch which he sold to Ascensao and subsequently issued a receipt for the sum of \$41:—bearing date 3.4.1945. In his evidence which the Magistrate did not believe, the appellant stated that he did sell a watch (not Folkard's) to one Eric Adams, the manager of the Grand American Hotel but issued the receipt therefor in the name of Ascensao that he never had possession of Folkard's watch and the watch he sold had gold numbers and gold hands, and was much smaller. This evidence of the appellant is, not inconsistent with the statement he made to the police on the 16th April just before his apprehension and before the charge laid against him. The watch which he sold he said was pledged with him on the 23rd day of December, 1944, by a white soldier in security for a loan of \$25:—, and on failure of the soldier to redeem the pledge he used the watch and advertised; it for sale. Eric Adams whose evidence the Magistrate accepted admitted that the appellant at the police station mentioned that the watch he sold was a smaller one.

There was no evidence led. to show that appellant knew Folkard or was ever seen in his company and in the various places which Folkard visited during the night of the 22nd and the morning of the 23rd day of March.

There can be no doubt from the findings of the learned Magistrate that the appellant was in the recent possession of the watch yet he did not call upon him to answer the charge of larceny, clearly negating the fact that the appellant was guilty of larceny.

It is evident therefore that someone else must be the thief;

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in short that the watch was stolen, and evidence there must be to establish that fact. Therefore in order to convict the appellant of receiving the watch knowing it to have been stolen, there must be proof that the watch was in fact stolen, as it is a necessary step in a case of receiving.

Suppose a person other than the appellant had been found in the possession of the watch soon after it had been *missing*, could that person be convicted of the offence of larceny? Must the prosecution not go further by an examination of the circumstances surrounding its receipt show that the watch was stolen so as to make a person found in possession of an article recently stolen the thief or the receiver? While it is laid down that it is not a rule of law that there must be other evidence of the theft, yet the prosecution has to satisfy the Court not as to the probability but as to the fact that a crime—that of larceny—had been committed, a necessary step in the establishment of the offence of receiving.

Two points of time may usefully be examined in keeping with the above cited authority—the time of the loss and the time of the receipt of the article. Folkard's evidence rather than helping tends the other way and there is no evidence available as to what happened when the appellant received the watch or when he was disposing of it from which it could be gathered that the watch was stolen.

The learned Solicitor-General referred us to the statement to the police and the evidence which the appellant gave before the Magistrate which the Magistrate did not believe but neither of which contains elements of circumstances relevant to the theft itself to show that the watch was in fact stolen, as were present in the case of Fuschillo. They were merely untrue statements given by the appellant to meet the charge of receiving and in no way connected with the larceny of the watch, or from which it could be gathered that the watch was stolen. From the evidence on the record, the only way that larceny could have been committed was by finding. It is therefore necessary to examine the statement of Folkard as to how the watch went out of his possession. He said "I do not remember having my watch when I went to the Regent Street house. On waking up, I found I hadn't my watch. The girl friend said I left the Savoy with the watch. I am of the opinion I dropped the watch on the way to the house." Later in his evidence he further said "I do not know where I lost the watch."

What are the material facts the prosecution has to establish before a watch so lost could be said to have been the subject of larceny.

Two things must be made out in order to establish a charge of larceny against the finder of a lost article. First, it must be shewn that, at the time of finding, he had the felonious intent to appropriate the thing to his own use. The other ingredient necessary is that, at the time of finding he had reasonable ground for believing that the owner might be discovered, and such reasonable belief may arise from the nature of the chattel found, or from there being some name or mark upon it; but it is not sufficient

that the finder may think that by taking pains the owner may be found; there must be the immediate means of finding him.

This statement of the law has been followed and interpreted by Judges of the past, the leading case being *Regina v. Thurborn* (1848) 2 C.K. p. 831 the head note of which reads "If a person finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriating them with intent to take the entire dominion over them, really believing when he takes them, that the owner cannot be found, it is not larceny." It would be a case of *dominus rerum non apparet*.

The Court of Exchequer Chamber which considered this case was composed of the following Judges—Pollock C.B., Parke B., Rolfe B., Patteson, Coltman, Cresswell and Williams J. J.

In course of their judgment the learned Barons and Judges held that to prevent, however, the taking of goods from being larceny, it is essential that they should be presumably lost, that is, they should be taken in such a place and under such circumstances as that the owner would be reasonably presumed by the taker to have abandoned them, or at least not to know where to find them.

There are cases where the owner of the goods may be presumed to be known from the circumstances under which they are found. For example articles left in a motor car by a passenger which the driver appropriates to his own use, or a gold watch dropped in a theatre.

In these cases and the like the taker is not justified in concluding that the goods were lost, but it is little doubt he must have believed that the owner would know where to find them again.

This case was not very long after followed by *Regina v. Preston* 2 Den. c.c. 353 where another strong bench of Judges held that the jury are not to be directed to consider at what time the prisoner, after taking into his possession, resolved to appropriate a £50:— note of the Bank of England which he had found in one of the public streets in Birmingham, but whether at the time he took possession of it he knew, or had the means of knowing, who the owner was, and took possession of it with intent to steal it, for if his original possession of it was an innocent one, no subsequent change of his mind, or resolution to appropriate it to his own use, would amount to larceny.

In the case *Catherine West* decided three years later reported in Dearsley's Reports at p. 402, the prisoner was indicted for stealing a purse and its contents. A purchaser at the prisoner's stall left his purse on it. The prisoner's attention was called to the purse by another person, and she treated it as her own and put it in her pocket, and afterwards concealed it.

The prosecutor returned to the stall and asked the prisoner about the purse, but she denied all knowledge of it. The jury found that the prisoner took up the purse knowing it was not her own and intending to appropriate it to her own use; but that she did not know who was the owner of the purse at the time she took it. On this finding a verdict of guilty was recorded. It was held that the conviction was right inasmuch as the property was not lost property, but property mislaid under circumstances which, would enable the owner to know where to find it, and that,

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therefore it was *unnecessary* to *inquire* whether the prisoner, when she took the purse, reasonably believed that the owner could not be found.

The facts in the case of *Regina v. Dixon* (1855) Dears. 580 being in some respects not unlike those of the instant case are worth while recording. "John Grimshaw, about four in the afternoon of the fourth day of September last, being then in the town of Leeds, placed in a black purse seven five-pound notes, three sovereigns and three shillings; he at that time put this purse in an inside pocket of a waistcoat which he then had on. He did not see either the purse or the money again before he discovered, as after mentioned, that he had lost them. About eight o'clock in the same afternoon he quitted a public-house where he had been drinking, and at that time he felt his purse in the pocket in which he had placed it. He was then not sober. He afterwards left Leeds by a railway train, which arrived at Bradford soon after ten o'clock that afternoon, and on his arrival there he found that he had not the purse or the money. He returned to Leeds early on the next morning and communicated the facts to the police. About eleven o'clock on the afternoon of the same fourth day of September last, William Dixon was seen in possession of two of the five-pound notes which had been placed in the purse by John Grimshaw. William Dixon changed one of these two notes, and endeavoured to change the other, but was not able to do so. On the next morning, between seven and eight o'clock, William Dixon attempted to change one of the notes that had been placed in the purse by John Grimshaw. A policeman, under the belief that this was a forged note, asked William Dixon where he had got that note and the note which he had changed on the preceding night. William Dixon answered that had found both last night in the Croft. The Croft is an open area in a much frequented part of Leeds; and there was full time for John Grimshaw to have been in the Croft between the time of his leaving the public-house and his coming to the railway station at Leeds on the said preceding night."

The conviction in that case was quashed.

In all of the above cited cases it is clear the *ratio decidendi* is that apart from the *animus furandi* in the person who obtains possession and at that time of an article lost or supposed to be lost, there must co-exist reasonable ground in him for believing that the owner might be discovered. A mere naked belief that the owner may be found is not enough. Failure to prove both or either of these ingredients no *prima facie* case would be made out.

The learned Magistrate lost sight of this principle in considering whether or not the watch was the subject of larceny, and not only as to whether or not the appellant could be called upon to answer a charge of larceny.

We have given anxious consideration to this first ground raised in the appeal, and to find, from the evidence and what may properly be presumed therefrom, that the prosecution had discharged the burden of proving that the watch was stolen, a vital step in cases of receiving, would be straining the principle laid down in the above cases.

For that reason we are of the opinion, and it is not necessary to consider the other grounds advanced by Mr. Wight, that the conviction must be quashed and the sentence set aside. The appeal is allowed with costs here and in the Court below.

BOLAND, J.: This is an appeal from the decision of one of the learned Magistrates of the Georgetown Judicial District, who on the 19th September, 1945 convicted the Appellant for having between the 22nd and 31st days of March, 1945 received one Gents' Elgin wristlet watch with gold band valued \$60.00 the property of Jim Folkard, knowing the same to have been stolen. Appellant was fined the sum of thirty-five dollars with costs \$15.00, in default of payment to undergo imprisonment with hard labour for two months.

The record shows that the information which was laid before the Magistrate on the 17th April, 1945, charged the Appellant along with two others named respectively Augustus de Ascencao and Peter Cletus with the larceny of this watch the property of Folkard, and that at the close of the case for the prosecution, after a submission by counsel for the Appellant that there was no evidence of larceny, the learned Magistrate, as he was fully empowered to do, called upon all three defendants to answer a charge of receiving instead of larceny.

By this the learned Magistrate was clearly intimating that whereas in his view the evidence was insufficient to establish the offence of larceny by any of the defendants, the evidence did establish a *prima facie* case of receiving against each defendant.

Thereupon the prosecution applied for an amendment of the date mentioned in the charge from "between the 22nd and 23rd March, 1945" to "between the 22nd and 31st March, 1945".

Incidentally it may be observed that it is difficult to see why the amendment fixed the date of the alleged receiving by the three defendants as occurring on any day between the 22nd March and 31st March, 1945. In charges of receiving it is proper to fix the date of the offence as being some time within the period commencing from the date of the larceny and ending at the date when the alleged receiver was first seen in possession of the stolen article. In this case whilst the owner of the watch knew that he had it in his possession during the night of 22nd March, and missed it in the morning of the 23rd March, it is alleged to have been first seen in the possession of the Appellant some Saturday night in March subsequent to this, which could only be Saturday the 26th March. The evidence for the prosecution was that it was on the next day, Sunday that Appellant caused it, after sale, to be delivered to the defendant de Ascencao; the defendant Cletus was first seen with it 3 days after the 3rd April; so that there can be no reason whatsoever for that date 31st March either in the charge or in the conviction for receiving.

The Appellant was not in any way prejudiced in his defence by the date given in the amended charge which would include in its ambit the period up to the Saturday, 26th March when, as alleged, he was first seen with the watch. He was given an adjournment of over one month to prepare to meet the amended charge of receiving. Consequently, quite correctly, this was not

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advanced as a ground of appeal. I think, however, the conviction should be amended to conform with the facts in evidence.

It is well established law that to substantiate a charge of receiving the prosecution must prove —

- (1) There was larceny of the article;
- (2) Receipt of the stolen article by the defendant;
- (3) Guilty knowledge by the defendant at the time of the receipt of the stolen article.

The facts given in evidence by the prosecution on which the learned Magistrate would seem to have based his finding that there was a *prima facie* case of receiving were as follows —

Jim Folkard was wearing on the night of the 22nd March his Elgin 17 jewel watch valued \$60.00. Going around town he went to the Savoy Hotel with four friends about 7.30—8.30 p.m.; there they had drinks, and Folkard left about 10—11 p.m., still wearing, as he deposed, the watch. He went to a few places returning back to the Savoy, which he ultimately left again about 1.00 a.m. in company with friends, and then found his way to a girl's place where he slept the balance of the night. On waking later in the morning he did not find his watch, yet had no recollection that he had the watch when he went into that house. His own opinion was that he must have dropped the watch on the way to this house from the Savoy Hotel—an opinion based as he said on his girl friend's statement to him that he had left the hotel wearing it. Some weeks afterwards the defendant Cletus was seen by Folkard with the watch on his wrist, and it was this discovery that led to police investigation which resulted in the charge against the three men. A witness for the prosecution, Eric Adams swore that that same watch (produced in Court) between 10.30—11.00 p.m. on a Saturday night in March had been brought to him by the Appellant who offered to sell it to him for \$41.00, but that the defendant de Ascencao came up and agreed to purchase it, and by arrangement the watch was left with Adams to be delivered to de Ascencao on payment of \$41.00 to Adams on behalf of Appellant. De Ascencao the next day Sunday handed Adams the \$41.00, which Adams paid over to Appellant on the 3rd April, when a receipt was made out by Appellant in favour of de Ascencao. The receipt was produced before the Magistrate. Adams also deposed that three days after he saw Cletus, who is Adam's son, with the watch.

This evidence in my view established that there had been a larceny of the watch. For it established that the watch had gone out of the owner's possession without the owner's consent and it had got into the possession of another person in circumstances from which *prima facie*, at any rate, it could be deduced that there was the *animus furandi* on the part of someone. For obviously this passing of the watch from the owner's possession without his consent to that of another could have occurred in only one of three ways namely—(1) taken directly from owner's person; (2) taken from some place where the owner had placed it, or (3) the owner had dropped it without knowing or had misplaced it and someone had picked it up and taken it.

If it happened as in the hypothetical instances given in (1) or (2), clearly that would be strong *prima facie* proof of larceny

by the person taking. If it happened to have gone from the owner's possession by the manner cited in instance (3) then the person picking it up and taking it would be guilty of larceny by finding if on enquiry he could easily have found the owner and had made no attempt to find the owner so as to restore to him his property. For he would not be deemed to have had the *animus furandi*, which with the asportation entailed by his taking it up would provide the necessary elements of the offence of larceny.

It should be noted that a valuable article like a gold Elgin watch could hardly create a belief in the finder that it was deliberately cast away and abandoned by the owner, and in a place like Georgetown there are many ways of trying to get at the identity of the owner of a valuable article which appears to have been misplaced or dropped. There is for instance the Police to whom it is customary for losers of articles to make reports, and then there is also the medium of the newspaper press.

To support a charge for receiving it is not necessary for the prosecution to establish that there had been a particular type or class of larceny, nor to indicate who the thief was. It is sufficient that larceny of some kind or class had in fact occurred with respect to the article which the defendant received subsequently with guilty knowledge. The prosecution may put forward facts which suggest *prima facie* a Larceny of one kind or alternatively a larceny of another kind. This of course would not be permissible on the substantive charge of larceny—when such an alternative charge would be deemed defective and any conviction so worded would be bad for duplicity.

In my view the learned Magistrate was justified in holding that the facts on the evidence submitted by the prosecution did establish *prima facie* evidence of larceny sufficient at any rate as a basis for a charge of receiving, but because of the uncertainty as to how the watch had gone out of Folkard the owner's possession, that evidence could not support a conviction for the larceny itself against any of the defendants.

The doctrine of recent possession applies to every class of, larceny—including larceny by finding. In every case where the doctrine is correctly invoked as against a person in possession, there is the presumption that he is the thief, or the guilty receiver, unless he can give some reasonable although unconvincing, explanation for his possession. In the case of a person found in possession of an article admittedly lost or misplaced, to raise this presumption against him the prosecution would have first to establish that the finder could not reasonably and honestly have assumed that the article was abandoned, also that he could easily have found the owner an enquiry. Then the possession of the article if recent after the loss would give rise to the presumption that he was the person who committed the offence of larceny by finding or a guilty receiver through such person.

In this case, as I have stated, the inference to be drawn from the evidence being uncertain on the point whether the watch was taken directly from the possession of Folkard or dropped by him and picked up by someone, the Magistrate very rightly ruled out larceny either by finding or otherwise by the defendants.

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In my view there was ample evidence in the case presented by the prosecution to raise the presumption that defendants were guilty receivers — even if the watch had been dropped by Folkard without his knowing it — such evidence of larceny by finding being provided by the nature and value of the article and the area where it was dropped or misplaced.

The three defendants were rightly called upon for a defence but de Ascencao and Cletus after their evidence was heard were each acquitted, the Magistrate being; apparently not satisfied that their possession was tainted with guilty knowledge. He however convicted the Appellant.

The learned Magistrate accepted the evidence that Appellant did have that watch of Folkard and had sold it to de Ascencao who had passed it on to Cletus. He rejected the evidence of the Appellant that the receipt produced in Court referring to an Elgin watch was not in receipt of this watch of Folkard, but to another Elgin watch which he the Appellant had sold to Adams, about that time, the name de Ascencao being written in the receipt as purchaser at Adams' request. If that were not the watch it was unnecessary to consider the question of the reasonableness of Appellant's account—if on the other hand it was the watch his account was not merely unconvincing but both unreasonable and decidedly untrue, seeing that he was claiming" to have had possession since January 1945, whilst Folkard had the watch up to March 1945.

There was ample evidence to warrant the Magistrate in finding that Appellant was in possession of Folkard's watch, and not having dispelled the presumption that he had received it with guilty knowledge some time between the date of its disappearance from the possession of Folkard and the date he was seen with it on Saturday 26th, Appellant was rightly convicted of receiving.

In my view the Appeal should be dismissed and the conviction and penalty imposed should stand.

*Appeal allowed.*

## KENNETH HALL v. ISAAC ALEXANDER

KENNETH HALL,

Appellant (Defendant).

v.

ISAAC ALEXANDER, P.C. NO. 4770,

Respondent (Complainant).

1946. No. 215.—DEMERARA

BEFORE FULL COURT: LUCKHOO, C.J., (ACTING), BOLAND, J. AND  
JACKSON, J. (ACTING).

1946. NOVEMBER 22; DECEMBER 20.

*Criminal law and procedure—Larceny—Explanation as to possession—Given by accused—Principles by which Court is to be guided—In considering such explanation.*

On appeal, a conviction for larceny was set aside where the Full Court (Boland, J. dissenting) was not satisfied that the magistrate had correctly applied the principles laid down in *R. v. Abramovitch* (1914) 11 C.A.R. 45.

APPEAL by the defendant. KENNETH HALL from a decision of a Magistrate of the Georgetown Judicial District convicting him of the larceny of a Lucifer generator. The facts sufficiently appear from the judgment.

*C. Lloyd Luckhoo*, for the appellant.

*E. M. Duke*, Solicitor-General, for the respondent.

*Cur. adv. vult.*

The judgment of Luckhoo, C.J. (Acting) and Jackson, J. (Acting) was delivered by the acting Chief Justice as follows:—

Many reasons have been set down in this appeal but they may be reduced to two of any real merit.

1. There was no evidence or sufficient evidence to support the complaint of larceny for which offence, the appellant was convicted.

2. The explanation offered by the appellant was a reasonable one and consistent with his innocence, and the learned Magistrate should have so found.

The appellant and one Dennis Beckles were charged with the larceny between the 4th and the 5th days of June 1945, of a Lucifer generator, bearing the number 932898 the property of one Hubert Gravesande a post office clerk who worked within the same compound as the appellant who is a Town Constable. Gravesande's generator was stolen from his bicycle which he had left at the Town Hall and it was subsequently found on the 3rd day of November, 1945, in the possession of Dennis Beckles who sometime in the month of September or October that year had borrowed a Lucifer generator from the appellant whose bicycle since the month of May was not in use due to the lack of tyres and tubes. Both Gravesande and the appellant are the owners of bicycles the former having purchased his along with a generator No. 932898 as far back as the 5th day of May, 1938, and the latter on the 29th day of June, 1944, save that in the receipt for the

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said purchase there is no mention of a generator. It was not, however, disputed that the appellant did possess a Lucifer generator.

One very important bit of evidence was given by Gravesande to the effect that Lucifer generator is a popular type of generator and that he had known of cases where a person would remove a generator from a bicycle and put another generator in its place, whereby an owner of a bicycle might quite innocently be found possessed of another one.

When he was called by the police on the 4th day of November, 1945 to verify a statement made in his absence by Dennis Beckles as to the loan of a Lucifer generator, the appellant said in the words of the witness Gravesande (the owner of the stolen generator) "it was a generator like Ex. "A" that he had lent to Beckles" and it was at that stage that Gravesande left the appellant for him to make a statement which was to be taken down in writing. The appellant also reiterated this statement on oath, but in the written statement taken by PC. Jackson the following appears— "Constable Jackman asked me if I had lent Beckles anything. I told him Yes. I then looked at the generator *which bore* the No. 932898 and I told him that that is my generator which was given me when I bought my bicycle." Dennis Beckles admitted he made no note of the number of the generator when it was lent to him by the appellant nor did he change the generator from the time he borrowed it. He, however, stated that he went to Cricket and used to leave his bicycle under his cousin's house.

Upon the foregoing facts was the possession of the generator by Beckles in the month of September or October, three months after the generator was stolen sufficiently recent on which he could be convicted of larceny? This is purely a question of fact and we cannot say, although we might not have come to the same conclusion, that the learned Magistrate was wrong.

The point which gave rise to some difficulty in the mind of the learned Magistrate was the application by him of the principles laid down in the cases of *Rex. v. Schama* and *Rex. v. Abramovitch* 11 C.A.R. p. 45. In these words he directed himself —

"5. I gave careful consideration to all that the appellant said and to all that was submitted on his behalf. I did not fail to recognise that cases may well arise when a thief in an effort to escape detection may switch stolen property from one bicycle to another. But, having regard to the events leading up to the appellant's arrest and the precise wording of the appellant's statement and his unconvincing manner in the witness-box, I had no reasonable doubt that the appellant was guilty. I particularly directed myself regarding the well known principle of law concerning the reasonableness of an explanation and the course the Court must adopt even though not convinced of its truth and I bore in mind too that the burden of proof remains on the prosecution throughout and never shifts."

He placed, in our opinion, undue weight on the precise wording of the statement above quoted, in the face of the testimony of Gravesande of that point and of the appellant himself.

The Magistrate, having found that generators of a like type may be easily transferred from one bicycle to another without detection, and having regard to the fact that Beckles had possession of the Lucifer generator without knowledge of the number thereon

and had left his bicycle with the generator under his cousin's house during the Cricket season, could not justifiably say that the appellant's story might not reasonably be true. The appellant's alleged "unconvincing manner" in the witness box had nothing to do with the question, if the story might reasonably be true. It would be a negation of the principle, where the story is consistent with innocence though the Court is not convinced of its truth for the Court to convict.

We cannot say that, had the learned Magistrate properly directed himself, he would necessarily have come to the same conclusion.

In the circumstances, the appeal must be allowed with costs, and the conviction and sentence set aside.

*BOLAND, J.:*

In my view the conviction of the Appellant should stand.

The generator identified as the one stolen from Gravesande's bicycle at the Town Hall some time between the 4th and 5th June 1945 was found on the 3rd November, 1945 in the possession of one Beckles who accounted for his possession by stating that he had borrowed it from the Appellant since the month of September as his own generator was out of order.

Appellant on being questioned by the Police admitted that he had lent Beckles a generator exactly similar to this. I agree that neither to the Police nor in his evidence in Court did the Appellant intend that he was to be understood as being positive that that was the identical generator that he had lent to Beckles but nevertheless he seemed to be urging that he had no reason to think it was otherwise. Beckles himself said that he had not changed the generator loaned to him and he appeared to be satisfied that it was the same.

The Magistrate found as a fact that it was the same generator—Gravesande's generator — which Appellant had lent to Beckles that was found by the Police in Beckles' possession. On the evidence I cannot say that the Magistrate went wrong in so finding. Accordingly he dismissed the case against Beckles whom jointly with the Appellant the Police had charged with larceny of the generator.

As against the Appellant by the rule of the doctrine of recent possession, there arose the presumption that he, being the possessor of an article recently stolen, was either the actual thief or the guilty receiver, unless he could give some reasonable account, even if not fully convincing, for his possession of same. And here it may be remarked that as regards an article like an electric generator a period of three months is within the description "recent" and not too long so as to preclude the application of the doctrine of recent possession.

It is claimed that the account given by the Appellant as a possible explanation for his possession of this generator was quite a reasonable one, on which the learned Magistrate, even if not convinced as to its truth, should have acquitted the Appellant. What was Appellant's explanation? It was that there was the possibility that a person stealing Gravesande's generator may have removed Appellant's generator from Appellant's bicycle and put there in its stead the stolen generator which the Appellant

## KENNETH HALL v. ISAAC ALEXANDER

continued to keep on his bicycle in the innocent belief that it was his own. Appellant testified that he had bought a bicycle with electric generator lamp attached since June 1944, and although the cash bill for same from the British Guiana Pawnbroking Trading Company, Limited, produced by him in Court, makes no reference to a generator lamp, his evidence, in the absence of evidence to the contrary which the prosecution could have tendered in rebuttal, was not unreasonable as proof of his once owning a generator. This is the generator which the Appellant suggests must have been removed from his bicycle and the generator stolen from Gravesande substituted by the thief in its place.

It is clear from Gravesande's evidence that his generator was stolen from the bicycle at the yard of the Town Hall, Georgetown, where he had left his bicycle some time between 4th and 5th June, 1945.

Now Appellant, who as a Town Constable is a person like Gravesande working at the Town Hall, stated that he had not ridden his bicycle since May because of a lack of tyres and tubes, and the statement of Beckles to the Police repeated by him in evidence in Court was that Appellant kept his bicycle while unserviceable for want of tyres under the house of Mr. October — a place not anywhere within the compound of the Town Hall. If a thief had stolen Gravesande's generator from his bicycle at the Town Hall and then afterwards removed Appellant's generator and placed the stolen generator on Appellant's bicycle, as Appellant suggested to the Magistrate, then he could have done so only by going to Mr. October's premises for this purpose. This is a possibility but much too remote for acceptance as reasonable and likely.

It is true that according to the evidence the stratagem, adopted by thieves of stealing bicycle generators and placing the stolen generators on other bicycles after removing the generators on those other bicycles, is not unknown — Gravesande himself admitted having heard of such instances. But it would be a bold thief indeed who, having so many bicycles about the town upon which to pursue his sinister plan, would go into premises to make the necessary substitution. It is a curious coincidence indeed that the victim of this trick should happen to be the Appellant who was one of those around and about the spot where the generator was stolen, but who did not have his bicycle there at the time.

For the above reasons I am of opinion that the learned Magistrate was right in rejecting as unreasonable the account given by the Appellant, and in my view the Appellant was rightly convicted of larceny and accordingly the Appeal should be dismissed.

*Appeal allowed conviction and sentence set aside.*

J. H. DYER *v.* J. E. DYER  
 WEST INDIAN COURT OF APPEAL  
 REPORTS OF DECISIONS  
 OF  
 THE COURT  
 SITTING IN  
 BRITISH GUIANA  
 1946.

JUDGES OF THE COURT:

Sir H. W. B. Blackwall, Kt, (Chief Justice of Trinidad and Tobago),  
 PRESIDENT.

Sir Allan Collymore, Kt, (Chief Justice of Barbados).

Sir Clemant Malone, Kt., (Chief Justice of the Windward Islands and the  
 Leeward Islands).

IN THE WEST INDIAN COURT OF APPEAL

On appeal from the Supreme Court of British Guiana.

JONAS HONIWOOD DYER,  
 Appellant (Defendant),

*v.*

JOHN EDGAR DYER *et al*,  
 Respondents (Plaintiffs).

1945 No. 2 — BRITISH GUIANA

BEFORE THEIR HONOURS SIR H. W. B. BLACKWALL, Chief Justice of  
 Trinidad and Tobago (President); SIR ALLAN COLLYMORE, Chief  
 Justice of Barbados; and SIR CLEMENT MALONE, Chief Justice of  
 The Windward Islands and the Leeward Islands.

1946 FEBRUARY 22.

*Trust—Co-owners of immovable property—Property managed on behalf of  
 all co-owners by one co-owner—Purchase of property at execution sale by that co-  
 owner for his own benefit—Such purchase not to be deemed to be on behalf of all  
 the co-owners—No fiduciary relationship.*

There is no fiduciary relation between co-owners of immovable property  
 prohibiting one of them from purchasing the property at execution sale for his  
 own benefit, and this is so notwithstanding the fact that the purchasing co-owner  
 used to manage the property on behalf of the other co-owners.

*Kennedy v. de Trafford* (1896) 1 Ch. 762, applied.

APPEAL by the defendant Jones Honiwood Dyer from a judgment of  
 Verity, C.J., British Guiana. The necessary facts and arguments appear  
 from the judgment.

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

*A. J. Parkes*, for the respondent.

*Cur. adv. vult.*

## J. H. DYER v. J. E. DYER

The judgment of the Court was as follows: —

This is an appeal against a judgment of the Chief Justice of British Guiana by which it was declared that the appellant holds certain property known as Lot No. 40, High and Harel Streets, in Werk-en-Rust District, Georgetown, Demerara, as trustee for the parties entitled as co-owners of this property or as beneficiaries in the property under the estates of Catherine Dyer deceased and Philip Dyer deceased prior to the purchase thereof by the appellant. By his notice of appeal the appellant asks that the judgment of the learned Chief Justice may be varied by limiting the declaration of  $\frac{7}{36}$ th parts or shares in the property and by making all necessary consequential amendments therein.

The material facts, which are not in dispute, are set out in a concise and convenient form in a memorandum supplied by counsel for the appellant, and agreed on by the counsel for the respondents, and may be thus summarized. By a transport dated the 7th December 1925 Catherine Dyer, Warwick Dyer, Lizzie Frank, Gladys Dyer, Philip Dyer and the appellant (the widow and children of Philip Henry Dyer (deceased)) became possessed as co-owners in equal shares of the property described above, and thereupon mortgaged it to the Demerara Mutual Life Assurance Society, Limited. In 1927 Philip Dyer died intestate and each of the remaining co-owners and also John Edgar Dyer, a brother of the deceased, inherited one undivided one-sixth of Philip's one-sixth share, that is to say an undivided  $\frac{1}{36}$ th interest in the whole property. Philip Dyer's estate was administered by Catherine Dyer, but the undivided  $\frac{1}{36}$ th interest inherited by each of these parties from Philip was never vested in them by transport. Catherine Dyer died intestate in 1939 and her estate was administered by the appellant. Catherine Dyer's estate consisted of one undivided sixth share in Lot 40 which she acquired under the transport of 1925 and an undivided  $\frac{1}{36}$ th interest (not transported) which she had inherited from Philip on his death. It is in respect of this undivided  $\frac{7}{36}$ th interest only that the appellant was administrator.

In 1941 the Demerara Mutual Life Assurance Society foreclosed the mortgage and brought Lot 40 to sale. It is to be noted that this was a sale at public auction on an execution order *in rem*. The appellant attended this sale and purchased the property for himself for \$2,000.00 a sum substantially less than the market value at the time this case was heard (1945) although sufficient to cover the amount of the mortgage debt and the costs of execution at the time of the sale. This purchase by the appellant is impeached by the respondents on the ground that the appellant was at the time administrator of the estate of Catherine Dyer and therefore stood in a fiduciary relationship to the other co-owners, indisputably as to seven undivided thirty-sixth shares in the property, and as to the remainder because inasmuch as the property was sold as a whole and not in separate shares, the appellant's interest as a co-owner clashed with his duty as administrator. It was submitted that in such circumstances the purchase by him for his own benefit should not be allowed.

On behalf of the appellant it is admitted that he stands in a fiduciary position to the respondents with regard to seven un-

divided thirty-sixth shares, but with regard to the remaining twenty-nine undivided thirty-sixth shares no such fiduciary relationship exists.

The learned trial Judge negated the allegations of misconduct, fraud and misrepresentation on the part of the appellant, and was satisfied that the appellant did all he could to avert the foreclosure and sale of the property. He felt, however, that the principle of law enunciated in the case of *Nugent v. Nugent* (1907) 2 Ch. 292 was applicable to the issue now before this Court, and he came to the conclusion that the appellant could not be allowed to acquire for himself the benefit of the property he had purchased, or of any part thereof. He therefore made a declaration that the appellant held the property as trustee for the parties entitled thereto, and ordered a sale of the property and a division of the purchase price "between the parties respectively entitled thereto in due proportion to their shares as co-owners and beneficiaries in this property under the estates of Catherine Dyer and Philip Dyer her deceased son, but subject to a charge in respect of the purchase price paid by the defendant (appellant) in the amount thereof remaining on mortgage as the case may be." He also ordered an account to be taken of the rentals received by the appellant from the date upon which he purchased the premises in order to ascertain what sums are due to the persons entitled after deduction of all proper charges in respect of maintenance of the property.

It is clear from the decision in *Kennedy v. De Trafford* (1896) 1 Ch. 762 that there is no fiduciary relation between co-owners of real estate prohibiting one of them from buying or getting in for his own benefit, an outstanding incumbrance or estate therein, and this is so notwithstanding the fact that the purchasing co-owner managed the property on behalf of the other co-owners. The case of *Nugent v. Nugent* was cited by counsel for the respondent in support of his contention that the appellant being not only a co-owner but also an administrator, his duty would clash with his personal interest. An examination of that case shows, that in a partition action in which a sale had been asked: for, a receiver (the defendant) had been appointed of the whole property. Under an order of the Court the property was put up for sale by the mortgagee, and purchased by the receiver who was one of the tenants in common. As she was a receiver of the whole property she was necessarily in a fiduciary position to all the tenants in common, and obviously a purchase by her for her individual benefit could not be allowed, and it was held by the Court in that case that her purchase was that of a trustee for the co-owners of the property. In this case, however, the appellant is admittedly administrator of 7/36ths only of the property and not of the whole, and while his interests and his duty clash in so far as these 7/36th shares are concerned, his position with regard to the remaining 29/36th shares cannot be said to be a fiduciary one. Counsel for the respondents agrees that had 29/36ths of the property been put up for sale and purchased by the appellant that purchase could not have been impeached, but he argues that because the property was sold in one lot the duty and interests of the administrator had become so inter-woven that it is impossible to divide them. We are unable to accept this contention as, in

## J. H. DYER v. J. E. DYER

our view, the positions of the appellant as administrator and as co-owner are clearly severable.

Having come to these conclusions it follows that this appeal must be allowed. The declaration and order made by the trial judge must be varied, and this Court now declares that the appellant holds the property (Lot No. 40) as to 29/36ths thereof in his own right and as to the remaining 7/36ths thereof as Administrator and Trustee for the parties (including himself) beneficially entitled. In accordance with the desire of the parties it is ordered that the property be resold at public auction and that the proceeds of the sale, after deduction of the expenses attendant thereon and after payment of incumbrances (if any), be paid into Court to be divided in the proportion of 29/36ths to the appellant in his own right and 7/36ths among the beneficiaries under the estate of Catherine Dyer deceased. The order made for accounts will also be varied and limited to the 7/36th shares held in trust. All parties interested in the property will be at liberty to bid at the sale. The respondents will pay the appellant's costs in this appeal, and the appellant will pay 7/36ths of the respondents' costs in the Court below. There will be liberty to apply to a Judge of the Supreme Court.

*Appeal allowed.*

Solicitors: *J. Edward de Freitas*, for appellant:  
*D. P. Debidin*, for respondent.

KOUBLALL HARDEEN, Appellant (Defendant),  
 v.  
 RAMCHARRAN, P.C. No. 4808, Respondent (Complainant).

[1945. No. 445.—DEMERARA.]

BEFORE FULL COURT: LUCKHOO, C.J. (Acting), BOLAND, J.  
 and DUKE, J. (Acting).

1946. JANUARY 18; FEBRUARY 8.

*Defence Regulations—Price-controlled article—Sale of—Garlic a foodstuff—Control of Prices (No. 2) Order, 1944, Second Schedule, List C.*

*Evidence—Judicial notice—That garlic used as condiment or flavouring for nutritive food.*

*Words—Foodstuff—Includes garlic—Control of Prices (No. 2) Order, 1944, Second Schedule, List C.*

Garlic is a foodstuff within the meaning of item 13 (b) in List C in the Second Schedule to the Control of Prices (No. 2) Order, 1944.

*Per* Boland, J.: The Court will take judicial notice that garlic is used as a condiment or flavouring for nutritive food.

APPEAL by the defendant Kooblall Hardeen from the decision of a Magistrate of the Georgetown Judicial District convicting him of selling a price-controlled article, to wit, an imported foodstuff known as garlic, at a price in excess of that permitted by item 13 (b) in List C in the Second Schedule to the Control of Prices (No. 2) Order, 1944.

C. *Vibart Wight*, for the appellant.

A. V. *Crane*, acting Solicitor-General, for the respondent.

*Cur. adv. vult.*

BOLAND, J: The appellant was convicted by the Magistrate for the offence of selling garlic at a price in excess of that

which is permitted by a certain Order No. 845 made by the Controller of Prices under Regulation 44 of the Defence Regulations to control the prices at which certain articles shall be sold. Garlic is not specifically named amongst the articles set out in the lists contained in the schedules to the said Order whose maximum prices are prescribed by the Order, but, as mentioned in the Particulars of Offence in the complaint filed, the prosecution alleged that garlic is an imported foodstuff whose price is controlled by virtue of Item 13 (b) in List "C" of the second schedule of the said Order.

In this item 13 (b) List "C" where the maximum price permitted is to be computed by the prescribed addition to the cost price of a certain percentage as set out opposite to the Item, the words in the column headed "Classes of Goods" are — "All imported foodstuffs other than those specifically named in any schedule to this Order."

Before the Magistrate the prosecution in proof of its case that garlic was an imported foodstuff contented itself by calling an officer from the Control Board with 3 or 4 years' experience in dealing with controlled articles in that department, who deposed that he knew garlic which he declared was a foodstuff imported into and not grown in this colony. There was little or no challenge to this statement by way of cross-examination nor was any evidence in opposition tendered by the defence, when called upon. But Counsel for defendant, as would appear from the Magistrate's Reasons for Decision in the record, in his address to the Magistrate contended that the charge should be dismissed, "because garlic is a condiment not a food."

The learned Magistrate convicted defendant declaring, as stated in his Reasons, that he did not agree with Counsel's *argument* but would adopt the definition of food given under the Foods and Drugs Act "as including every article used for food or drink by man other than drugs or water, and any article which ordinarily enters into or is used in the composition or preparation of human food, and includes flavouring matters and condiments."

The sole point for decision in this appeal is whether the learned Magistrate was right in his findings that the sale of garlic was a sale of "an imported foodstuff other than those specifically named in any Schedule to the Order." The appellants, it should be stated, does not contest that garlic is not grown in the colony; his sole contention is that it is not a "foodstuff" within the meaning of Item 13 (b).

As stated above, no evidence was given as to the use of garlic as a foodstuff beyond the bare statement of the witness from the Control Board that garlic was a "foodstuff". What meaning this witness attached to the word foodstuff — whether he included as such, adopting, as the learned Magistrate did, the definition in the Foods and Drugs Act, flavouring matter and condiments, is not apparent. But it is clear from his reasons, that the learned Magistrate ignored this bit of evidence altogether and turned to the Foods and Drugs Ordinance for guidance. In seeking guidance from the Food and Drugs Ordinance the learned Magistrate

clearly went wrong. The main object of that Ordinance is to ensure the purity of food and drugs to the purchaser and to safeguard him against being prejudiced by the transfer to him of any article of food or drug different from or inferior to what he had demanded from the vendor; and it can therefore be appreciated that to enforce this principle of the purity of all food to be sold, the Legislature would include everything that may be used in the preparation of food. In legislating for the control of the prices of commodities, food or otherwise, during a war, very different principles would apply, and accordingly the definition of food or foodstuff in the Food and Drugs Ordinance cannot be invoked to interpret the meaning of "foodstuffs" in an Order for the control of prices under the Defence Regulations.

To decide that an article is a foodstuff within the meaning of Item 13 (b) the Court must be satisfied that the article is used in such a way that it comes within the ambit of what the Order includes as a foodstuff. The onus in every criminal proceeding is always on the prosecution and therefore as a general rule evidence of such use of the article by the general public should be established satisfactorily to the Court by the prosecution. But a well known exception to this rule of the onus probandi is that relating to matters of which the Court can take judicial notice.

At the hearing before the Magistrate both Counsel for the defendant and the learned Magistrate seemed to agree that garlic was a commodity so generally known that its use only as a condiment for food was a notorious fact of which the Court would take judicial notice. It was doubtless for this reason that learned Counsel for the defence called no evidence as to the use made of garlic but he apparently appealed to the Court's knowledge of this fact which he thus impliedly declared to be a notorious fact. As has already been stated the witness from the Control Board merely expressed the view that it was a "foodstuff" without specifying what such a term connoted—whether nutriment or mere flavouring or condiment or both, and the learned Magistrate would seem to have agreed with Counsel's submissions as to the notoriety of the purpose for which garlic is used as he does not in his reasons reject this submission of Counsel — but he makes the finding nonetheless, that though it may be only a condiment, garlic is a "foodstuff" by adopting the definition of the Food and Drugs Ordinance—a conclusion that is based, as stated, upon a misconception of the objects of the two respective bits of legislation.

The question this Court has to decide, it appears to me, would be (1) Is the use of garlic as a condiment or flavouring so notorious that the Court could have taken judicial notice of that fact and dispense with the necessity of proof by evidence and (2) If it is only a flavouring or condiment, as established by judicial notice, is it to be classed as a foodstuff within the meaning of Item 13 (b) in Order 485? As to (1) it is difficult to define the degree of notoriety required to bring a fact within the purview of judicial notice. Counsel for appellant has in his submissions referred to a few of the well recognised and leading dictionaries in which garlic is defined, and its use as a condiment only and not as nutriment is there mentioned; while the dictionary cannot be

invoked in Court as evidence of the use or properties of a substance, still these references to the dictionary help in determining the degree of notoriety of the manner in or the purpose for which garlic is used.

In *Hinde v. Allmond* (1918) 87 L.J. K.B. 893 which was a case stated by Justices, the Court comprising Darling J., Avory J. and Shearman J. would seem to have based its decision as to whether tea was or was not a "food" within the meaning of the Food Hoarding Order 1917 on the Court's knowledge of a notorious fact — namely that tea is an infusion from tea leaves which is drunk and that the leaves are not eaten, nor taken for nourishment. It is true that because of the special definition of "food" in that Food Hoarding Order, the Court held in that case that tea was not a "food" within the meaning of the Order, but the case is cited in this judgment to show that the Court does take judicial notice of the qualities and the use made of certain well known articles. Doubtless tea and its uses and properties are more well known than garlic, but I am not prepared to say that the Court would be wrong to take judicial notice of garlic being used if not as nourishment at any rate as a condiment or flavouring for nutritive food. Then comes question (2) Is garlic though a mere flavouring or condiment for nutritive food nevertheless a "foodstuff" within the meaning of Item 13 (b) in the List "C" of the second schedule? To determine this it should be helpful to see what commodities are classified as foodstuffs in the lists in the schedule to the same Order. In List A under the caption "Foodstuffs" there appear such items as coffee beans, ground coffee, onions and salt and tea — while in Item 13 (a) of List "C" in the second schedule such commodities as lard and salt are set out. It is competent for a Court to take judicial notice of the use of some if not all of these commodities in the dietary of the public and to find, as was said of tea by Avory J. in *Hinde v. Allmond*, that "it is something not taken for the purpose of nourishment", yet the Order nevertheless classifies them as foodstuffs and wishes them to be so considered.

For the above reasons I hold that garlic is a foodstuff within the meaning of the Order, and the decision of the Magistrate was right though for reasons different from those advanced by him.

The appeal should therefore be dismissed with costs.

DUKE, J. (Acting): This is an appeal by the defendant KOUBLALL HARDEEN from a decision of a Magistrate of the Georgetown Judicial District convicting him of selling a price-controlled article, to wit, an imported foodstuff known as garlic, at a price in excess of that permitted by item 13 (b) in the Second Schedule to the Control of Prices (No. 2) Order, 1944.

By paragraphs 4 and 12 (1) of. and item 13 (b) in List C in the Second Schedule to, the Control of Prices (No. 2) Order, 1944, any person who sells, at a price in excess of that permitted by the said item 13 (b), any imported foodstuff other than a foodstuff specifically named in any of the Schedules (foodstuffs are specifically named only in the First and Second Schedules) to the Order, is guilty of an offence. The appellant was charged with such an offence, and the particulars of the offence were that he sold garlic

at a price which was in excess of that permitted by the Order. Evidence was led by the complainant that the article sold is a foodstuff, and that garlic is an imported article. Such evidence was given by Mr. C. G. A. Thompson who has been on the staff of the Commodity Control Office for 3 or 4 years and was perfectly competent to give the evidence; he was indeed cross-examined but his answers as recorded by the magistrate strengthened the evidence given by the witness in examination-in-chief that garlic is a foodstuff. Evidence was also led by the complainant to prove that the appellant sold the garlic at a price in excess of that permitted by the aforesaid item 13 (b). The magistrate called for a defence, and the appellant led evidence in which he sought to establish that the garlic which the prosecution alleged was sold by the appellant was not in fact sold by him. No evidence was led by the appellant in contradiction of the evidence for the prosecution that garlic is an imported foodstuff. Garlic is not specifically named as a foodstuff in the First or the Second Schedules to the Control of Prices (No. 2) Order, 1944.

At the close of the case for the defence, counsel for the defendant submitted that garlic was a condiment or flavouring, and was therefore not a foodstuff. The magistrate referred to section 2 of the Sale of Food and Drugs (Consolidation) Ordinance, Chapter 102, under which flavouring matters and condiments are included in the definition of "food", and decided that garlic was a foodstuff; and, having been satisfied of the sale and of the sale at a price in excess of that permitted by item 13 (b) in List C in the Second Schedule to the Control of Prices (No. 2) Order, 1944, and having been further satisfied that the article sold was imported, the magistrate found the defendant guilty of the offence charged.

The grounds of appeal are that the decision is erroneous in point of law in that —

- (a) the learned magistrate should not have adopted the definitions and/or definition under the Food and. Drugs Act for the purposes of this case;
- (b) the learned magistrate erred in his finding and/or construction that garlic was a foodstuff;
- (c) the learned magistrate erred in his finding and/or construction that garlic was a foodstuff and as such could be the subject matter of the charge as laid under the Defence Regulations. 1939.

On the hearing of the appeal counsel for the appellant submitted that if the magistrate found as a fact that garlic was a foodstuff, he was wrong, and that when he held as a matter of law that garlic is a foodstuff he was wrong. In support of his argument counsel stated that garlic is merely a seasoning or condiment, that it contains no nutriment, that no article can be a foodstuff unless it contains nutriment, and that consequently garlic is not a foodstuff.

If the question as to whether or not garlic is a foodstuff, is to be treated as one of fact, then I must point out that no evidence was led before the magistrate in support of the statements of counsel for the appellant to which I have just referred; and, fur-

ther, that it was not suggested to Mr. C. G. A. Thompson in cross-examination that an article cannot be a foodstuff unless it contains nutriment.

The magistrate did not make any specific finding as to whether or not he accepted the evidence for the prosecution that garlic is a foodstuff. There was no conflict of evidence on this point, and the testimony thereon on the part of the prosecution, although apparently challenged by cross-examination, was strengthened thereby, and was uncontradicted by evidence. If the question whether garlic is a foodstuff or not, is a question of fact, then on the authority of the judgment of this Court in *GONSALVES v. CHAIRMAN, POOR LAW COMMISSIONERS* (1939) L.R.B.G.61, it was not open to the magistrate to reject the evidence for the prosecution that garlic is a foodstuff, without adequate cause to be found in such matters as improbability, insufficiency, or a considered conclusion as to the falsity of the evidence based on reasonable grounds. The evidence that garlic is a foodstuff in no way shocks the judicial conscience, and had the magistrate found on the evidence, as a fact, that garlic is not a foodstuff, his decision would, in my view, have been reversed by this Court. Consequently, if the question as to whether or not garlic is a foodstuff is to be treated as one of fact, I am of the opinion that this Court ought to accept, as proved in this case, that garlic is a foodstuff.

There now remains for consideration the question whether, as a matter of law, garlic is included in item 13 (b) in List C in the Second Schedule to the Control of Prices (No. 2) Order, 1944, which sub-item relates to "All imported foodstuffs other than those specifically named in any Schedule to this Order."

In support of his legal argument that garlic is not a foodstuff, counsel for the appellant submitted that garlic is not an article used as food by man and cited *HINDE v. ALLMOND* (1918) 87 L.J.K.B. 893, where it was held during the 1914-1918 War that tea was not included in the definition of "article of food" in the United Kingdom Food Hoarding Order, 1917. A case is, however, only authority for what it decides. There is no definition of "foodstuffs" in the Control of Prices (No. 2) Order, 1944, neither is there one in the *SHORTER OXFORD ENGLISH DICTIONARY*: and tea is specifically named as a foodstuff in the Control of Prices (No. 2) Order, 1944. The purposes of a food hoarding Order made in 1917 under the Defence of the Realm Act are not the same as the purposes of a price-control Order made in 1944 under regulation 44 of the Defence Regulations, 1939. The case of *HINDE v. ALLMOND* is of no assistance in determining whether or not garlic is an imported foodstuff within the meaning of item 13 (b) in List C in the Second Schedule to the Control of Prices (No. 2) Order, 1944.

In developing his legal submission, counsel for the appellant strenuously contended that the expression "foodstuffs" ordinarily means an article used as food by man: that garlic is not an article used as food by man inasmuch as it is used merely as a seasoning or condiment; that garlic is not specifically named as a foodstuff in the First or the Second Schedules to the Control of Prices (No.

2) Order, 1944; and that garlic is therefore not a foodstuff within the meaning of that Order.

The word "foodstuffs" is not defined in the Control of Prices (No. 2) Order, 1944, and in order to ascertain whether any article is properly included within the ambit of the expression "imported foodstuffs" in item 13 in List C in the Second Schedule to the Order, the Order itself must be examined in the light of all relevant surrounding circumstances. List A in the First Schedule to the Order relates to Foodstuffs, and among Foodstuffs in List A there are included, for example, Deodorised Coconut Oil, Cocoa Beans, Coffee Beans, Ground Coffee, Lard Substitute, Fryol Compound, Onions, Locally crushed Salt, and Loose Tea. Further, Tea in packets, Lard, and Tomato Paste are named as Foodstuffs in item 13 (which relates to imported articles only) in List C in the Second Schedule to the Order.

The articles which are not articles used as food, and which are specifically named in the Order as foodstuffs, must, in the absence of a definition of "Foodstuffs", be treated as different species of the various articles which, together with the articles which are used as food, make up the genus of foodstuffs. The word "foodstuffs" in the expression "imported foodstuffs" in item 13 in List C in the Second Schedule to the Order cannot, therefore, in my opinion, be given the same narrow interpretation as was ascribed in *HINDE v. ALLMOND* to the expression "article which is used as food by man".

In my opinion, the Control of Prices (No. 2) Order, 1944, clearly indicates in itself that the words "imported foodstuffs" in the expression "all imported foodstuffs other than those specifically named in any Schedule to this Order" cannot be restricted to mean only imported "articles used as food by man". The words include, among other things, imported articles which are flavouring substances or condiments. Assuming, but not deciding, that this interpretation is subject to the proviso that the articles must be *ejusdem generis* in relation to articles specifically named in the First or the Second Schedules to this Order, what would be the position of garlic? If garlic, which is an imported article, is a flavouring substance or condiment, it would be an imported foodstuff within the meaning of item 13 (b) in List C in the Second Schedule to the Control of Prices (No. 2) Order, 1944, if garlic and any article specifically named as a foodstuff in the First or Second Schedules to the Order are *ejusdem generis*. Onions and garlic are *ejusdem generis*, and the article known as onions is specifically named as a foodstuff in List A in the First Schedule to the Order.

Counsel for the appellant has conceded that garlic is used as a flavouring matter or condiment. It has been proved that garlic is an imported article. In these circumstances, I am of the opinion that, as a matter of law, garlic is an "imported foodstuff" within the meaning of item 13 (b) in List C in the Second Schedule to the Control of Prices (No. 2) Order, 1944. Item 13 relates entirely to imported foodstuffs and it may not be irrelevant to state that when garlic is imported, customs duty is paid on it as a vegetable: see item 52 in the First Schedule to the Customs Duties Ordinance, 1935 (No. 23).

The sole issue raised in this appeal is whether garlic is a foodstuff within the meaning of the Control of Prices (No. 2) Order, 1944. In my opinion, whether this issue is treated as one of fact or as one of law, garlic is a foodstuff. The magistrate decided that garlic was a foodstuff, and his decision was therefore right.

Many years ago, the Earl of Mansfield gave the following advice in relation to the appointment of justices of the peace: —

Consider what you think justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong.

A magistrate is, however, required by law to state his reasons for any decision against which an appeal is being brought. Although it would not be correct to say that reasons of decision, as stated by magistrates, will certainly be wrong, it has been laid down by this Court, in the general interests of justice that an appeal under the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, is from the decision of the magistrate and not from his reasons of decision. If the decision of the magistrate is right, it will be upheld by this Court, even if this Court prefers to base its judgment on circumstances not specifically stated by the magistrate in his reasons. It is not unusual for two or more judges, although they may approach the consideration of a case from entirely different points of view, to arrive at the same result.

In my opinion the appeal should be dismissed, and the conviction affirmed, with costs.

LUCKHOO, C.J. (Acting): It is my misfortune, and I hesitate a great deal before doing so, to differ from the conclusions arrived at by my learned brethren and for that reason I have set out in this judgment the grounds as fully as possible upon which I base my own view of the evidence.

The issue raised by this appeal can be stated simply but its solution evidently affords ground for difference.

The appellant was charged by the respondent for selling on the 29th day of March, 1945, above the fixed price a quarter pound of garlic for 15 cents which the complainant alleged is a price controlled imported foodstuff as set out at item 13 in List "C" of the second schedule to Order No. 845 made on the 22nd day of June, 1944, under Regulation 44 of the Defence Regulations 1939, and published in the *Official Gazette* of the 27th day of June, 1944.

List "A" of the First Schedule sets out the various articles of foodstuffs controlled and their prices. The remaining lists of that schedule do not refer to foodstuffs. List "C" of the second schedule is headed: "Applicable to articles of the classes or descriptions not dealt with in the first schedule or in lists A and B of the second schedule." In the second column the names of the classes of goods appear—Item 13 (a) deals with certain foodstuffs (imported) and item 13 (b) to which the complaint purported to refer reads: "All *imported foodstuffs* other than those specifically named in any schedule to this order."

In none of the schedules to the order is the article "garlic" specifically named. It can therefore be reasonably assumed that

before garlic can be said to be an article of foodstuff it must first be established by evidence that in fact it is so, or else there would not have been the necessity under List "A" of the first schedule or under Item 13 (a) of the second schedule to have named the particular article controlled.

There are several articles in both of the abovementioned lists which one in the ordinary course of human- existence does not partake of alone as a food, for instance salt, tea, lard, tomato paste and such like things, but the Regulations specifically provide by the Order that these things not commonly known Or called foodstuffs should for the purpose of the Order be deemed to be so. In my view it becomes all the more necessary that garlic not listed, should be proved by evidence an article which the Order intended to embrace.

So soon as a plea of not guilty was entered by the appellant the fact that garlic is a foodstuff and that it is an imported article was put in issue. A legal burden was at once placed upon the shoulders of the respondent to establish those matters. When the law puts on a party the burden of proving certain facts as a condition for giving him judgment, that burden never shifts and must be discharged or he will fail. Those facts as proved must establish a *prima facie* case so that from them the fact in issue may be inferred, but not in the sense that it must be inferred unless the contrary is proved.

What were the facts in issue in this case before the Magistrate? (a) That garlic is a foodstuff, and (b) That it is an imported article. With respect to (b) the witness Claude Thompson stated that he had been attached to the Control Board for the last three or four years. He knows that garlic is imported into the colony, and it is not grown in the colony. Those facts which are undisputed by evidence, established that issue and the learned Magistrate was quite justified in finding that the prosecution had discharged the legal burden that garlic is imported and not grown in the colony. It was when he gave consideration to the other issue involved that garlic is a foodstuff that he went wrong. He adopted the definition given under section 2 of the Food and Drugs Ordinance Chapter 102: "Every "article used for Food or drink by man other than drugs or water, and any "article which ordinarily enters into or is used in the composition or "preparation of human food, and also includes flavouring matters and "condiments," and did not accept the submissions of learned Counsel for the appellant that garlic is a condiment or flavouring matter and not food.

The learned Solicitor-General who appeared for the respondent in this appeal himself confesses his inability to support the learned Magistrate's reasons on this point, as in his view that Ordinance provides that definition for the specific purpose named therein — as to the standard of purity. He contends, however, that there is evidence on the record on which this Court could make its independent finding on that issue and that the appeal is not one from the Magistrate's reasons but from his decision.

Whilst the law has been repeatedly laid down on this point, with which I agree, nevertheless one has to consider how the

Magistrate approached consideration of this issue in order to ascertain if he considered, de hors his reasoning, a sufficiency of evidence to establish it, and whether or not this Court acting independently and on the record can sustain the conclusion arrived at that garlic is a foodstuff.

What is the evidence given on behalf of the respondent on this point? The witness Thompson deposed as follows:— "I have been dealing with controlled articles. I know garlic which is imported into the colony. It is a foodstuff" and in *cross-examination* "It is the same class of thing as onion and is classed as foodstuff. They are both in the same category." Nowhere can I find in the schedule that garlic is classed as foodstuff or that garlic and onion are both in the same category.

These are not statements of fact, but, if anything, questions of law which the Court has to determine.

The only statement of the witness on which the prosecution could have hoped to support its case is: "It is a foodstuff." To eke out of this statement proof that garlic is a foodstuff is to beg the question. It has to be proved by evidence that it is so; and intended to be covered by the terms of the Order. The mere statement in my view is insufficient. It is one of the essentials in the case to be found by the Court in view of the fact that it is not specifically mentioned in either the first or second schedule.

I am not unmindful of the judgment which was delivered by this Court comprised of the late Camacho C.J., Verity and Langley JJ. in the case of *Gonsalves v. Chairman. Poor Law Commissioners* (1939) L.R. B.G. 61 where the Court held that "where there is no conflict of evidence and the "testimony on one side or the other remains unchallenged by cross-examination and uncontradicted by evidence, it is not open to the "Magistrate to reject such testimony without adequate cause to be found in "such matters as inconsistency, inherent improbability, insufficiency, or a "considered conclusion of the falsity of the evidence based upon "reasonable grounds." The *ratio decidendi* in that case can be distinguished from this appeal.

In that case the evidence, not the conclusions, of certain facts was led and was unchallenged by cross-examination. Apart from what I have already said of the nature of Thompson's statement, Counsel for the appellant in the Court below challenged such statement by the recorded answers of that witness in cross-examination.

If the *Gonsalves* case is not distinguishable from the instant case then I am prepared to hold that there was an insufficiency of evidence, and it would seem that the learned Magistrate by reason of the excursion he made to another Ordinance for an artificial meaning applicable only to that Ordinance, felt likewise.

If at the end of a case the Court cannot come to a determinate conclusion on what evidence there is before it, the legal burden is not discharged. If an order under these Regulations is so loosely framed by the use of language of such generality and where it must have been patent to those responsible for controlling the price of foodstuffs that garlic is a well known article, and used as a flavouring for cooking, some definition such as one finds in

the Foods and Drugs Ordinance should have formed part of the Order.

No Court should be called upon to carry on a flirtation with cryptic enactments. The public are entitled to know and be informed what goods are price controlled. It must not be left to a legal interpretation of what the words of the order mean, especially where certain articles are specifically set out. They should be sufficiently explicit to eliminate obscurities and misunderstandings in interpretations.

In arguing the appeal, appellants' Counsel contended that in the ordinary acceptance of the meaning of the word garlic it could not mean a foodstuff but only a bulbous strong-smelling pungent lasting root used as flavouring in cooking and not edible by itself — a condiment and not a food.

Whilst it is true that the meaning as formulated in a dictionary never can be an absolute and infallible guide to actual usage, and whilst a Judge realises the dangers of blind adherence to dictionaries, nevertheless where the meaning of a word which is used in a highly penal section of an Order is left in doubt a judge is entitled as a first rule to treat it as having its ordinary dictionary meaning unless a definite trade meaning is proved by witnesses with knowledge of the trade competent to give that evidence. In other words that in the usage of the trade and among commercial men garlic is regarded as a foodstuff. Sometimes a judge has to choose between a meaning current among vendors and a meaning current among purchasers. Similar problems arise under the Food and Drugs Ordinance. What in ordinary language is the description of the article that has been sold is a scientific one to be settled by examining the thing that has been sold. But the question is: What is the meaning of the words used by the purchaser and does the thing sold, as already examined, conform to this meaning?

Questions of this kind are not determined exclusively by the Judge's own interpretation of the language used but are decided chiefly by evidence — What kind of evidence then must be tendered?

In *Soper v. Johnston* (1944) I.A.E.R. 42, affirmed on appeal, at p. 586, which was a civil action for breach of a warranty of compliance with the Food and Drugs' Act, the Judge accepted the *evidence* of the meaning of the word "cordial" tendered by the analyst, a manufacturer of soft drinks and others.

In the case of *Newby v. Sims* (1894) 1 Q.B. p. 478 where by section 6 of the Sale of Food and Drugs Act. 1875, any person selling, to the prejudice of the purchaser, any article of food not of the nature, substance, and quality of the article demanded is liable to a penalty, and by s. 6 of the Amendment Act of 1879 it is made a good defence to a charge of selling rum adulterated only with water to prove that the admixture has not reduced the rum more than 25 per cent, under proof, the analyst stated in his certificate the conclusion only at which he arrived. Day J. at p. 482 said

"It comes to this, that he takes upon himself to act as the "Judge of law and fact; whereas those questions are for the

“magistrates to determine. To enable us to act on the certificate we must “know what the analyst finds in fact. The analyst ought to determine as a “matter of fact how much water there is in the pint of rum, and, as he has “not done so, the certificate is not in such a form as to amount to evidence “on which the magistrates could act.”

What the witness Thompson said in this instant case amounts to a finding in law, based on no evidence or no sufficient evidence. It can also be regarded as a mere matter of opinion not founded on evidence. It is unlike cases under the Food and Drugs Ordinance where the analyst's certificate gives the constituent parts of the thing analysed and then his opinion whether the particular thing is or not the substance.

As Lord Hewart C.J. said in the case of *Bowker v. Woodroffe* (1928) 1 K.B. 217 at p. 222 where the analyst had given a certificate under the sale of Food and Drugs Act, 1875:

“What are the facts stated in this certificate? The statements with regard “to the constituent elements of this compound are undoubtedly “statements of facts. The statement of the relative proportions in which “those elements are found is undoubtedly a statement of fact. Then the “certificate contains a sentence which it is suggested is really a statement “of opinion, or it may be an aspiration: ‘a genuine meat and malt wine “should contain at least 5 per cent, of a mixture of equal parts of meat and “malt extracts with a wine basis.’” “Speaking for myself,” continued the “learned Chief Justice, “I read “that sentence as meaning that a genuine “meat and malt wine should contain at least 5 per cent, of a mixture of “equal parts of meat and malt extracts with a wine basis. Starting from “that conclusion the certificate proceeds step by step to demonstrate that “there was here a deficiency to the extent of at least 60 per cent, of the “minimum amount of meat and malt extracts, and having set out the “stages and the factors in conclusion, it concludes with the final sentence. ““This is not "a meat and malt wine.”

If it had appeared from the proceedings that the learned Magistrate had directed his mind to the right question, and so directing his mind had found facts which justified his determination, I would not think it right to interfere, but I am not satisfied on either of these points. He seemed to have paid no attention to the evidence of Thompson.

During the argument of this appeal reference was made to the Customs Ordinance, Chapter 34 wherein garlic along with onions is placed under the head "Vegetables", whilst tea, butter, lard, pepper and salt specifically classed as foodstuffs under the Order are found under different heads under that Ordinance.

I feel I would fall in like error as the learned Magistrate if I were to attempt to look at the said Ordinance for any guidance, and to hold that, because both onions and garlic are classed as vegetables for the purpose of collecting Customs duties, garlic should be deemed a vegetable and therefore a foodstuff under the Order.

As a last resort can I take judicial notice that it is a foodstuff? This point has created some difficulty in my mind. It is not one of the things covered by the Evidence Ordinance Chapter 25. Can

KOBLALL HARDEEN v. RAMCHARRAN, P.C. No. 4808.

I otherwise take judicial notice that it is a foodstuff? The scope of the rule is not, it is true, confined to evidence only but extends to all departments of law and would apply to matters coming within the sphere of every day knowledge and experience of a judge.

But although a judge may use his general knowledge of the common affairs of life and in this case would probably know that garlic is used as a condiment could he possibly go further and conclude without any evidence that it falls within the term "foodstuff" as contemplated by the Order? He is not permitted to act on information gained in another case.

The question what food value a particular product contains is a scientific question with which the analyst is fitted to deal; but the question whether given the composition of the product it is properly called by a certain name is a verbal one which a judge would be competent to determine.

The only other instance in which a judge might take judicial notice is where the facts are notorious, for example the course of nature, public coin and currency, the meaning of common words and phrases, but is the fact that garlic is a condiment regarded, if at all, as a foodstuff so notorious? In my view it would be dangerous without evidence in proof thereof so to hold.

In allowing this appeal I am far from deciding that garlic may not be a foodstuff contemplated by the Order but that in this case the prosecution has failed to discharge the burden which rests upon it to establish by evidence, not opinion, or by a bare statement, one of the necessary elements of proof.

In my view the conviction should be quashed and the sentence set aside.

*Appeal dismissed.*

## IN THE WEST INDIAN COURT OF APPEAL

On appeal from the Supreme Court of British Guiana.

ABJAL,

Appellant (Plaintiff).

v.

ABID HOSSEIN and SOOKDIN,

Respondents (Defendants).

1945. No. 1.—BRITISH GUIANA.

BEFORE THEIR HONOURS SIR H. W. B. BLACKALL, Chief Justice of Trinidad and Tobago (President); SIR ALLAN COLLYMORE, Chief Justice of Barbados; and SIR CLEMENT MALONE, Chief Justice of the Windward Islands and the Leeward Islands.

1946. FEBRUARY 22.

*Appeal—To West Indian Court of Appeal—Finding of fact by trial judge—Reversed—Where Court of Appeal satisfied that it is wrong.*

The trial judge found as a fact that the appellant acted as the agent of one of the respondents. The West Indian Court of Appeal, being satisfied that the finding was wrong, reversed it.

APPEAL by the plaintiff Abjal from a judgment of the Supreme Court of British Guiana. The necessary facts and arguments appear from the judgment.

## ABJAL v. A. HOSSEIN &amp; ORS.

*H. C. Humphrys*, K.C., (W. J. Gilchrist with him) for the appellant.  
*A. J. Parkes*, for the respondents.

*Cur. adv. vult.*

The judgment of the Court was as follows: —

In this action the appellant sought as against the respondent Abid Hossein specific performance of an agreement dated 23rd January 1941 (hereinafter referred to as Exhibit A) for the sale to him of 23 acres of land and in the alternative repayment of certain sums of money paid by the appellant to this respondent, and for damages. As against both respondents the appellant claims damages for conspiracy to defraud him of the benefit of his contract.

The respondents' case is that Ex. A was made by the appellant as the agent of the respondent Sookdin and that he acted throughout in that capacity; further that the contract was for the sale not of 23 acres but of two fields which on subsequent survey were found to contain 18 acres, instead of 23. They denied any conspiracy on their part.

The learned trial Judge found as a fact that the appellant was the agent of the respondent Sookdin and decided in favour of the respondents. Against this judgment the appellant has appealed

Dealing first with Ex. A it is conceded by Mr. Humphrys that if that document stood alone, extrinsic evidence could be adduced by the respondent Sookdin to show that the appellant had made that agreement as his agent. But as Sookdin subsequently executed the agreement of 1st February 1943 (hereinafter called Ex.-C) in which the appellant is described as the seller and he (Sookdin) the purchaser of 18 acres of the land agreed to be sold under Ex. A. he is estopped from denying that the relationship of the parties is as stated in Ex. C. and consequently he cannot be heard to assert that the appellant had acted as his agent when making Ex. A.

Mr. Parkes, for the respondents, submits that neither Ex. A nor Ex. C disclose the true nature of the transactions and that extrinsic evidence is admissible to explain what those transactions really were. He argues that the object of Ex. C was merely to clarify the position by placing beyond all doubt the fact that Sookdin was the real purchaser of the land agreed to be sold under Ex. A.

In considering whether the learned Judge's finding that the appellant acted as Sookdin's agent throughout was justified by the evidence, the contrast between Ex. B on the one hand and Ex. A, and the receipts of 26 January 1942, 27 July 1942 and 26 January 1943 (Exhibits F2, F3 and F4,) on the other, is instructive. In Ex. B a self-serving document to which the appellant was not a party — he is referred to as Sookdin's agent. But in the other documents (to which the appellant was a party) there is no mention of agency, and this although the receipts cover a period of two years and one of them (Ex. F2) is in the handwriting of the legal practitioner (Mr. E. V. Luckhoo) who, on the instructions of the parties, prepared Ex. A: and who witnessed both documents.

## ABJAL v. A. HOSSEIN &amp; ORS.

It is relevant also to observe that in other transactions in which the appellant acted as an agent he disclosed that fact.

Another very significant feature of the case is that Mr. E. V. Luckhoo who was far better equipped than anyone else to enlighten the Court upon the true intention of the parties, was not called by the respondents to support their case. Now this is an action for specific performance based on a document (Ex.A.) and the respondents are asking the Court to import into the transaction the relationship of agency which on the face of the document does not exist. It was therefore incumbent upon them to place before the Court the best evidence available and this they failed. to do. It is almost inconceivable that a legal practitioner with any sense of responsibility could have given the advice Mr. Luckhoo is alleged to have done and to have so entirely neglected to safeguard the interests of the real purchaser, if Sookdin was such. The reasonable inference to be drawn from the failure to call him as a witness is that he could not support the respondents' case.

Even if all the evidence adduced at the trial were admissible in support of the allegation of agency we should nevertheless hold that the trial Judge's finding that the appellant acted as Sookdin's agent was wrong.

This Court has however come to the conclusion that Mr. Humphrys' submissions on the question of estoppel are well founded and we hold upon examination of the documents that the appellant was the principal and is entitled to succeed. We are also satisfied after considering the documentary and other relevant evidence that the respondents conspired together to deprive the appellant of his rights under Ex. A and with this object in view they executed Ex. B.

Under Ex. A the respondent Hossein agreed to sell 23 acres of Plantation Friendship to the appellant. Owing to his subsequent dealings with the land this respondent now finds himself unable to carry out this agreement. The appellant is therefore entitled to damages against him which we assess at \$300.

We consider that the appellant is also entitled to damages for conspiracy against both respondents. These we assess at \$150.

The Court also makes a declaration that the respondent Sookdin shall in lieu of paying to the appellant the balance owing under Ex. C (\$270) pay the same direct to the respondent Hossein with interest. In the result the judgment of the Court below is set aside and judgment will be entered for the appellant accordingly.

*Appeal allowed.*

Solicitors: *J. Edward de Freitas*, for appellant;  
*W. D. Dinally*. for respondent.

## G. L. FORSHAW v. COMMISSIONERS OF INCOME TAX.

GEORGE LESLIE FORSHAW, Appellant,

v.

COMMISSIONERS OF INCOME TAX. Respondents.

1945. No. 144—DEMERARA.

BEFORE LUCKHOO, C.J. (ACTING). IN CHAMBERS:

1945. DECEMBER 11; 1946. JANUARY 3, 5, 8, 12; FEBRUARY 9.

*Income tax—Return—Refusal by Commissioner to accept—Based on reasonable and sufficient grounds—Assessment made by Commissioner—Appeal against—No fresh facts adduced before judge to warrant the return—Assessment not to be disturbed—Income Tax Ordinance cap. 38, sections 40 (1) (b), 45 (2).*

*Income tax—Return—Refusal by Commissioner to accept—Capricious act on his part—Assessment made by Commissioner—Appeal against—Commissioner unable to shelter under Income Tax Ordinance, cap. 38, section 40 (1) (b).*

*Income tax—Return—Based on Profit and Loss Account—Right of Commissioner to demand—Where such account is proper form of account—Even though Cash Basis account had been accepted by Commissioner during the preceding nine years.*

If the refusal under section 40 (1) (b) of the Income Tax Ordinance, cap. 38, to accept a return was based on reasonable and sufficient grounds, and no fresh facts have under section 45 (2) been adduced before the judge to warrant the return, the judge should not disturb the assessment.

If, however, even without further evidence, the judge were to find that the Commissioners acted capriciously in refusing to accept a return, they would be unable to shelter under section 40 of the Income Tax Ordinance, cap. 38.

The appellant's income tax return for the year 1942 was prepared by him on a cash basis. The Commissioners reconstructed the return on the basis of a Profit and Loss Account. For a period of 9 years immediately preceding the year 1942, the appellant's income tax returns which were prepared on a cash basis were accepted by the Commissioners.

*Held* that the Commissioners had not waived their right to a Profit and Loss Account which, in the circumstances of this case was the proper form of account to be rendered.

APPEAL by George Leslie Forshaw from a decision of the Commissioners of Income Tax.

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

*A. V. Crane*, acting Solicitor-General, for the respondent.

*Cur. adv. vult.*

LUCKHOO, C.J. (Acting): Very careful and able arguments of great elaboration by both counsel for the appellant and the respondents were advanced when the appeal of George Leslie Forshaw, who carried on the business of a wholesale and retail dry goods merchant at lot 27 Water Street, Georgetown, against the confirmation by the Commissioners of Income Tax of the assessment of income tax No. 389 C/43 made on the 15th day of May, 1944, came on for hearing before me. The appeal related to the year of assessment, 1943, based on the income of the appellant for the year 1942.

## G. L. FORSHAW v. COMMISSIONERS OF INCOME TAX.

The appellant, in one of his grounds of appeal, alleged that the respondents were not justified in rejecting his return showing net profits from trade to be \$4,910.78 and in arbitrarily substituting the sum of \$14,000:— for the said sum and assessing his profits from trade at \$14,000:— and his total chargeable income at \$14,036:81.

As some doubt has been expressed during the arguments of counsel as to the powers and duties of the Commissioners sitting in review on their own assessment after objections were lodged by the appellant and the powers of a judge, on appeal by either party, it would be well to set them out as succinctly as possible in so far as it affects this appeal.

Sections 40 (1) (b) of the Income Tax Ordinance empowers the Commissioners to refuse to accept a return made by a taxpayer and to the best of their judgment to determine the amount of the chargeable income of the person and assess him accordingly.

The powers of the judge are to be found in Section 45 (2) and (6) whereby he is authorised to receive evidence if tendered, and if he is satisfied that the appellant was overcharged he may reduce the amount of the overcharge, or if satisfied that the appellant was undercharged, he may increase the amount of the assessment by the amount of the undercharge. In other words the judge, if the evidence warrants it, can make a fresh adjudication notwithstanding the fact that the Commissioners have determined the amount of the assessment "to the best of their judgment."

The Solicitor-General specially drew my attention to those words and submitted that they were absolute in their effect and admitted of no qualification. I cannot, however, agree with him that they bear that meaning. If that were so then Section 45 (6) would be meaningless. These words mean that if the refusal of the Commissioners to accept a return was based on reasonable and sufficient grounds and no fresh facts have been adduced before the judge to warrant it, he should not disturb the assessment. If, however, even without further evidence the judge were to find that the Commissioners acted capriciously they would be unable to shelter under that section. See *Sharp v. Wakefield* (1891) A.C. p. 173. Under the Income Tax Act of 1918 the Commissioners in England are set up as a tribunal to deal with the facts and the facts only. There is no appeal from them unless it is on a question of law, a distinction which is important to observe as under the local Ordinance the judge hearing an appeal can deal afresh with the facts of the case and make his own finding.

Having settled what I conceive to be the respective duties and powers of the Commissioners and the judge on appeal, I pass on to a point made by counsel for the respondents at the very threshold of his address, that the return of income means a return showing profits made year after year from the 1st day of January to the 31st of December in each year, and that the return contemplated by Section 35 must be a true and correct return.

There was much argument by counsel on both sides as to what system of bookkeeping should be used so that a true state of the profits for each year should be disclosed. Two systems of accounting have been put forward, that by the appellant what

is described as the Cash Basis account (receipts and payments), and the Cash and Credit or Profit and Loss account, sometimes called Income and Expenditure account, favoured by the respondents. Both accountants who gave evidence before me, Messrs. Royer and Farnum, for the appellant and the Commissioners respectively, made it clear that in certain circumstances the Cash Basis method may be used and accepted for purposes of income tax assessment but that the correct system is the Profit and Loss account.

As I shall have to determine which of the two systems of accounting should have been used by the appellant in the preparation of the return and the right of the Commissioners to refuse to accept a return based on either system and in making an arbitrary assessment for the reasons given by them, I propose to examine shortly the two systems in the light of recognised authority on the subject.

First I shall deal with the Receipts and Payments account or the Cash Basis account. This is nothing more than a classified summary of the cash book for a stated period. It deals with all cash received and paid during the period, irrespective of the year to which it relates. No attempt is made to arrive at the income for that period and no distinction is made between capital and revenue, receipts or payments. The resulting balance represents the unexpended cash in hand or at the bank and where no property or assets (other than cash) are held, as in the case of a professional man, and no liabilities exist, such an account would meet the needs of the case.

As to a Profit and Loss account or Income and Expenditure account, its sole purpose is to disclose the net profit made in a certain period. It should include the whole of the income and expenditure appertaining to the period covered, whether or not cash is actually received or paid. This account forms an integral part of the accounts kept in a system of double entry bookkeeping whereas a Receipts and Payments account or Cash Basis account forms no part of that bookkeeping system.

In my view to satisfy the provisions of the law in the furnishing of a correct return showing the true income earned in the period to which the assessment relates, the Profit and Loss account or the Income and Expenditure account should be furnished by taxpayers who like the appellant during the relevant period carry on a mercantile business, and in the exercise of their discretion under Section 40, the Commissioners were justified in refusing to accept the return prepared on a Cash Basis account.

Counsel for the appellant contends, however, that for a period of nine years immediately preceding the relevant period the appellant's returns prepared on a cash basis were accepted by the Commissioners and that they cannot now be heard to object to a form of account which avoided disputes over bad debts and simplified matters. He quotes in support of the action of the Commissioners in the past a passage from Halsbury (2nd Edn.) Val. 17, p. 30: "Once a charge is imposed the taxpayer may waive the machinery if "assessment, e.g. the taxpayer is entitled to pay tax under an agreement so "to do without insisting upon the formality of an

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“assessment. Machinery sections are not subject to especially rigorous “construction, so that the Court will not tend so to construe a machinery “section as to defeat a charge to tax.” Counsel also cited the case of *Cockerline Co. v. Commissioners of Inland Revenue* (1930) 144 L.T. at p. 96.

The above passage does not in any way assist the argument of counsel for the appellant. In Cockerline's case there was no formality of an assessment whilst in the nine previous years the appellant made his returns in form similar to Ex.A on which he was assessed. The appellant in Cockerline's case contended that there was no final determination without an assessment. In Forshaw's there were previous assessments made on Cash Basis returns.

The right to a rigorous construction of the machinery section has never been waived by the Commissioners. Even if they did they have advanced grounds for impeaching the former mode of assessment. That there may be a waiver by them of the machinery adopted for the purpose of quantifying the assessment there can be no doubt, as was established in the case of the *Attorney-General v. Avelino Aramayo and Co.* (1925) 1 K.B. 86. But it is not a waiver for all time. It is only a waiver for the particular instance. The Commissioners could never lose their right at any future time to enforce the statutory machinery.

Whilst it is true that in some instances the machinery sections need not be rigorously insisted on yet if at any time the Commissioners feel they should do so, the appellant could hardly contend that they are estopped from a rigid enforcement of the same, or that such act would be in the nature of a waiver. Such pleas in my opinion can be of no avail for the Commissioners could not by any act of theirs abrogate the law. If by reason of the change in the method of accounting and preparing the returns the appellant should suffer any loss, Government would not. I feel certain; retain that which is justly repayable to the appellant, on a readjustment of the previous returns.

With the aid of the answers given to certain queries contained in Exhibits E1 to E6 and the return lodged by the appellant, Ex.A, the Commissioners were able to construct an account (income and expenditure) as shown in Ex.B. This account, however, the Commissioners refused to act upon for the reasons which I shall state later and instead determined by a process which although termed arbitrary might indeed in certain circumstances be deemed an exercise by the Commissioners of their best judgment in determining a trader's chargeable income for the particular year under review.

The whole of the appeal turns, in my view, on the question whether or not the Commissioners should have accepted the account Ex.B as prepared by them and whether for the reasons contained in their statement and in the light of all the evidence both oral and documentary submitted before them and me I can find that they exercised the discretion which the law gives them justly and properly.

The facts disclose that the appellant carried on a wholesale and retail dry goods business at lot 27 Water Street, Georgetown,

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from the year 1939 until he sold the said business to G. L. Forshaw Ltd. in 1942. Previously he had carried on a similar kind of business in another part of the city. It would appear from his evidence that by the year 1942 he had had at least 20 years business experience. Of his stock he imported some and purchased the balance locally from large Water Street firms and he sold those goods by wholesale and retail. He was unable to say what quantities he sold from year to year by wholesale and by retail as he never kept separate books showing his wholesale and retail transactions. His business, until he closed down on the 18th day of November, 1942, was his solely and there was no reason, he states, to keep separate accounts of these sales. There is no doubt that he kept a certain number of books — bill books, petty cash book, cash book, ledgers and journals — from which it is not disputed a proper trading account could be prepared. They are proper books such as ordinarily kept by those engaged in a similar business.

At the beginning of the year 1942 and before the prices of dry goods were controlled, the appellant had a stock of the value of \$14,008.16 and during that year made purchases to the extent of \$67,641.43. The cash from sales and accounts paid in to him totalled \$100,438.31 to the time he ceased business.

For nine years prior to 1942 the appellant states he has been submitting profit and loss accounts to the Income Tax Commissioners. They were all prepared along the same lines and were accepted for the purpose of calculating the tax. Apparently when he said profit and loss he meant a cash basis account as he went on to state: "I prepared accounts all those years on a cash basis — that is cash received and amounts paid out." This form of return took no account of amounts outstanding in his favour or of debts due by him.

For the year 1941 Ex.A shows his profit to have been \$4,916.89 upon which sum he was assessed for taxation. When however he prepared his return for the year 1942 he brought in all debts due to him and not paid and charged himself with book debts owing by him to the extent of \$2,801.14 and \$7,648.48 respectively. This he did as he had closed down and sold out the stock of his business to the company. He however continued to collect the debts due to him. The respondents tendered in evidence before me during the hearing of this appeal two trading accounts for the years 1940 and 1941 which were submitted by the appellant for those years in respect of the said business and the respondents state that they were differently prepared from Ex. A as that account contained items not appearing in the two former accounts (Exhibits H1 and H2). Mr. Farnum, who gave this evidence on behalf of the Commissioners, was unable to say if those two accounts were prepared on a cash basis or not. They are on printed forms bearing a heading: "Trading and Profit and Loss Account for the year ending....." The Solicitor-General contended that if they differ from Ex.A it is because the appellant had to bring into account, after he had sold out his business, all outstanding debts due to him and debts due by him,

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Mr. Royer the appellant's witness, a certified accountant and an auditor under the Companies Ordinance, with 22 years experience, admitted that the sum of \$4,916.89 appearing in Ex.A under liabilities was wrongly taken off and should be added to the profits while the sum of \$1,191.37 should not have appeared on the credit side; in other words the difference between the two amounts represents profits which should have been added to those declared by the appellant. The appellant admitted that he prepared the account Ex.A before submitting it to Mr. Royer who was first employed by him in March 1943 just before he delivered his return. That return bears Mr. Royer's signature but he had to admit that it was incorrect with respect to the two items mentioned above, and that taking Ex.A by itself the true profits from that year's trading could not have been ascertained. Mr. Royer also agreed that Ex.B was correctly constructed from the information supplied to the Queries of the Commissioners in Exhibits E1 to E6 and that the books kept by the appellant were adequate.

In view of the several admissions by Mr. Royer it cannot be contended by counsel for the appellant with any effective force that any reliance could possibly have been placed by the Commissioners on Ex.A, and in order to determine the true profits they were compelled to construct the year's trading from the information in Exs. E1 to E6 and from the books themselves. Even this constructed account the Commissioners rejected on the grounds set out in their statement which forms part of the record of this appeal, the main points of which are.

- (1) That the appellant imported most of the merchandise sold by him and that he sold most of it by retail and kept no record from which it could be ascertained how much was sold by wholesale and how much by retail.
- (2) That in the year 1942 the appellant was able to pay off the balance of the mortgage debt due on the business premises amounting to \$12,000:— and was unable to disclose the source of this sum.
- (3) That the trading and profit and loss account submitted by the appellant disclosed a considerable understatement of profit.
- (4) That the gross profit of \$20,428:51 shown in the constructed account was, in the opinion of the Commissioners far below the reasonable amount of profit normally obtainable in 1942 in relation to the volume of business done by the appellant in that year.
- (5) That the stock in hand on the 31st December 1942 put down by the appellant as \$5,000:— was not correctly or properly valued and does not bear comparison with the stock as on 1st January, 1942.

The appellant on the other hand contests all those grounds and submits that the arbitrary assessment of \$14,000:— was not based on any proved facts.

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On a perusal of the books I find most of the merchandise was imported and that whatever was sold either by wholesale or retail was entered in the proper books of account. That no books were kept from which wholesale and retail transactions could be separately distinguished cannot affect the true profits if all such transactions were faithfully recorded in the books of the appellant.

The appellant has satisfied me from the entries in his books that he was able to liquidate the indebtedness of \$12,000:— from sales of the stock of the business which he had no intention of carrying on after a certain date.

I find that the trading account Ex. A was not correctly prepared and in this respect the Commissioners were justified in rejecting it.

It is with respect to the fourth and fifth points that most of the controversy arose in this matter. Do the facts justify the Commissioners in rejecting the reconstructed account and making an arbitrary assessment based on an estimated percentage of profits which the appellant is alleged to have made or could have made on the value of the goods sold by him during the year 1942? If they do, is the appellant still entitled to question the amount? Or is the correct issue to be determined whether or not the appellant has been overcharged? I shall examine the evidence in relation to the first question.

The appellant, it would appear, in the month of June 1942 decided to sell out the stock of his business and to close down, due to the following circumstances. He was unable he states to obtain goods readily owing to difficulties of shipping. Even the goods he received were not up to expected quality as, on account of the abnormal conditions then prevailing, they had to be ordered from photographic samples. Bales of goods arrived composed of items of unpopular colour and length. Some were sold below the maximum controlled price, a fact verified by an official of the Income Tax Office, and in some cases the appellant sold below cost, as evidenced by two vouchers produced before me. He estimated that he sold at least \$10,000:— to \$15,000:— worth of goods below cost. These statements were in no way contested by the respondents by evidence and I therefore cannot find them to be untrue.

The average profit *retail* he gives at 33 $\frac{1}{3}$  to 40%, and *wholesale* at 16 to 25%, a mean average of about 28%, which is not far different from the profit shown in Ex. B. In coming to the conclusion that there was an understatement of profits the Commissioners were of the view that they did not measure up to the profits normally obtainable from a business of the size of that carried on by the appellant but apparently they did not take into account the several factors which must have operated against such a fact.

They compared the appellant's business with twelve others ranging from \$80,000:— to \$200,000:— in volume of annual turnover but Mr. Farnum was unable to say in what proportion these amounts comprised wholesale and retail transactions. In addition, these compared firms each had the advantage of the Christmas trade while Forshaw had not. Forshaw's stock was dwindling and he eventually closed down on the 18th day of November, 1942. One of the compared firms which did \$87,000:— worth of

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business made a profit of \$26,000: less in percentage than the appellant's gross profits as shown in Ex. B.

The Commissioners were also suspicious as to the source from which the appellant was able to derive the sum of \$12,000:— to pay off the mortgage debt on his premises in 1942, but Mr. Farnum in his evidence stated that he had no reason to doubt that that amount may have been part of the sales from the appellant's business in 1942. He also admitted in cross-examination that the amounts paid towards this mortgage debt and totalling this sum of \$12,000:— were all duly entered in the cash book.

The entry of \$14,905:05 on the last page of Ex. F2 was challenged and it was at one time thought that this amount represented accumulated proceeds of cash sales not entered in any part of that exhibit, but on a careful perusal of the several pages therein it became evident that had that sum not been paid out as shown, including \$12,000:—on the mortgage, the amount in hand or cash balance would have been \$18,126:28 instead of only \$3,221:23.

All these matters now explained aroused, and rightly so, a great deal of suspicion in the minds of the Commissioners and impelled them to assess the appellant on estimated profits.

Despite the fact that the appellant's return was inaccurate and that the Commissioners were justified in rejecting it, nevertheless an appeal lies and will succeed if the appellant is able to satisfy the judge that he has been overcharged, upon an examination of the books kept by him and from which the Commissioners were able to assess the true amount of his profits.

I have examined the Daily Cash Sales Books for both the Ideal and Elite Stores for the years 1941 and 1942 and I find that the cash sales in 1942 exceeded those in 1941 by approximately \$14,000:— In the month of June 1942 when the appellant decided to sell out his stock and close his business his sales for that month were \$11,864:42 as against \$3,874:47 for the corresponding month in the previous year. On the 7th of September and on the 22nd of October following that he paid two sums of \$5,000:— each towards the mortgage debt on the premises.

It was the item Stock estimated at \$5,000:— which caused Mr. Farnum as he stated in his evidence in chief to question the propriety of using Exhibit B. It was then decided to refuse to base the tax on it in view of that fact. The Commissioners had to tax the appellant and they decided to assess him on the basis of the percentage of profits of similar businesses on the goods sold.

The Commissioners invoked the aid of this procedure. They took the opening stock in Ex. B, \$14,008.16, and added that the total purchases for the year, \$59,834:20. They deducted the estimated stock left, \$5,000:—, after comparing the percentages of profits earned by twelve similar businesses ranging in sales from \$80,000:— to \$200,000:— they used 36% as a fair measure of profit and calculated the same on \$68,842.36 which gave \$24,783:— gross profits, or a net trading profit of \$11,842:— after deducting expenses, to which must be added insurance bonus, \$1,639:49 and rent \$234:—, a total of \$13,715:— or in round figures \$14,000:—

Is the ground therefore alleged by Mr. Farnum a sound one both in fact and in law for rejecting the reconstructed account,

Ex.B? Did it really matter whether the stock was \$5,000:— or more as no profit was based on that amount in applying the percentage test? What really was the concern of the Commissioners was whether the books were properly kept from which a trading account could be prepared showing the true transactions from which the profits could be ascertained. In Ex. B, however, the value of the stock \$5,000:— transferred to Forshaw Ltd. was placed on the credit side and must have been taken into account when the gross profit was carried down at \$20,426:51.

The Solicitor-General contends that the estimated stock of \$5,000:— purchased by the new company formed by the appellant was not a true guide for purposes of revenue collection, and cited the cases of *The James Cycle Co. Ltd. v. The Commissioners of Inland Revenue* (1919) 12 Tax Cases, p. 98, and *John Marston Ltd. v. The Commissioners of Inland Revenue*, reported in the same volume at p. 106.

Counsel for the appellant cited in support of the propriety of making an estimate without actually taking stock, the authority of *Craig Ltd. v. Cowperthwaite* 13 T.C. pp. 668, 669, and emphasized the words "slump sum" appearing in that report .

In the *James Cycle* case Rowlatt, J. held, and his judgment was affirmed by the Court of Appeal, that the General Commissioners had sufficient material on which they could make a finding of fact and that it was impossible to ascertain with any approach to accuracy the profits without either actually taking stock or keeping accurate stock accounts. The learned Judge went on to state that the Commissioners found that the appellants arrived at the quarterly profits in that case by a process of reasoning and not by direct reference to ascertained facts which did not enable them (the Commissioners) readily to see the profits that were made.

"I am asked," said the learned Judge, "to say that they went wrong in "saying that, in point of law, or that they ought to have decided the other "way. It seems to me the purest question of fact imaginable upon which "they may have had accountancy assistance, which is not open to me, on a "subject upon which the Commissioners had much better means of coming "to a (right conclusion than I have."

*Marston's* case was to the same effect. These two cases can be distinguished from the present appeal where the appellant took stock at the end of each year except the last and his books written up so that one could readily ascertain with some approach the profits made at the end of the year. If the appellants in the *James Cycle* and the *Marston* cases had kept to the yearly returns to accuracy the profits made at the end of the year. If the appellants in the *James Cycle* and the *Marston* cases had kept to the yearly returns of profits and stock at the end of the yearly period the true profit and stock could have been ascertained, but selecting the end of the third quarter they calculated an average profit for each quarter assuming that the profit for the same was constant, by a process of reasoning and not by direct reference to ascertained facts. In those cases the large businesses were still being carried on as opposed to that of the appellant which was being sold out and the stock so reduced that it could easily be estimated.

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The books contained the materials for finding out the profits and as near as possible the value of the stock which would be on hand when the appellant closed down his business on the 18th November, 1942.

A judge under the Ordinance, unlike a judge under the Income Tax Act in England, rehears the whole case and can make findings of facts. I have had the advantage of hearing the evidence of Mr. Royer and Mr. Farnum, both able accountants and of examining the books and documents tendered and I do not find myself embarrassed in any way in forming a conclusion as to what reliability I can place upon the estimated value of the stock. The evidence discloses that the appellant sold his business to G. L. Forshaw Ltd. in which he holds a very substantial interest. He was paid separately for the stock the sum of \$5,000:— which he considered a fair estimate, allowing for a margin of error either way not exceeding \$200:— The goods, he said, were placed in a little room 12" by 12" in size and were not sufficient, it is clear, for the company to begin business with. As a matter of fact the company began by operating a provision business. Very little profit could have been obtained by the appellant on this sale, if the company, as they must have contemplated, were to re-sell by wholesale and or retail at a profit. Incidentally the company, on a re-sale of whatever stock they purchased, would have had to account in their returns for assessment. No revenue could therefore be lost. It was stated by one of the accountants that he would expect a man who was selling his stock to a new business to obtain the best possible price.

In view of the above circumstances and considering the amount of stock at the beginning of the year 1942 and that the appellant purchased during that year and the cash sales for that period, can I, with any approach to accuracy, find that the stock on the 18th November was about \$5,000:—? These are the figures: Stock at start \$14,008.16; purchases during the year \$67,641.43, making a total of \$81,649.59. Cash and credit sales amount to \$100,438.31 which includes 1941 accounts collected in, 1942 \$13,407.34 leaving a balance of \$87,030.97. Credit sales not paid during the year 1942 \$2,801.14 which includes \$1,324.92 from the previous year, leaving \$1,476.22 credit sales not paid for during 1942. These figures show, as will be seen in Ex. B, cash and credit sales for the year 1942 at \$88,507.19, while stock and purchases, with the necessary adjustments in Ex. B, claim a total of \$59,834.20.

Examining as I have done the whole course of business and the above figures I cannot say that the sum of \$5,000:— for stock is so unreasonable that the Commissioners should not have acted upon the same. As was said by Lord Strathclyde in the case of *Craig v. Cowperthwaite* supra, "the "seeming obscurity which surrounds the controversy in this case vanishes "upon a reasonable scrutiny of the figures" an expression which can be aptly applied in this appeal with regard to the estimated stock. Whether or not Forshaw was content to receive \$5,000:— for the stock which he handed over to the company cannot make any difference. The point is what did he receive, so that the Commissioners

could estimate the profits of the business by taking into account the actual receipts by him.

If the new company had purchased the stock of the appellant at far below the actual cost and then had revalued it at a higher price in the books for the purpose of their initial trading stock in order to avoid the payment of income tax on its re-sale by them the revenue would be defrauded either by the appellant on the one hand or on the other hand by the company in which the appellant owns a substantial interest. The company did not buy the assets of the appellant to turn them over en bloc and make their profit on the transaction as if they were an assets company or a dealer in bankrupt businesses. They bought to carry on the business of the appellant for which these assets were adapted and added to it a provision business.

Mr. Farnum himself admitted in cross-examination that with the books and exhibits "A" and "B" there is nothing to show that the appellant made more profit than what is disclosed.

As I have already stated in the early part of this judgment the Commissioners were justified in refusing to act on Ex. A not only on the ground that it was not accurate in several respects but that the Commissioners could not be bound by a former practice of avoiding consideration of bad or doubtful debts. The income disclosed must be the true income for the year and debts due, whether bad or doubtful, could always be adjusted. They must be treated as good until shown to be bad or doubtful. As long as a business is continued and income tax rates are fairly constant, it matters little to the taxpayer how this profit is computed; the allowance in future years will remedy any inequality, but when the rates begin to rise or particularly as in the present case where the appellant closed the business owned by him alone the position at once becomes unsatisfactory. He has brought in, when the rates are far higher than when he started business, an indebtedness by him of \$7,648:48 as against debts due to him \$2,801.14, a difference of \$4,847:34.

Despite the fact that no reliance could be placed on the returns submitted by the appellant, yet if by a reconstructed account his true income could be ascertained it would be the duty of any Court to give him the relief consistent with the justness of his case, as was said by Pollock, M.R. in the case of *The Stirling Trust Ltd. v. The Commissioners of Inland Revenue*, 12 T.C. at p. 882: "For my own part I am very reluctant to think that on any occasion it is possible for these questions of the liability of the subject to be affected or still less decided by the actual proceedings which have taken place in drawing up a balance sheet or a profit and loss account, because it appears to me and it has often been laid down, that the Court has to look at the substance of the matter and the Crown is not bound by a balance sheet which would be favourable to the taxpayer, nor is the taxpayer subject to be charged because he has drawn up a balance sheet or profit and loss account which imperfectly shows the immunity which he would otherwise be entitled to claim from the tax which is assessed upon him".

The reconstructed account Ex. B prepared by the Commissioners fairly sets out the substance of the matter which I accept as

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the return on which the appellant should be assessed, I think that the Commissioners were entitled to contest even what they themselves prepared in order to have their fairness and accuracy tested and if necessary corrected.

I find as a fact that the appellant has been overcharged to the extent of \$4,640:25. I order that the determination of the Commissioners be recalled and I remit this matter to them to fix the profits at which the appellant is to be assessed, having in view the judgment I now pronounce.

I have given careful consideration to the question of costs in this matter. In view of the fact that both the appellants and the Commissioners have partly succeeded I make no order in this respect.

Solicitors for respondent: *VIVIAN C. DIAS*, acting Crown Solicitor.

*Re* MOTI SAWH, deceased.

[1945 No. 506.—DEMERARA.]

BEFORE DUKE, J.(ACTING) IN CHAMBERS.

1946, FEBRUARY 12, 13.

*Practice and procedure—Proceedings commenced by way of affidavit—Injunction—Application for—Cannot be granted—Proceedings not commenced by way of writ of summons or originating summons.*

It is not competent to make an application for an injunction in a proceeding which is commenced neither by writ of summons nor by originating summons.

*Sewdin and Barron v. Edun, Griffith et al* (1942) L.R.B.G. 400, applied.

SUMMONS by Hari Persaud Sawh for an injunction restraining the Public Trustee in his capacity as administrator of the estate of Moti Sawh deceased from selling certain property of the estate. The proceedings were commenced by way of affidavit.

*E. G. Woolford*, K.C., for applicant.

*H. C. Humphrys*, K.C., for Public Trustee.

DUKE, J. (Acting): MOTI SAWH, male, B.R. No. 897 of 1897, died on the 8th January, 1945. On the 18th July, 1945 Letters of Administration of the estate of the deceased were granted by the Supreme Court to MANGRI, the widow of the deceased. By an order of the Court made on the 17th September, 1945 in proceeding No. 368 of 1945 Demerara, instituted by way of originating summons, in which SOPHIA MATILDA PEREIRA, widow, a mortgagee on property of the deceased, was plaintiff, and MANGRI, widow, as administratrix of the estate of MOTI SAWH deceased was defendant, it was ordered, with the consent of MANGRI, that the Letters of Administration issued in her favour

*Re* MOTI SAWH, DECEASED.

be revoked, and it was further ordered that Letters of Administration of the estate of MOTI SAWH deceased be granted to the Public Trustee.

RAMDHANNY SAWH and the deceased MOTI SAWH owned certain properties in common. On the 31st October 1945, RAMDHANNY SAWH authorised the Public Trustee in writing to put up for sale at public auction his undivided half share in all the properties belonging to himself and to his deceased brother MOTI SAWH situate at No. 78 Village, Corentyne Coast, Berbice and to sell the same to the highest bidder at a price not less than the amount agreed on between RAMDHANNY SAWH and the Public Trustee as the upset price for the respective properties. It was specifically stated in the authority that the properties at Crabwood Creek comprising rice mill saw mill and shingle business were not presently to be included in the sale, but would be considered for realisation in the near future.

The Public Trustee advertised in the Gazette, in accordance with the authority hereinbefore mentioned, that he would sell at public auction, as agent of RAMDHANNY SAWH and as administrator of the estate of MOTI SAWH deceased, certain property described in the advertisement. One of the assets of the estate of MOTI SAWH is a provision business, the stock of which is likely to deteriorate unless disposed of at an early date.

The sale was advertised to take place at 10 a.m. on the 23rd November, 1945 at Springlands, Corentyne, Berbice.

On the 28th November, 1945, HARRY PERSAUD SAWH instituted this matter by filing an affidavit herein. In that affidavit he stated that the Public Trustee, in pursuance of his appointment as administrator of the estate of MOTI SAWH deceased, had advertised in the Official Gazette for sale at public auction at Springlands, Corentyne, Berbice at 10 a.m. on the 28th November, 1945 the immovable property of the deceased and he continued as follows : —

5. That there is in existence a document purporting to be the Last Will and Testament of the said deceased and there is presently pending a criminal prosecution against myself (HARRY PERSAUD SAWH), BEHARRY SAWH the executor therein named and others on the ground of forgery.

6. I am advised by counsel and verily believe that in the event of such proceedings or prosecution terminating in favour of the executor of the said will, that the said will may be admitted to probate, and thereafter the appointment of the Public Trustee as administrator of the above named estate will be cancelled and annulled and any sale made by the Public Trustee may thereby be avoided.

7. By reason of the premises there is likely to arise irreparable damage to the persons entitled to the estate under the said will.

8. I am informed by counsel and verily believe that the facts as to the said will and the prosecution were never brought to the notice of the Court which made the Order appointing the Public Trustee as administrator of the abovementioned estate.

On that affidavit counsel for HARRY PERSAUD SAWH applied ex-parte in Chambers for, and obtained, an Order restraining the Public Trustee from selling at public auction or otherwise all or any of the property and effects of MOTI SAWH deceased until

*Re* MOTI SAWH, DECEASED

the hearing and determination of a summons to continue this injunction returnable for the 10th December, 1945. It will be observed that the sale at public auction was advertised to take place at Springlands, Corentyne, Berbice at 10 o'clock in the morning of the day on which the Order was applied for and made.

The next step in this matter was taken on the 4th December when HARI PERSAUD SAWH issued a summons, not being an originating summons, (it is noted, for instance that the fee paid for filing the same was the fee payable for filing a summons other than an originating summons), for an order that the sale at public auction of the property of MOTI SAWH deceased and RAMDANI SAWH advertised in the *Official Gazette* to have taken place on the 28th November, 1945, be stayed, and that the Public Trustee of British Guiana be restrained from selling the same "until the hearing and determination of this matter." RAMDANI SAWH is not one of the applicants herein.

The summons was supported by the affidavit of HARRY PERSAUD SAWH which was in terms similar to the one filed in support of the *ex parte* application, except that paragraph 8 of the affidavit was as follows:—

8. In the affidavit sworn to by me on the 27th day of November, 1945, at paragraph 8, I deposed as follows: —

"I am informed by counsel and verily believe that the facts as to the said will and the prosecution were never brought to the notice of the Court which made the Order appointing the Public Trustee as administrator of the abovementioned estate."

This statement is however erroneous as I did not understand the communication made to me by counsel. What counsel did in fact inform me was the fact that the prosecution was still pending and yet undetermined was not brought to the notice of the Court when the said Order was made.

The summons was addressed to the Public Trustee of British Guiana, and was served upon him.

It is not correct to state, as is alleged by HARRY PERSAUD SAWH in his second affidavit, that the fact that the prosecution was still pending and yet undetermined was not brought to the notice of the Court when the Order of the 17th October, 1945 was made.

In the affidavit of ANTHONY MARQUES STANISLAUS BARCELLOS filed on behalf of the plaintiff in proceedings No. 368 of 1945, Demerara, it was, *inter alia*, stated that —

7. After the death of the deceased, one BEHARRY SAWH, a brother of the deceased, began to manage the shop, the rice and saw mills in his capacity as executor under an alleged will of the deceased, which Will forms the subject matter of a criminal charge by the Police, for forgery, against the said BEHARRY SAWH and RAMDHANNY SAWH.

8. About March, 1945, after Police investigations about the alleged forged Will, BEHARRY SAWH gave up the said management and one HARRY PERSAUD SAWH a son of the deceased, and RAMDHANNY SAWH took charge.

Counsel for the Public Trustee has submitted that the Order for which HARI PERSAUD SAWH has applied cannot be made

*Re* MOTI SAWH, DECEASED.

on the summons which was filed herein on the 4th December, 1945. Counsel for the applicant has, however, submitted that by Order XI (A) of the Rules of Court, 1900, (as inserted by the Rules of Court, 1932), *ex parte* applications are to be made on affidavit; that as HARRY PERSAUD SAWH was making an *ex parte* application on the 28th November, 1945 he acted properly and correctly in filing an affidavit without at the same time filing an originating summons; that the summons filed on the 4th December 1945 was merely a summons to continue the injunction ordered by the Court on the 28th November, 1945 on the *ex parte* application; and that the Order asked for on this summons can therefore be properly made thereon.

The summons under consideration is for an injunction restraining the Public Trustee of British Guiana, who is administrator of the estate of MOTI SAWH, deceased, from selling certain property of MOTI SAWH deceased and RAMDANI SAWH "until the hearing and determination of this matter". The words "this matter" mean, and can only mean, proceeding No. 506 of 1945 Demerara. The Order asked for presupposes that a writ of summons, or an originating summons, has been filed in this proceeding, and that the summons under consideration relates to part of the relief claimed therein or is ancillary or incidental thereto. Counsel for the applicant states that an originating summons was indeed prepared, but admits that it was not filed. The words "until the hearing and determination of this matter" in the summons are meaningless, and should be treated as if they did not appear therein.

This is therefore a summons for a perpetual injunction restraining the Public Trustee of British Guiana from selling certain property. Can an injunction, which is neither interim nor interlocutory, be granted on an application made by way of the summons which I have described? In *SEWDIN and BARRON v. EDUN, GRIFFITH et al* (1942) L.R.B.G. 400, the plaintiffs did not file a writ of summons, they filed an affidavit in which they named themselves as plaintiffs and certain persons as defendants, and in which they made an *ex parte* application for an interim injunction. That application was refused by me as I was of the opinion that a writ of summons should have been filed before, or at the same time as, the application made *ex parte* by affidavit. The principle of that decision applies to interlocutory injunctions; and, unless by consent, a perpetual injunction is only granted at the trial of an action. No writ of summons was filed in this proceeding. The applicant HARI PERSAUD SAWH is not entitled to make an application for an injunction in a proceeding which is commenced neither by writ of summons nor by originating summons.

The summons filed herein on the 4th December 1945 by HARI PERSAUD SAWH must therefore be dismissed with costs to be recovered by the Public Trustee (on whom the summons was served) against the applicant. I certify that this summons is fit for counsel.

On the application of counsel for HARI PERSAUD SAWH, I grant leave to appeal, if such leave is necessary.

*Summons dismissed.*

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

W. F. LAWRENCE, P.C. 4385 v. SOOKDEO KASSIE.  
 WILTON FITZ LAWRENCE, P.C. 4385,  
 Appellant (Complainant),

v.

SOOKDEO KASSIE, Respondent (Defendant).

[1945. No. 515.—DEMERARA.]

BEFORE FULL COURT: LUCKHOO, C.J. (ACTING), BOLAND, J. and

DUKE, J. (ACTING).

1946. FEBRUARY 22.

*Motor vehicles—Notice of intended prosecution—Ingredients of offence—Not necessary to set out therein with particularity—Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22), section 44 (c).*

In a notice under section 44 (c) of the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22) of an intended prosecution, it is not necessary to set out, with particularity, all the ingredients of the offence.

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

APPEAL by the complainant Wilton Fitz Lawrence, P.C. No. 4385 from the decision of a Magistrate of the Georgetown Judicial District dismissing a complaint under section 35 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22) against the defendant Sookdeo Kassie for dangerous driving.

*A. V. Crane*, acting Solicitor-General, for the appellant.

*C. Lloyd Luckhoo*, for the respondent.

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

In this appeal the only point is whether section 44 of the Motor Vehicles and Road Traffic Ordinance, No. 22 of 1940, has been complied with. The respondent was charged on a complaint preferred by the appellant under section 35 (1) of that Ordinance for the offence of dangerous driving. No warning had been given to him under section 44 (a) at the time of the alleged offence nor was a summons served within fourteen days thereafter, but a notice signed by one L. Outram, a Superintendent of Police, was served on him by Edwin Ross, P.C. No. 4178, six days after the alleged offence. That notice is in these terms —

British Guiana Police,  
 21st March, 1945.

To: Sookdeo Kassie,  
 of Grove, E.B.D.

In accordance with section 44 (c) of the Motor Vehicles and Road Traffic Ordinance, 1940, you are hereby warned that legal proceedings will be taken against you for driving motor bus No. H5210 at East Bank Public Road, between the hours of 10 a.m. and 11 a.m. on the 17th day of March, 1945, for dangerous driving.

L. OUTRAM,  
 Superintendent of Police.

A summons was issued later at the instance of the appellant for driving motor bus No. H5210 on the 17th day of March, 1945, on the public road on the East Bank in a manner dangerous to

the public. This summons contained all the necessary particulars of the offence under section 35 (1) of the Ordinance.

At the close of the case for the prosecution counsel for the respondent made the following submissions : (1) That Exhibits A and B (the original and copy of the above notice) refer to an accident between the hours of 10 and 11 a.m. and that the evidence does not disclose exactly at what time the accident occurred; (2) that the place "East Bank public road" is too vague, and (3) that the notice is signed by a person who is not the complainant in the case. The learned Magistrate overruled these submissions but held that the notice served on the defendant (respondent in this appeal) failed to specify the nature of the alleged offence, on counsel proceeding to challenge the validity of the notice, and relied on the authority of *Bagado v. Welcome* (1942) L.R.B.G. 293, a judgment of this Court.

We cannot find any reasoning of the learned Judges in that case in support of the Magistrate's conclusion on this point. That case only dealt with the particulars of the offence contained in the complaint, the evidence led in support thereof and the conviction which was drawn up and had nothing to do with the notice which the Ordinance provides in certain circumstances as a condition precedent to prosecution for an offence under section 35.

It has been repeatedly held under the corresponding English enactment — The Road Traffic Act, 1930, S.21 — that the object of the notice is to take back the recollection of the driver of the vehicle to the facts upon which reliance is to be placed. The question here is whether the notice gave the defendant adequate information about the essential facts in the case. We are of the opinion that it did.

It is not necessary to set out in such a notice, with particularity, all the ingredients of the offence. It could never be suggested that if the warning were given at the time the offence was committed it would have been necessary for the constable to notify the driver in precise language of the offence with which he might be charged. A sufficient notice of intended prosecution is, in our view, to specify the *nature* of the alleged offence and the time and place when it was alleged to have been committed. As was said by Avory, J. in the case of *Milner v. Allen* (1933) 1 K.B., 700, during the argument of counsel for the appellant in that case, if the notice is to be as precise as the summons why should not the summons be issued in the first place? The summons should be precise. The notice is merely to keep in the offender's mind the facts which may be the substance of the charge.

The case must go back to the Magistrate with a direction to continue the hearing and to determine the issue in the case.

This appeal is allowed with costs.

*Appeal allowed.*

## ALBERT AGARD v. JOHN A. MAYCOCK.

ALBERT AGARD, Appellant (Plaintiff),

v.

JOHN A. MAYCOCK, Respondent (Defendant).

[1945. No. 420.—DEMERARA.]

BEFORE LUCKHOO. C.J. (Acting), and DUKE, J. (Acting).

1946. FEBRUARY 8, 22.

*Estoppel—Res Judicata—Rent of house—Claim for—Dismissal of—Acting in detinue for house—Dismissal of claims for rent not res judicata.*

*Detinue—Action for—Ingredients of—Demand and refusal before issue of writ.*

The dismissal of a claim for rent of a house cannot be pleaded as *res judicata* to a claim in detinue to the house.

An action in detinue does not lie where there was no demand for the goods and no refusal of the demand before writ.

*Clayton v. LeRoy* (1911) 2 K.B. 1038 C.A., and *Aksionairmoye v. Sagor* (1921) 1 KB. 478, applied.

APPEAL by the plaintiff Albert Agard from a decision of the Magistrate of the West Demerara Judicial District dismissing a claim which the plaintiff brought against the defendant John A, Maycock for delivery of a house.

*Ronald H. Luckhoo* (for *C. Lloyd Luckhoo*), for the appellant.

The respondent appeared in person.

*Cur. adv. vult.*

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

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

Two points arise for consideration in this appeal.

The first relates to the plea of *res judicata* urged with success by the solicitor for the respondent before the Magistrate.

It would appear that both the appellant and the respondent claim to have purchased the same house from the appellant's father, one Benjamin Agard, the former on the 3rd day of November, 1938, for the sum of \$80:— and the latter on the 26th day of November, 1942, for the sum of \$50:— This house is situate on lands belonging to Pln. Metermeerzorg, on the west coast of Demerara, and at all relevant times the rental for the land was either paid by Benjamin Agard himself or on his behalf.

On the 14th day of December, 1938, one Samaroo filed a suit against Benjamin Agard, also called G. Agard, for the sum of \$56.71 and obtained judgment thereon on the 25th day of January, 1939, in pursuance of which he levied execution on the said house. The appellant filed an interpleader action claiming to have purchased the house from his father the judgment debtor in which action the appellant succeeded. At that time the respondent was in occupation of the house as a tenant, the appellant alleging as *his* tenant, as would appear in the suit for rent which he filed on the 10th February, 1944. and the respondent contesting that fact and claiming to be the owner of the house by purchase from Benjamin Agard as aforesaid.

Benjamin Agard died on the 11th day of July, 1943, without having transferred the lease of the land on which the house is situate in the books of the plantation to either the appellant or the respondent. After Benjamin Agard's death the appellant applied to the respondent for payment of rent and the respondent contested the fact that he was ever a tenant of the appellant or owed any rent and asserted he was the owner of the house. The appellant then filed a suit for the sum of \$14:— for 7 months rent from the 1st July, 1943, to the 31st January, 1944, alleging in his plaint the relationship of landlord and tenant between him and the respondent. Nowhere in that plaint is there any allegation that the appellant is the owner of the house, as indeed it is not necessary in such a suit.

The respondent in his defence denied indebtedness and the existence of the relationship of landlord and tenant and further stated that his occupation for the period claimed was that of owner, having purchased the house from Benjamin Agard. The learned Magistrate who heard that claim dismissed the suit and in his reasons for decision made the following findings : That even if the deceased Benjamin Agard did sell the house to the appellant he never parted with or handed over the legal possession thereof and that at all material times he was in the legal possession as the true owner and that as such he sold the house to the respondent, leaving the appellant to his remedy for breach of contract, under the Sale of Goods Ordinance, Cap. 65. Then the learned Magistrate proceeded to make a definite finding of fact in the cause of action before him as follows: —

The Court did not believe (1) that there was any attornment, nor (2) that the plaintiff (appellant) did at any time rent the said house to the defendant (respondent). He concludes his reasons with these words: “On “the whole case the reasonable preponderance of probability of the “evidence being in favour of the defendant on both points the claim is “dismissed”.

It is incumbent to examine what findings of fact he made are necessary to support the issues involved in the cause of action before determining whether or not the plea of *res judicata* in the proceedings out of which this appeal arose is well founded.

In our view two issues were raised, the relationship of landlord and tenant and the amount due for rent, the former of which was dependent upon an agreement, and not ownership, because such relationship could subsist without ownership in the landlord, and the latter on the rental arranged for in the former. The statement in the defence of the respondent that he was the owner was not necessarily involved in the cause of action of the appellant. It was something on which the respondent sought to rely in derogation of the alleged agreement, and it was not a fact which it was necessary for the learned Magistrate to decide in the action for rent.

Before a plea of *res judicata* can succeed there must be a judicial declaration of the tribunal whose decision it is intended to set up as *res judicata*. The formal record or order of dismissal adjudged that the claim be dismissed, the plaintiff having failed to make proof of his claim to the satisfaction of the Court. There

## ALBERT AGARD v. JOHN A. MAYCOCK.

is no express finding or recital of fact as to the ownership of the house and none in our opinion was necessary for the adjudication.

The judicial pronouncement usually resorted to for a correct statement of the rule is the opinion of the judges delivered to the House of Lords in the *Duchess of Kingston's case*, although for precision and lucidity the judgment of the Court of Queen's Bench, by Cockburn, C.J., in the case of *R. v. Inhabitants of Hartington Middle Quarter Township* (1855) 4 E & B. 780 at p.p. 794 to 797, is a preferable exposition and guide, where it was laid down that "the judgment" relied upon as a *res judicata* "concludes not merely as to the point actually decided, *but as to a matter which it was necessary to decide*, and which was actually decided, as the groundwork of the decision itself, though not directly the point at issue", or as it is expressed in another passage, "is conclusive evidence not merely of the facts directly decided, but of those facts which are necessary steps to the decision" in the sense that they are so cardinal to it that, *without them it Cannot stand.*" It is recognised that unless they are necessary steps the rule fails and they are collateral facts.

We are of the opinion and so hold that the decision of the learned Magistrate, and he himself so concluded in the latter part of his reasons, could have been legitimately or rationally pronounced without at the same time determining the question of ownership of the house.

The burden is on the party setting up the estoppel of alleging and establishing not only the identity of the subject matter in a physical sense and in a juridical sense, but that the case put forward by the party sought to be estopped as that which was the subject of the judicial decision in the former proceedings raises the identical question of law or issue of fact which it was necessary to decide as we have hereinbefore stated. As was said by Brett, M.R. in *Brunsdon v. Humphrey* (1884) 14 Q.B.D. 141 C.A. at p. 146 "Two actions may be brought in respect of the same facts where "these facts give rise to two distinct causes of action."

The learned Magistrate from whose decision this appeal has been brought fell into error when he held that because the proceedings in the former action related to the same house in dispute and the Magistrate in those proceedings found as a fact that there was a sale of the said house by the appellant's father to the respondent, the plea of *res judicata* prevailed, without addressing his mind to the different cause of action in each case and whether it was necessary in the former proceedings to decide the question of ownership. He himself does not make any findings of fact on the evidence before him as to ownership.

The second point for determination is whether, assuming that the appellant was the owner of the house, there was a cause of action in detinue at the date of the filing of the plaint in the magistrate's court. In his defence the respondent specifically denied that the appellant had, at any time prior to the filing of the plaint, demanded delivery from him of the house. It is, however, clear from the evidence that the respondent claims to be the owner of the house. The magistrate did not accept the evidence of the appellant that, prior to filing the plaint, he made a demand on the

respondent for delivery of the house; and we cannot say that the learned magistrate erred in that respect. Counsel for the appellant, has, however, submitted that as the respondent is in adverse possession of the house, it was not necessary for the appellant to make such demand. He referred the Court to *RAMOTHARSING v. GONSALVES*, Appellate Jurisdiction, 18th October, 1901, in which *BOVELL*, Chief Justice, said: —

It appears from the proceedings before the magistrate that the appellant did not contest his adverse detention of the animal claimed but sought to justify it on the ground that the cow was his own property having been purchased by him from one Gunga. Under these circumstances the fact that the respondent did not prove that a demand for delivery of the cow was made on the appellant cannot now be made a ground of objection.

When that appeal was determined, the common law of the Colony in relation to delicts (torts) was Roman-Dutch law, and not English law, and consequently the judgment does not necessarily express what is the English common law.

In *CLAYTON v. Le ROY* (1911) 2 K.B. 1048, C.A., *FLETCHER MOULTON, L.J.*, said:

The question as to the exact moment at which a cause of action arises may seem a very technical one, but in my opinion it is a point of substance in this case, and for the following reason. In an action of detinue, as in the other actions of tort, the Statute of Limitations runs from the time when the cause of action arose; consequently, if nothing has happened to give rise to an action of detinue, there is no period of time which can operate to extinguish the title of the real owner. He may have been deprived of control over his chattel for a hundred years, but it still remains his property. If there is a demand by the owner from the person in possession of the chattel and a refusal on the part of the latter to give it up, then in six years the remedy of the owner is barred; it is therefore very important for the owner that the law should lay down the principle that some clear act of that kind is required to constitute a cause of action in detinue. It would be mulcting the real owner of his rights, if the law did not thus insist upon some definite act of deliberate withholding as being necessary preliminaries to the arising of this cause of action. If something less were sufficient, the Statute of Limitations might commence to run against the true owner without his knowledge.

In *AKSIONAIRNOYE v. SAGOR* (1921) 1 K.B. 478 *ROCHE, J.* referred to the judgment of the Court of Appeal in *CLAYTON v. Le ROY* as authority for the proposition of law, which he said was beyond dispute, that an action in detinue would not lie where there was no demand for the goods and no refusal of the demand before writ.

This Court is bound by the judgment of the Court of Appeal.

The question remains what Order should be made on this appeal? The learned magistrate dismissed the appellant's claim,

## ALBERT AGARD v. JOHN A. MAYCOCK.

and thereby barred for ever the right of the appellant to file another plaint in detinue for the house. We have already pointed out that the learned Magistrate did not, in his reasons of decision, state what were his findings of fact on the evidence before him as to the ownership of the house. If those findings are adverse to the appellant, he has been unable to appeal against them, as he does not know what they are. The decision dismissing the case must therefore be set aside. The respondent is, however, entitled to a judgment of non-suit, as there was no demand for the house and no refusal of the demand before the plaint in the action was filed. The appellant had to come to this Court in order to preserve his right to file another claim in detinue against the respondent, and to obtain a decision from the magistrate thereon: he is therefore entitled to his costs of this appeal. The respondent is entitled to the fee of his solicitor and to the costs awarded to him in the court below.

The appeal is allowed with costs, and the decision of the magistrate varied by substituting for the words "Case dismissed" the words "Case non-suited".

*Appeal allowed.*

SEQUAR, Appellant (Defendant),

v.

SAGNA, Respondent (Plaintiff).

[1945. No. 491.—DEMERARA. ]

BEFORE FULL COURT: LUCKHOO, C.J. (Acting), BOLAND, J.,

and DUKE, J. (Acting).

1946. FEBRUARY 27.

*Damages—Trespass to land—Growing rice—By cows of different owners—Each owner liable for damage caused by his cows and no more—Apportionment of total damage—Where cows have acted in concert—Each owner liable for total damage.*

Where cows belonging to more than one person stray on to a rice field and damage rice growing thereon, then, unless there is evidence that the cows belonging to the respective owners had so acted together that it could be said that the cows of one owner had caused the whole damage and the cows of another owner had caused the whole damage, each owner is liable for the damage done by his cows and no more.

In the absence of evidence to the contrary, the amount of growing rice consumed by each of the cows present together may reasonably be presumed to have been the same for all the cows.

Where the owners of cows, in pursuance of a common purpose, drive their respective cows on to a ricefield, the cows will be acting in concert, and each owner will be liable for the whole damage done by all the cows.

*Arneil v. Patterson* (1931) A.C. 564, 565, applied.

APPEAL by the defendant Sequar from the decision of the Magistrate of the Courantyne Judicial District awarding \$60

## SEQUAR v. SAGNA

damages to the plaintiff Sagna in an action against Sequar and Budhram in his capacity as the executor under the last will and testament of Deokalia deceased.

*Mungal Singh*, for the appellant.

There was no appearance by or on behalf of the respondent.

The Judgment of the Court was delivered by Duke, J. (Acting) as follows: —

The plaintiff SAGNA, alleging that on the 23rd, 24th and 25th days of October 1944 the cattle of the defendant SEQUAR and the cattle of the defendant BUDHRAM in his capacity as the executor under the last will and testament of DEOKALIA deceased trespassed upon the rice field of the plaintiff and there ate trampled and destroyed a quantity of his ripe bearing rice, brought a claim in the Magistrate's Court of the Courantyne Judicial District against the said defendants claiming the sum of \$100 as damages. The learned Magistrate of the said District found that on the days as aforesaid 34 cows, 14 belonging to the defendant SEQUAR and 20 belonging to the estate of DEOKALIA deceased and BUDHRAM, trespassed upon, ate and damaged the plaintiff's rice field, and that the plaintiff thereby suffered pecuniary loss to the extent of \$60. On these findings the Magistrate entered judgment against both defendants for the sum of \$60 with costs and fee to counsel. From that judgment the defendant SEQUAR has appealed to this Court.

Counsel for the appellant has submitted, firstly, that at the close of the case for the plaintiff there was no evidence that the defendant SEQUAR was the owner of any of the cows which damaged the plaintiff's rice field and that the plaintiff's claim against the defendant SEQUAR should be non-suited; secondly, that there was no evidence that the cows of the defendant SEQUAR and the cows of the aforesaid defendant BUDHRAM acted in concert and that the defendant SEQUAR was therefore only liable for the damage actually caused by her cows and was not liable for the total damage caused by the cows of the two defendants; and, thirdly, that there was no satisfactory evidence of the amount of the damage, if any, done to the plaintiff's rice field by the cows of the two defendants on the 23rd, 24th and 25th days of October 1944 and that the plaintiff's claim should therefore be non-suited.

At the close of the case for the plaintiff there was evidence

ZS

that 14 cows branded — trespassed upon the rice field of the

1

plaintiff and ate rice growing thereon, but there was not, at that stage of the proceedings, any evidence that the cattle so branded were the property of the defendant SEQUAR. This missing link was, however, supplied by the husband of the defendant SEQUAR when he gave evidence on her behalf. The defendant SEQUAR could not, at the close of her case, take the objection, and she cannot now take the objection, that there was no evidence, at the close of the plaintiff's case, that she owned the cattle which were branded ZS. Counsel's first submission therefore fails,

## SEQUAR v. SAGNA

With respect to counsel's second submission, there was no evidence that cows of the defendant SEQUAR and cows of the defendant BUDHRAM acted in concert. When cows trespass on a rice field and trample and eat the rice growing therein, they do not necessarily act in concert with one another: each cow acts in accordance with its individual nature in trampling the rice field and in seeking and obtaining for itself a meal of growing rice. If, however, for instance, the owners of cattle, in pursuance of a common purpose, drive their respective cattle on to a rice field, then, of course, the cattle will be acting in concert. In ARNEIL v. PATTERSON (1931) A.C. 564,565 it was expressly admitted that the animals of the defendants were acting in concert. There was no evidence in the case now under appeal upon which the learned Magistrate could properly find that cattle of the defendant SEQUAR and cattle of the defendant BUDHRAM had so acted together that it could be said that the cattle of the defendant SEQUAR had caused the whole damage, and that the cattle of the defendant BUDHRAM had caused the whole damage. The Magistrate therefore erred in entering judgment against each defendant in respect of the total amount of the damage which he found to have been caused by cattle of the two defendants. In the absence of evidence to the contrary, the amount of growing rice consumed by each of the cows present together may reasonably be presumed to have been the same for all the cows, and the total damage should have been apportioned accordingly between the two defendants, regard being had to the number of cows respectively owned by the defendants.

With respect to the third submission of counsel for the appellant, there was evidence that on the 29th October 1944 an assessment was made of certain damage to the plaintiff's rice field, but there is nothing on the record to show that such damage, or any specified part thereof, was caused by the cows of the defendants. There was no evidence as to what was the total damage, if any, caused by the cows of the two defendants on the 23rd, 24th and 25th days of October 1944. Such being the case, there is no material upon which we can apportion, as between the 14 cows of the defendant SEQUAR and the 20 cows of the defendant BUDHRAM, the total damage caused by those cows. The claim of the plaintiff should have been non-suited by the learned Magistrate.

The appeal is allowed with costs. The decision of the Magistrate is set aside, and there is substituted therefor judgment of non-suit with costs and fee to counsel.

*Appeal allowed.*

ALVIN ROBERT LASHLEY,  
 Plaintiff,  
 v.  
 OWNERS OF "M.V. TURRET CAPE",  
 Defendants.

1945. No. 90 — DEMERARA.

BEFORE LUCKHOO, C.J. (Acting):

1945. DECEMBER 18, 19; 1946. JANUARY 7.

*Master and servant—Seaman—Wages of—Meaning of—Merchant Shipping Act, 1894.*

*Words—"Wages"—Merchant Shipping Act, 1894.*

Under the Merchant Shipping Act, 1894, the expression "wages" includes not only what a seaman gets as a wage, but what he obtains in the course of his service as recompense for the execution of his duty.

*Shelford v. Mosey* (1917) 1 K.B. 158, applied.

ACTION by the plaintiff Alvin Robert Lashley against the motor vessel "Turret Cape" claiming the sum of \$625.73 as war bonus and cost of living bonus.

*J. Carter*, for plaintiff.

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

*Cur. adv. vult.*

LUCKHOO, C.J. (Acting): The "Turret Cape" against the owners of which the plaintiff claims the sum of \$625.73, being the amount alleged to be due by them to him (a) as war bonus between the 28th day of April, 1944, and the 4th day of February, 1945, and (b) as cost of living bonus for the like period, is a motor vessel of 2079 gross registered tonnage with a port of registry at Montreal, in the Dominion of Canada.

At all material times the "Turret Cape" was employed in dredging the Demerara River, such operations extending to the Bar outside of the limits of the mouth of the river.

It would appear from the ship's articles, a document headed "Agreement and List of the Crew" (Exhibit A) that on the 4th day of December, 1943, one Thomas Quinn, master of the said motor vessel, on behalf of the owners, entered into an agreement at New York with certain A.B. seamen and others from St. Vincent, Barbados, and British Guiana, fifteen all told, to serve on board the said vessel in the several capacities expressed against

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their respective names on a voyage from New York to any port or ports between latitude 75 degrees north and 60 south to and fro as required for a period not exceeding 12 months, and to end at such port in British Guiana as may be required by the master.

On the face of that agreement there are two affixures — one which states that the vessel may be employed in river dredging, and the other that if the agreement should terminate at a port outside of British Guiana the members of the crew on this section of the agreement shall be entitled to repatriation to Georgetown, British Guiana.

The "Turret Cape" arrived in the port of Georgetown some time in the month of February, 1944, and undertook the work of dredging the Demerara River.

The agreement is a document which can be executed in seventeen pages, the eighteenth sets out instructions to masters on several matters. Page 2 in its original state is a blank page, the only thing appearing on it being the figure "2" and the words "Additional clauses." On this page there are affixed three documents, one of which hardly directly concerns the matter in issue. It is an extension of the duration of the agreement for 6 months from the 4th day of December, 1944, and is signed by one R. Mc David, for the Harbour and Shipping Master of this Colony. The other two are important as it is upon one of them that the plaintiff bases his claim to payment of the above-mentioned sum while the other reflects on the terms of the contract entered into by the Chief Officer Dodd, on behalf of the defendants and the plaintiff.

The former of the last two documents deals, among other things, with the payment of war bonus and cost of living bonus. With respect thereto this is how the document reads — "War "bonus will be paid to all ratings \$44.50 per month, except the "master and chief engineer to receive 25% of basic rate of pay. "Cost of living bonus will be paid to all members of the crew at "prevailing rates." It must be taken for granted that this document was attached to blank page 2 some time before the latter document for on the 24th day of February, 1944, we find this latter document affixed over it. It reads —

"c/o Sprostons Ltd.,  
Georgetown,  
24.2.44.

"We the undersigned agree to the wages as laid down against "our respective names and for the ship's articles to be endorsed "accordingly". Then follow the names, ratings, wages and the signatures of the men. At the bottom there are typed the words "All bonuses are included in the above wages", and the signature of Thomas Quinn, master, appears below.

Mr. McDavid in his evidence makes it clear that he placed the Harbour Master's stamp on it, signed and dated it and himself affixed it to the articles on the 29th day of February, 1944. Of the 15 men who signed the agreement in New York on the 4th December, 1943, 13 of them signed that document and of the other 2 one Thomas Malcolm McLean left the ship at New York on the 6th of December, 1943, on account of illness and the other, C. A.

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Swan, left the ship at Georgetown on the 24th February, 1944, (Ex. A. p.p. 6, 7).

It would seem reasonable to conclude from these two documents that these 13 men had agreed, even if they could have claimed war bonus and cost of living bonus when they signed the agreement in New York that henceforth they were to be paid the amounts set opposite their names as their wages which included all bonuses. It may be that as the "Turret Cape" was to undertake work in river dredging it was no longer necessary to pay these men separately a basic wage, war bonus and cost of living bonus but to fix a commuted sum according to the work they did on board the ship, the rate of wage per month being fixed, in the case of A.B. seamen, at \$58.05, British Guiana currency.

Mr. Carter, learned counsel for the plaintiff, admitted that the men who signed the latter of the two documents mentioned above were bound by it and in my view there is no escape from, that position. He urges, however, that the plaintiff was not bound by that document whether it was affixed to page 2 as deposed by Mr. McDavid or not, but that the obligation of the defendants arose by reason of the fact that the former of the two documents was part of the ship's articles and bound them accordingly. This contention which is not without some merit I shall deal with later.

To resume the course of events, the "Turret Cape" began dredging operations some time in February or early in March, 1944, and additional men were taken on from time to time to perform various duties on board including the plaintiff and one Harry Bunbury, an A.B. seaman who was called as a witness on behalf of the plaintiff. Under the head "Particulars of Engagement" on pages 6, 7, 8 and 9 of the agreement, sub-head II, amount of wages per week or calendar month, there are set out the amounts payable to each rating, including those who were engaged in New York and who subsequently signed the document for a commuted sum. For those classed as A.B. seamen the rate of wages per month is \$58.05. The plaintiff and Bunbury who were classed as A.B. seamen and performed similar work were put down for \$58.05 per month.

The plaintiff alleges by the particulars of his claim and in his testimony before the Court that his employment as an A.B. seaman was on terms unlike those of the 13 contractees who were originally signed on at New York and that in company with Bunbury and one Sambo, on a recommendation given to him by Mr. McDavid, he interviewed Mr. Dodd, then Chief Officer on board the ship to whom Capt. Quinn the master had deputed the duty of employing men, and that Mr. Dodd, with the ship's articles before him, told the plaintiff that he would receive a basic wage of \$58.05, Canadian currency, per month, a war bonus of \$53.40 per month and a cost of living bonus of \$14.30 per month, all Canadian currency. Those wages were to be the same for Bunbury. They were to work 8 hours per day and to receive 30 cents per hour overtime. The period of service was fixed at one year. He further stated that Mr. Dodd told him that he would be given an advance at the end of each month for the mainten-

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ance of his family and that the balance would be given him when he signed off. The plaintiff alleges that it was under those circumstances and on those conditions he signed the articles. The plaintiff's signature appears on page 8 and the amount of his wages is set out in Col. 11 as \$58.05.

Plaintiff relies on an oral agreement in support of his claim for on perusal of the document affixed to page 2 of the articles I find no amount stipulated as to basic wage per month nor is any amount indicated as to cost of living bonus. Plaintiff's evidence is that all the figures mentioned by Mr. Dodd were Canadian currency. In the document attached the war bonus is given as \$44.50 per month. Mr. Dodd could not have read those 3 sets of figures from the articles for they are not there. The only conclusion I can come to is that the agreement as to terms was made orally. Bunbury supported the plaintiff as to the 3 different amounts — all Canadian currency — the terms of service and the matter of the making of advances. He said it was the same in his case. Plaintiff denies the existence of the document which was signed by the 13 men on the 28th day of April. He however relies on what must have been under that document.

Bunbury said there was no document affixed to page 2 — at least in so far as the articles he saw posted up in the mess hall. What he saw were plain articles — nothing about wages. To quote his evidence in chief: "Mr. Dodd then brought out the ship's articles and placed same on the table". In another part of his examination-in-chief he said "I am seeing the attached document for the first time today".

The case for the defendants is that the agreement was written, as required by section 114 of the Merchant Shipping Act, 1894, (an agreement with the crew shall be in the form approved by the Board of Trade and shall be dated at the time of the first signature thereof and shall be signed by the master before a seaman signs his name); that Dodd told the plaintiff he would be paid one amount of \$58.05 per month and nothing else except in the case of overtime when he would be paid 30 cents per hour and that the plaintiff agreed and signed the articles on page 8 with the amount of \$58.05 opposite to his name in Col. 11 on page 9.

Marcel Bouille who at the time of the arrangement with the plaintiff was the second officer on the "Turret Cape" and later on the 1st October, 1944, succeeded Dodd as Chief Officer, deposed in the *de bene esse* examination before a special examiner appointed by commission in the action and dated the 26th day of April, 1945, which the plaintiff, although informed of the same, did not attend, that he was present when the then Chief Officer Dodd told the plaintiff the scale of wages. This was done before he signed the articles. Dodd told him that the scale of wages would be \$58.05 while the dredging was going on and that that was inclusive of everything. It was unfortunate that Chief Officer Dodd was not available to give evidence at the time the examination was conducted by the special Examiner or before me and in determining the question as to what were the terms of the agreement under which the plaintiff was employed on

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the 28th day of April, 1944, my task has been rendered somewhat difficult. It becomes necessary to dredge the evidence in order to find a channel by which I could arrive at the beacon of truth. I have also to examine the conduct of the respective parties during the currency of the agreement and the general circumstances of the case.

If the plaintiff were to rely upon the articles simpliciter would he not be estopped by the plain entries in Exhibit A, pages 8 and 9 thereof? If he does not, must he not rely on an oral agreement supported by the evidence of Bunbury on that point? Let me first deal with the articles simpliciter.

The printed articles, as we see it, have a blank page 2. The particulars of engagement are set out on pages 6 to 15 inclusive. Column 11 on pages 7, 9, 11, 13 and 15 shows the amount of wages payable to each person and that would be the whole agreement as shown in the printed articles. There may be special clauses attached to page 2 but in this case as I pointed out the terms and figures (three sets) of the agreement which the plaintiff alleges was made by him, are not borne out by the entries so that the plaintiff's contract with the ship's owners, through the Chief Officer, could only subsist on an oral agreement. Such an agreement although oral and not in accordance with section 114 quoted above is enforceable by a seaman against the master or owners, in other words, although the agreement is not in writing, it would nevertheless be binding and provable in favour of the seaman.

Let us therefore examine the evidence to see wherein lies the balance of probability. When the plaintiff was engaged by the defendants the ship was engaged in dredging the river. There was no intention at that time that it should run the high seas. The 13 men above referred to, many of them A.B. seamen, elected, however their previous contract with the defendants might have been construed in a court of law, to accept a monthly wage of \$58.05 with an overtime allowance of 30 cents per hour, plus victualling allowance. It became necessary from time to time to engage additional crew and on the 28th of April, 1944, the plaintiff and Bunbury, armed with a recommendation, boarded the "Turret Cape" and the plaintiff entered into the agreement now under discussion.

Mr. Carter urges that it was a simple case of contract, that Dodd read from the articles and specifically mentioned among other things the two terms upon which plaintiff has founded his claim for payment. Although plaintiff was to perform the same kind of work on the same ship, operating within territorial waters he was to receive those extra considerations, amounting to \$67.70 per month which the owners of the ship must have had clearly in mind when they diminished, if they did, the wages of the 13 men by the document of the 24th of February, 1944. Nevertheless Mr. Carter contends that those special considerations were given to the Canadian personnel and that Dodd may have mentioned those special terms, confined to the Canadians, to induce both the plaintiff and Bunbury to join the ship. He further contends that war bonus and cost of living bonus are fixed

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sums in the ship's articles due monthly but not payable monthly. I shall at a later stage examine these contentions in the light of the conduct of both the plaintiff and Bunbury and the time when plaintiff demanded the balance which he alleges is payable to him by the defendants.

Learned counsel for the defendants, on the other hand, contends that it would not only be unreasonable but highly improbable that after a little over two months the defendants would employ two more A.B. seamen at a monthly wage of more than double the amount paid to the others on the same ship. This, he states, would not only encourage but bring about dissension and lead to mutiny, and that the Chief Officer being well acquainted with the document of the 24th of February would be the last person to involve the owners in extra expenditure for one year to the tune of \$1,800. The plaintiff's conduct, counsel further submitted, negatived any such agreement.

Let us consider the acts and conduct of each contracting party. When plaintiff entered into service on the 28th day of April, 1944, Capt. Thomas Quinn was master of the "Turret Cape". As such master he was obliged to keep a book called the Master's Book in compliance with Sections 185 and 186 of the Canadian Shipping Act, 1934, which corresponds to section 132 of the Merchant Shipping Act, 1894. This book, with seamen's accounts of wages, he did keep, (Ex. B). On the outside page of this book there is this note: "This book is issued by the Department of Transport to enable the "master of a ship to keep in a simple and convenient form a record of the "wages (and other earnings) of each member of his crew, and of any "deductions to be made therefrom, and also readily to prepare the account "of wages required by Section 185 of the Canadian Shipping Act, 1934, to "be delivered before a seaman is paid off or discharged". On each page of this book there is a duplication of the printed matter separated by a perforated line right down the page which can easily be detached. With the exception of the seaman's signature the detachable account of wages is practically a copy of the corresponding page in the master's book.

If during the progress of a voyage the master is removed or superseded or for any other reason quits the ship and is succeeded in the command by some other person he must deliver this book to his successor as required by section 278 of the Canada Shipping Act, 1934, which corresponds to section 158 of the English Act. Capt. Quinn was succeeded by Capt. Matheson but before Capt. Quinn left the ship on the 30th June, 1944, he made up the account of the plaintiff which showed a final balance in plaintiff's favour of \$29.23. There is no evidence that the plaintiff\* challenged the correctness of the account. In fact he said he did not as the war bonus and the cost of living bonus were to be calculated and paid to him at the end of his service or at any time before on his leaving the ship.

On the 15th day of December, 1944, he was paid another such account when Capt. Matheson was succeeded by Capt. Young. There again the document (Ex. C) showed a final balance, this time of \$34.59. It was after Capt. Young took over and on the 5th

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day of February, 1945, when his account of wages was handed to him prior to his discharge that he raised the question with Capt. Young of the war bonus and cost of living bonus which he stated became payable to him. On each of the account of wages forms in the master's book and that part which is given off to the seaman there is a head "Earnings" and below the entry "Overtime" there is the word "Extras". On not one of the forms given off to the plaintiff or the corresponding forms in the master's book are there any entries against the word "Extras". As indicated before the master's book is to keep in a simple and convenient form, a record of the wages *and other earnings* of each member of the crew and of any deductions to be made therefrom. War bonus and cost of living bonus are undoubtedly earnings or emoluments in the sense that they are both earned during the currency of the month when the seaman performs his work.

There is no evidence that any other book is kept or is required by law to be kept in this respect. On the 5th day of February, 1945, plaintiff states he received his counter wages slip, meaning the detached part of the account and a notice that he would be paid off and be discharged. He approached Capt. Young and told him he had come to "argue" about his war bonus and cost of living bonus and that Capt. Young asked "Isn't your money right?" (referring to the account) and told him to go away and not argue. Plaintiff then said he must argue and that it was his legal right. Just then one Eric Caleb, an oiler on the same ship, came up and according to the plaintiff began to make the same demand. Plaintiff said he attended on the following day at the Harbour Master's office at the request of Capt. Young at 10 o'clock but that he didn't see Capt. Young and thereafter he consulted counsel with whom he returned to the Harbour Master's office when for the first time he saw the document signed by the 13 men. It was then tucked in the articles and not attached to them.

The defendants in accordance with the provisions of the Act kept a master's book and as one captain succeeded another the account of each seaman prepared from time to time was detached and handed to the seaman. This account in each case showed a final balance. In two of the three cases plaintiff signed such account as correct. The evidence of Capt. Young taken by the special examiner is to the effect that bonus is principally "paid for the extra hazards incurred by seamen due to enemy action and the "Turret Cape" operated in the Demerara River and up to the Georgetown River bar. In some cases war bonus and cost of living bonus are paid to personnel of Canadian ships when absent from Canada and employed abroad on a Canadian ship. Capt. Young further states that he was present when plaintiff was paid the amount in Ex. C on the 15th December, 1944, at the time when he was taking over command of the ship and that nothing was said by plaintiff as to any claim for cost of living or war bonus. It would appear from the evidence of Capt. Young that some time after he assumed command rumours reached him that some of the men felt that they were entitled to these allowances and that he spoke to them with the intention of clarifying matters for the good of the ship or getting rid of the malcontents. He

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told them that they were not entitled to these allowances because of their agreement.

One Caleb was signed on as an oiler by Marcel Bouille when he became Chief Officer and according to Bouille's evidence he made it quite clear to Caleb that his wages would be \$67.19 per month and referred him to the agreement of the 24th day of February, 1944. It was this very Caleb who on several occasions approached Capt. Young and was in company with the plaintiff and his counsel when they visited the Harbour Master's office on the 6th of February, 1945.

After a very careful examination of the acts and conduct of the plaintiff and those representing the defendants and of the documentary exhibits in this case I am driven to the conclusion, despite my inclination to assist the plaintiff, a member of a class of person whom Lord Stowell in the case of the "Minerva" in the year 1825 strained his equitable power to a length hardly warrantable in his endeavour to save them from their own agreements, that the contract between the plaintiff and the defendants is not as the plaintiff states. I have given my mind the greatest latitude in an endeavour to reach a degree of probability in favour of the plaintiff's story but without success.

I find as a fact that plaintiff was specifically told by Mr. Dodd that his wages would be \$53.05 per month while the dredging was going on and that that amount was inclusive of everything. With the special agreement of the 24th February, 1944, before him and knowing the circumstances in which that agreement was reduced to writing I cannot believe that Chief Officer Dodd would have made the arrangement the plaintiff alleges he did. It was not necessary to induce the plaintiff or Bunbury by false promises in order to obtain their services, the agreement or ship's articles showing that several A.B. seamen were signed on after the 28th of April at the rate of \$58.05 per month.

It is correct to say, and I agree with Mr. Carter, that the special agreement or any agreement cannot bind the plaintiff if he did not affix his signature thereto, but there is nothing to prevent persons using the terms of an agreement to which they were not parties to found their own agreement and that is what I find happened in this case. There is no doubt that the Canadian crew composed of engineers, officers and captain, whose homes and families are in Canada were given the special allowances claimed by the plaintiff. As was said by Capt. Young in some cases war bonus and cost of living bonus were paid to personnel of Canadian ships when absent from Canada and employed abroad on a Canadian ship and while it is true that Capt. Young said in another part of his depositions that war bonus is principally paid for extra hazards incurred by seamen due to enemy action, yet I cannot find anywhere in the evidence that plaintiff ran any special risks on board the "Turret Cape" when dredging the river and its approaches, nor was there any agreement to pay the allowances as I have already found as a fact.

Section 120 (1) of the Merchant Shipping Act provides that the master shall at the commencement of every voyage or engage-

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ment cause a legible copy of the agreement with the crew (omitting the signatures) to be posted up in some part of the ship which is accessible to the crew. This was done for Bunbury stated that in the mess hall he saw plain articles but nothing about wages. He personally did not claim war bonus and cost of living during the time the vessel was engaged in dredging. He received \$37.69 as his final wages on the 16th day of April, 1945, under the old articles. It seems to be incredible that the plaintiff would not have drawn attention at an earlier stage than when he said he did to the incorrectness of his account and final balance. According to Capt. Young within the first few days after he took command he spoke to all members of the crew including plaintiff and told them that the wages they were getting as shown against their names in the articles were all inclusive and that there would be nothing more.

How the subsequent request originated it is not difficult to find from the evidence. One Davey who was an indentured apprentice and not on the ship's articles was paid war bonus, cost of living bonus and overtime as were the Canadian crew. Davey who is a Guianese went up to Canada as a cadet and he has since been made an officer. The barometer of discontent began to rise when some of the men felt that they were also entitled to these allowances and so the plaintiff, when he was given notice on the 5th February, told Capt. Young that he had come to "argue" about war bonus and cost of living bonus.

In the early part of this judgment I referred to the submission of Mr. Carter that the defendants became liable to pay to the plaintiff the amount sued for on the ground that one of the documents affixed to page 2 of the articles became part of the ship's articles and therefore entitled the plaintiff to claim what was stated therein. Apart from my findings of fact as to the terms of the agreement entered into between the plaintiff and the defendants how is that document to be regarded in computing what were the wages per month of the seamen? Are war bonus or war risk as it is sometimes called and cost of living bonus to be considered distinct from wages? If they are something apart from "wages" then there might be some force in Mr. Carter's submission. If however they are to be treated as wages then it is clear that the plaintiff cannot recover more than the amount of wages recorded in the ship's articles when he signed the same.

As was said by Lord Reading, L.C.J. in the case of *Shelford v. Mosey* (1917) 1 K.B. at p. 158 "That is a question of importance "because in this time of war, in the majority of cases, masters "of ships make some agreement to pay extra or higher wages than "were usually paid before the war or that they will pay a bonus." The facts of this instant case show that the wages of the fifteen contractees in New York at the time when they signed the agreement were fixed at a certain sum. Whatever bonus or bonuses they were to receive were treated in the ship's articles as wages. In the very case of *Shelford v. Mosey* Lord Reading said in another part of his judgment: "...bonus cannot be separated from the wages". It seems to me when the term "wages" is used in the

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articles it must include bonus, if any, and that bonus cannot be regarded as something apart from wages.

It will be observed that when the "Turret Cape" reached these shores and was engaged in dredging, the wages of 13 of the 15 who signed the articles at New York were revised, in some cases they were diminished and in others increased, according to the nature of the duties performed by them, and in the document above referred to the statement appears "all bonuses are included in the above wages", showing in my view that bonus was never treated as apart from wages. The definition of the word "wages" in the Merchant Shipping Act makes it clear that "wages" includes emoluments, and in my opinion wide enough, and it is used in the Act in a large sense, to include not only what a seaman gets as a wage, but what he obtains in the course of his service as recompense for the execution of his duty.

Lord Stowell whose inclination was to lean very heavily on the side of seamen discussed the question of a mariner's contract in the case of "The Minerva". He spoke of it as an ancient instrument in which two stipulations are essential — on the part of the owners, the description of the intended voyage, and on the part of the seaman, the *rate of wage he was content* to accept for his service on *that voyage*.

From the evidence and all the circumstances of this case I find that it was made quite clear to the plaintiff by the defendants what was the rate of wages he was to receive per month inclusive of everything while the dredging was going on and that the plaintiff was content to accept the sum of \$58.05 and signed the ship's articles as I have already stated.

In the circumstances judgment must be entered in favour of the defendants with costs.

*Judgment for defendants.*

Solicitors: *H. A. Bruton; A. G. King.*

C. K. CHUNG & C. LUNG v. S. CHIN, P.C. No. 4346  
 CHO KAM CHUNG and CHIN LUNG, Appellants (Defendants),

v.

STANLEY CHIN, P.C. No. 4346, Respondent (Complainant).

[1945. No. 509.—DEMERARA.]

BEFORE FULL COURT: LUCKHOO, C.J. (Acting), BOLAND, J.  
 and DUKE, J. (Acting).

1946. FEBRUARY 22, 25; MARCH 1.

*Defence Regulations—Price controlled article—Sale to retailer—Without knowledge that he is such—Ordinary sale by retail in contemplation of parties—Sale by retail—Control of Prices (No. 2) Order, 1944.*

*Defence Regulations—Price controlled article—Sale of—Conviction for—By retail—Sale by wholesale established by evidence—Whether conviction can be amended on appeal.*

*Criminal law and procedure—Price controlled article—Sale of—Conviction for—By retail—Sale by wholesale established by evidence—Whether conviction can be amended on appeal.*

A. was charged and convicted for selling to B., by retail, a price-controlled article, to wit, a 5-lb. tin of cooking butter at a price in excess of that permitted by the Control of Prices (No. 2) Order, 1944. By paragraph 2 of the Order the sale of any price-controlled article to any person whose premises are licensed for the sale of such article to the public is within the meaning of the expression "wholesale". B's premises were licensed for the sale to the public of, among other things, cooking butter. A. did not know B. The sale was made in shop premises established for retail sales, and was made to a purchaser with no indication of his being other than the usual purchaser by retail. Both seller and purchaser contemplated an ordinary sale by retail.

*Held* that the sale was a sale by retail.

*Choo Kang & Sons v. Kilkenny* (1945) L.R.B.G., 1st June 1945, Full Court, explained.

QUAERE: whether, on appeal, a conviction for selling a price-controlled article by retail can be amended by substituting for the words "by retail" the words "by wholesale", where it is established by the evidence that the sale was by wholesale and not by retail.

*Chung Tiam Fook v. Slater* (1942) L.R.B.G. 415, considered.

APPEAL by the defendants Cho Kam Chung and Chin Lung from the decision of a Magistrate of the Georgetown Judicial District convicting them of selling a price-controlled article, to wit, a 5-lb tin of O.D. cooking butter, at a price in excess of that permitted by the Control of Prices (No. 2) Order, 1944.

*H. C. Humphrys, K.C., (F. O. Low)* with him), for the appellants.

*A. V. Crane*, acting Solicitor-General, for the respondent.

*Cur adv. vult.*

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

The Appellants were convicted for selling a certain price controlled article to wit a tin of 5 lbs. of O.D. cooking butter for \$3.00 (that would thus be at the rate of 60 cents per lb.), which price exceeds the maximum retail price fixed for this commodity — namely at the rate of 48 cents per lb. (which would be \$2.40 for 5 lbs.) as allowed by a certain Order No. 845

## C. K. CHUNG &amp; C. LUNG v. S. CHIN, P.C. No. 4346

dated the 22nd June, 1944 and made by the Controller of Prices under the Defence Regulations 1939 to control the prices at which certain articles shall be sold.

According to the evidence led for the prosecution before the Magistrate, Appellant Choo-Kam-Chung at the material date carried on a shop in Croal Street where groceries and provisions were sold. He was assisted there by a staff of clerks one of whom was the Appellant Chin Lung. On Tuesday, the 20th March, 1945, one Khoda Bacchus who lives at Victoria, East Coast, Demerara and carries on a retail provision shop there, acting under instructions from Police Constable Stanley Chin went to Choo-Kam-Chung's grocery and purchased from the clerk Chin Lung a 5 lb. tin of O.D. cooking butter paying for same the sum of \$3.00 which was the price demanded by Chin Lung. Khoda Bacchus had never bought from that shop before nor was he known then as a person who himself was carrying on a provision business. The learned Magistrate accepted the evidence that Khoda Bacchus paid for the butter with three one-dollar Treasury notes which had been handed to him by Police Constable Stanley Chin, although on the latter entering the shop, immediately as Khoda Bacchus left the premises, and making a search for these one dollar notes the numbers of which he had previously taken no such notes could be found. Appellant, Choo-Kam-Chung, who was not present in the shop at the moment of the alleged sale to Khoda Bacchus but came in after Constable Stanley Chin had arrived and was making enquiries about the sale, was nevertheless convicted of the offence as the owner of the shop for and on whose behalf as the magistrate found the sale was effected and the money accepted by the Clerk.

Counsel for the Appellants has contended that Khoda Bacchus being the owner of a retail provision shop, a sale to him of the O.D. cooking butter would be a wholesale transaction, unless he had expressly declared to the seller, that he wanted it not for the purposes of his retail business but for some other purpose. In support of this submission, Counsel referred to the definition of "wholesale" given in clause 2 of the said Order 845, as meaning "the sale of any price controlled article to four different classes of persons —

- (a) any person whose premises are licensed or on which any licence duty is due and payable under the provisions of the Tax Ordinance 1939, for the sale of any of the said articles to the public"—

Sub clauses (b), (c) and (d) refer to certain other classes of persons as being also purchasers by wholesale and are not relevant to this matter. Counsel points out that Khoda Bacchus comes within class (a) because if his shop premises are not licensed, licence duty would admittedly be due and payable by him.

But the complaint, so the argument continues, charged the Appellants with having effected a sale by retail at a price in excess of the permitted maximum retail price, and although the evidence established that it was a sale to a person coming under class (a), the learned Magistrate had found erroneously, as disclosed by his reasons for decision, that the sale was a sale by

retail, and Counsel also submitted that the conviction itself records the offence committed as being a sale by retail at an excessive price. In view of the evidence given by Khoda Bacchus and accepted by the learned Magistrate such a conviction, it is contended, is bad and cannot be cured in this Court by amendment. In support of his submission Counsel cited the decision in *John Chung Tiam-Fook v. Leslie Slater* (1942) L.R.B.G. 415. In that case the complaint which was laid for selling 200 lbs. of salt above the fixed price contrary to a certain Order No. 636 B, then existing, originally alleged in the particulars of offence that the defendant did sell by wholesale in excess of the named prescribed maximum wholesale price, but at the trial after some evidence was taken the charge was amended to read "retail" where the word "wholesale" appeared in the complaint, and so that the price fixed by the Order should appear therein as the named maximum retail price. The Magistrate held that the transaction was a retail transaction and he convicted the defendant accordingly. On appeal this Court holding that the sale was not a sale by retail according to the ordinary use of the term because of the large quantity of the commodity sold and there being then no definition of the word "retail" in the Order quashed the conviction declaring that "the particulars do, once they have "been determined, constitute the particular nature of the offence which the "defendant is alleged to have committed and by the proof of such "particulars, if material, the conviction must stand or fall if it purports to "have been founded thereon. The Court further declared that there was no "amendment that the Court could with propriety make, as the transaction "was also not a wholesale transaction because of the artificial meaning "given to wholesale in the definition contained in the said Order."

We are not certain that the Court would have refrained from exercising its powers to amend the conviction so as to make it in conformity with the evidence established at the trial relating merely to the particulars of the offence, if the facts constituted a wholesale transaction as defined in Order 636 B.

Be that as it may we do not agree with the submission that the fact that the purchaser in this case is a retailer himself makes every transaction of purchase by him a wholesale transaction in the absence of a declaration on his part that the purchase is not for the purpose of his retail business. The decision in this Court on 1st June, 1945 in *William Choo-Kang & Sons and Theophilus Choo-Kang* (Defendants-Appellants) v. *Louis Kilkenny, Police Constable* (Complainant-Respondent), Proceedings No. 447 of 1944, is, we hold, not an authority for that proposition as Counsel for Appellant contended. According to the evidence in that case defendants knew that the purchaser was a retailer carrying on a retail provision shop, as he was in the habit of purchasing goods from defendants for resale in his shop and accordingly this Court in its judgment on appeal declared that "the sale to this purchaser of articles for resale by retail fell therefore within the definition of sales by wholesale set out in the Order."

Although *mens rea* may not be a necessary ingredient in this

type of offence yet it is necessary to establish that a defendant knowingly did the act which is the subject of the charge, that is in a case of a sale by wholesale that he sold to a retailer knowingly as such. In this case both vendor and purchaser contemplated an ordinary sale by retail — the seller was selling an article in quantity not *prima facie* wholesale, in shop premises established for retail sales, and to a purchaser unknown to him before with no indication of his being other than the usual purchaser by retail, — the purchaser on his part although a retailer was purchasing for and on behalf of a policeman an article not intended to be resold.

In the circumstances the Magistrate was correct in finding the transaction a retail sale, and the conviction drawn up with the particulars of the offence described as a sale in excess of the maximum retail price is correct. There would be no need therefore to consider whether the Court would have the power or not to amend the particulars in the conviction so as to make it in conformity with the facts established in evidence.

As to the sentences imposed we see no reason to interfere with the penalties imposed by the learned Magistrate. The fine of \$500.00 imposed on the Appellant Choo-Kam-Chung, although for a first offence, is not in our view too severe in view of the gravity of this type of offence and the continued breaches of these price controlled Orders. Although Appellant Choo-Kam-Chung was not present when the sale was effected it would seem from his evidence before the Magistrate that he was supporting his clerk in his offence as shown by his attempt to discredit Khoda Bacchus' testimony by trying to make it appear that the latter was at a loss at first to identify the Appellant Chin Lung as the clerk who sold to him the butter. We do not think in the circumstances the fine of \$100 imposed on Chin Lung should be disturbed.

The appeal will therefore be dismissed and the convictions and the sentences imposed by the Magistrate are upheld with costs to the Respondent.

*Appeal dismissed.*

P. L. E. STULL v. O. M. STULL

PATRICK LIONEL ERIC STULL, Petitioner,

v.

OLGA MURIEL STULL, Respondent.

[1945. No. 262.—DEMERARA.]

Before LUCKHOO, C.J. (Acting).

1946. February 6, 7, 18; March 8.

*Husband and wife—Dissolution of marriage—Desertion on part of wife—Subsequent efforts by wife for a reconciliation—Repelled by husband—Malicious desertion—Not proved.*

A wife deserted her husband in October 1944, six months after the marriage. There was no evidence that the husband at least after the 9th December 1944, evinced any anxiety to effect a reconciliation. In June 1945 the wife took proceedings against her husband in the Magistrate's Court for maintenance. On at least three occasions before she took proceedings the wife endeavoured without success to bring to an end the existing state between her husband and herself, and at least on one occasion the husband repelled her advances towards that end. There was no clear and convincing evidence of a final repudiation of the marriage tie on the part of the deserting wife. After the proceedings in the Magistrate's Court had been taken by the wife, the husband filed a petition for dissolution of marriage on the ground of the malicious desertion of his wife.

*Held* that malicious desertion on the part of the wife had not been established.

PETITION by Patrick Lionel Eric Stull for dissolution of marriage on the ground of the malicious desertion of his wife Olga Muriel Stull.

*C. Vibart Wight*, for petitioner.

*J. L. Wills*, for respondent.

*Cur. adv. vult.*

LUCKHOO, C.J. (Acting): This case presents a somewhat unfamiliar aspect of the offence of malicious desertion. Within recent times so many of these cases have engaged the attention of the Courts that it will be well to deal again with the law that has been laid down on this subject in the several judgments of this Court so that parties intending to bring divorce proceedings may not take it for granted that even where a petition is undefended it necessarily follows that a decree nisi will be pronounced. The Court must be satisfied that there is a genuine willingness on the part of the deserted spouse to resume the conjugal relationship.

While the law of England since the Matrimonial Causes Act, 1937, made desertion for a period of three years a ground for dissolution of marriage and the decided cases help to determine when desertion takes place, yet under our system of law malicious desertion must be viewed not only from the angle of the deserting spouse but also from the attitude of the deserted spouse in relation to the marriage.

The petitioner who is an assistant teacher at Christ Church Anglican school was married to the respondent, a beautician by

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occupation, on the 12th day of April, 1944, not quite two years ago, and it is unfortunate for them that in the circumstances hereinafter narrated a petition for the dissolution of their marriage should have been filed hardly more than a year thereafter.

The petitioner complains that the respondent maliciously deserted him in the month of October, 1944. Her answer, put briefly, is that she was subjected to continuous threats, ill-treatment and cruelty at the hands of her husband and, in a state of fear, had to leave the matrimonial home on the 31st day of October, just over six months from the date of the marriage.

A great deal of evidence has been given in support of allegations on the one side and on the other, and a considerable amount of time has been expended in presenting and elucidating the facts but I do not feel any difficulty in arriving at the truth of the matter. Both petitioner and respondent have been cross-examined at great length and I have been able to assess not only the value of their evidence but from their demeanour to reconstruct as nearly as possible the incidents of the very short and unhappy sojourn at their home in Crean Street.

The petitioner, Patrick Stull, is a man though apparently quiet and somewhat submissive yet is easily disturbed and he becomes irascible. He was moved more by the love for his sister who mothered him in his early years than by the fleeting and enforced situation in which he found himself in the month of April, 1944. Mrs. Stull, on the other hand, perhaps by reason of her occupation, was not able and in fact did not appear to equip herself to assume domestic responsibility which should be part of the working equipment of every married woman and is the duty of a wife in relation to and in the fulfilment of her marriage vows. She at one time harboured a dislike to Miss Stull who was on affectionate terms with her brother and although he advised his sister, doubtless with much reluctance, to leave their parental domicile, yet Mrs. Stull was not so easily satisfied and thereafter gave way to nocturnal imaginings and complained of provocation by rude grimaces by children living in the district. Both parties, however, with some facility over-painted the background of the canvas on which this short and uninteresting episode in their lives was projected.

Trivial incidents were magnified and the spirit of give and take was lacking. There was frequent conflict of views between the one possessed of literary talent and the other skilled in the art of coiffure. It was in such a setting that the facts of the case were presented to the Court. They are briefly as follows.

Soon after marriage the petitioner complained that his wife was lazy, neglectful and indifferent to his views. The slender salary of \$36 which the petitioner received at the time of his marriage was insufficient with which to employ a servant and the petitioner's sister, who is a part owner of the house, gave her services willingly.

It would appear that, unknown to the petitioner, his wife and sister were not on the best of terms and after the respondent gave birth to her child on the 7th day of August at the home of her aunt, one Mrs. Kendall, at Barrack Street, Kingston, she (the

respondent) informed her husband on the 14th day of August that she was not returning to Crean Street and made certain allegations against the petitioner's sister. This state of affairs caused some surprise to him, and on the 30th August he wrote to his wife pointing out that his sister had left the home and asked the respondent to return by the 4th of September. She replied on the 31st August that she would do so. In the meantime petitioner's sister left Crean Street on the 26th August. She said in her evidence that she got on well with the respondent and that at no time was there any friction but that she decided to leave the house as she wanted to see her brother happy. The respondent rejoined her husband on the 4th September with their infant son. As she was unable to attend to her household duties as well as look after the child she took it back to her aunt at Kingston and there during the next ten days, until a part-time servant was engaged, she went as often as was required to suckle her child. She subsequently brought the child back to Crean Street.

On the afternoon of the 16th October on his return from school the petitioner said he found his wife packing up to go away as she was fed up; the baby was not there. He immediately left to call one Clementina Lewis, a friend of both, so that she might speak to his wife. On Mrs. Lewis' arrival one Hinds, who carried on a workshop below their residence, came upstairs. During the time they all discussed matters a cartman whose services the respondent had engaged earlier that day came up but the respondent sent him away. That evening the respondent slept at her aunt's house where she had gone with Mrs. Lewis for the child. She returned to her home with her child on the 18th October and on the 31st October finally left it.

The respondent complained of a series of acts of physical and mental cruelty which she sought to elevate in order to afford justification for leaving her husband's home but which when thoroughly combed, turned out to be nothing more than one might expect in the normal married life of any two persons in circumstances not dissimilar from theirs. I am quite convinced that Mrs. Stull never really entertained the slightest fear of physical violence when she finally left her home on the 31st of October 1944. It is not unlikely that becoming subject to certain hallucinations, the weird noises made by Hinds in the dead of night and the pranks played by the wicked children on her, she found life not comfortable in Crean Street and those things seem to have created a disturbing influence on her marital happiness. Nor do I find that her withdrawal from the marital home was with any deliberate purpose of abandoning conjugal society. She may have expressed an intention out of the fantasy created in her mind not to return to Crean Street, but I do not believe she ever used the words "or any other house".

I find, upon the evidence, that up to the time when Mrs. Stull finally left the home in Crean Street her husband was not guilty of any cruelty to his wife and did not by his conduct compel her departure. For at least a fortnight before she left Mrs. Stull conceived the intention of leaving and it was only after Mrs. Lewis had spoken to her that she dismissed the cart she had engaged to remove her belongings.

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There were faults attributable to both sides, neglect, indifference and thoughtless speech, but nothing so violent in character as legally to justify the termination of their cohabitation. On the facts as I find them Mrs. Stull deserted her husband but before I could find malicious desertion on her part I must be satisfied that she actually and wilfully brought to an end the existing state of cohabitation with the deliberate purpose of abandoning conjugal society. See *James v. James* (1901) N.L.R. 265. It becomes necessary therefore to examine her conduct after she left the matrimonial home.

The evidence discloses that in the month of December she visited the home of Mrs. Lewis in Bent Street with her baby and there met her husband who asked if she did not intend to return home. Her reply, states Mrs. Lewis, was that she would not return home under any circumstances and that all she wanted was money for her support; that she would go back neither to Crean Street nor elsewhere. On this point the petitioner's evidence is: "my wife said 'Pat, I want some money'. I said before we discuss that "I want you to come back home. She said 'I am not 'returning 'to your house'. I started to reason with her. I said, 'Consider the little child. We have just been married'. She said she was fed up. 'I am not coming back' ". The wife denied all of this.

I am inclined to believe the petitioner's version rather than that of the respondent as with a young child and with no support from her husband I would expect her to ask for money and that her statement "I am not coming back" was said because of his refusal to give her some money and for no other reason. I do not believe Mrs. Lewis' statement that the respondent said "I am not going back home to Crean Street or any other home". Nor do I accept the petitioner's story of any sincere desire on his part for his wife's return home. He has not even attempted since that day to write to his wife or to see his child.

There is always in cases of desertion a locus penitentiae on the part of the deserting spouse and the desertion must be persisted in without the consent and against the wishes of the other. In Scotland where desertion has been a ground for divorce since 1573, the pursuer has always been required to satisfy the Court that throughout the period of desertion he or she was ready and willing to receive back the erring spouse.

The evidence in this case satisfies me that the respondent wife on at least three occasions before she took proceedings in the Magistrate's court against her husband for maintenance in June 1945 endeavoured without success to bring to an end the existing state between them and there is evidence that at least on one occasion the husband repelled her advances towards that end.

In the month of January 1945, she visited the petitioner at school when she was told that it was not convenient for him to see her there. He made no effort afterwards to get into touch with her. Later the respondent approached Rev. Bacon, the manager of the school and finally Mr. Talbot, secretary to the Poor Law Commissioners. It was only after she had taken steps against him that he filed his petition.

As was said in *Pratt v. Pratt* (1939) 3 A.E.R. 437, "In fulfilling its duty "in determining whether on the evidence a case of desertion without cause "has been proved, the Court ought not to leave

“out of account the attitude of mind of the petitioner. If on the facts it appears that a petitioner husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life he cannot complain that she has persisted without cause in her desertion.”

Since the departure of the respondent from the petitioner's home Miss Stull returned to Crean Street and it may be that his reason for repelling his wife's advances to discuss their marital difficulties was his reluctance to face an embarrassing situation which his wife's return might have created. He may have been indeed thankful that she had departed. I cannot find from the evidence that the petitioner, at least after the 9th of December 1944, evinced any anxiety to effect a reconciliation. There is on the other hand no clear and convincing evidence of a final repudiation of the marriage tie on the part of the deserting wife.

As was stated by Verity, J. in the case of *Mathews v. Mathews* (1931-7) L.R.B.G. 460, “It is in accordance with what I conclude to be the fundamental principles of the divorce laws of this colony that the respondent should be shown by evidence of his or her conduct definitely to have reached a final determination to repudiate the obligations of the marriage state and also that it should be shown by evidence of the petitioner's conduct that such repudiation is against his or her will.”

It will be remembered that I have often expressed myself very strongly against the facility which is given to married persons in this Colony to have their marriages dissolved on the ground of malicious desertion. So far as the law obliges me to pronounce a decree for dissolution on that ground I shall act but only if the circumstances of the case warrant such a decision. In this case I am not so satisfied. I cannot therefore declare that the respondent has maliciously deserted the petitioner. The decree prayed for must be refused and the petition dismissed.

The separation of the parties will prove, I hope, to be only temporary and to be merely due to circumstances in which for the present neither would yield. There is nothing so deep-seated, and there could hardly be after only six months of marriage life, to cause to remain apart two persons of not inflexible will, and of some educational attainments, each able by remunerative occupation to contribute adequately to their joint maintenance and that of the child. It seems a great pity that a young couple in these days should take the hurried step of seeking to put an end to their marriage on the slightest provocation caused by just those difficulties of adjustment which arise and indeed must arise in the early stages of married life and without invoking in aid the soothing influences of mutual love, goodwill and esteem without which married life would be insupportable.

Much argument has been addressed to me by counsel on the question of costs and I have given the matter the closest consideration and. I am of the view that in all the circumstances of this case the petitioner should pay half of the wife's taxed costs and I so order.

*Petition dismissed.*

Solicitors: *N. C. Janki; H. B. Fraser.*

HENRY YOUNG v. RAMCHARAN, P.C. No. 4808.

HENRY YOUNG, Appellant (Defendant),

v.

RAMCHARAN, P.C. No. 4808, Respondent (Complainant).

[1945. No. 502.—DEMERARA.]

Before Full Court: LUCKHOO, C.J. (Acting) BOLAND, J.

and DUKE, J. (Acting):

1946. MARCH 1, 15.

*Defence Regulations—Price controlled article—Sale of—form of—In breach of price-controlled order—Real effect in conformity with order—No breach by seller of order.*

Where the form of a sale is in breach of a price control order made by a competent authority appointed under regulation 44 of the Defence Regulations, but the real effect is in conformity with the order, the seller has committed no breach of the order.

*J. P. Santos & Co., Ltd. v. Slater* (1942) L.R.B.G. 359, applied.

APPEAL by the defendant Henry Young from the decision of a Magistrate of the Georgetown Judicial District convicting him of selling bread at a price in excess of that permitted by an order made under the Defence Regulations, 1939.

*F. O. Low*, for the appellant.

*A. V. Crane*, acting Solicitor-General, for the respondent.

*Cur. adv. vult.*

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

Very attractive arguments were advanced by learned counsel for the appellant who submitted that the contract for the purchase of bread entered into between him and Edward Lallman on the 30th day of September 1944, was in respect of \$7.54 worth of bread and that there was no proof that he did not supply the quantity called for in terms of Order No. 849 made on the 24th day of June, 1943, and published in the *Gazette* on the following day whereby no person shall sell, offer or expose for sale any bread at a rate exceeding six cents for sixteen ounces. This Order amended Order No. 1046 of the 15th day of August, 1942, wherein the price was fixed at a rate of one cent for every two ounces. In that Order bread is expressly given the meaning commonly assigned to it by bakers and includes any loaf or roll of bread containing dried or other fruit.

The evidence disclosed that on Friday the 29th day of September 1944, Lallman, to whom the appellant had for some time been supplying bread for a parlour called "Gleneagle" sent an order to appellant for \$7.54 in bread and cakes. This order which formed the basis of the contract described with particularity the different types of loaves of bread Lallman required, giving the number and price of each type, and it was in execution of that contract that the appellant supplied on that and on the following day the bread specifically described among which there was one loaf priced at 24 cents. As that loaf appeared to Lallman to be on the small side he at once spoke to the appellant and asked what

was the price of that particular loaf when the appellant told him it was a 3 lb. loaf for one shilling and if he did not want it he could send it back. Instead of doing so he handed the bread to a police constable, but he nevertheless performed his part of the contract, paying to the appellant the sum of Twenty-one dollars and twenty-five cents in full for bread supplied to him to the 30th September, 1944.

On that loaf of bread being weighed by the Police it was found to be 2 lbs. 12 ozs. 13 drms. instead of 4 lbs. as required by the Price Control Order. To Police Constable 4808 Ramcharran who was detailed the same day to make an investigation into Lallman's complaint the appellant said that he had given that loaf as "ration" meaning a free gift to the customer; and on the 12th day of October 1944, when approached by P.C. Chin, the appellant admitted that he did supply to Lallman on his written order the loaf which was the subject of Lallman's report to the Police, but stated that it was a special loaf which he sent each week to Lallman, and containing extra ingredients of the weight of three pounds and sold for 24 cents. This latter statement he repeated when he gave evidence before the Magistrate.

The learned Magistrate did not accept the appellant's story and found as a fact that it was an ordinary loaf of bread weighing 2 lbs. 12 ozs. 13 drms. instead of 3 lbs. (this should be 4 lbs.) as required by the terms of the amended Order.

At the hearing of this appeal learned Counsel contended that the contract was one and indivisible and called for the supply of bread to the value of \$7.54; that the division into loaves of various prices and sizes being merely for the convenience of the purchaser, was not a term of the contract so as to found a charge for a breach of the Order; and that the respondent was not entitled to select the 24 cent loaf and weigh same without reference to the weight of the other loaves supplied.

At first blush the argument seemed plausible but the learned Solicitor-General correctly pointed out that in order to interpret the agreement one must necessarily look at the whole course of dealing between the parties and that in the requisition for bread sent to the appellant, Lallman was purchasing and appellant understood he was selling a loaf for the sum of 24 cents and that Lallman was entitled to receive a loaf of the weight of 64 ozs., i.e. at the rate of 16 ozs. for 6 cents, no matter what was the weight of other loaves in the same requisition.

Appellant's counsel argued, alternatively, that the appellant had voluntarily allowed a discount of 16% on the total purchase price and that Lallman actually paid \$5.88 (this should be \$6.33) for \$7.54 worth of bread, but, as was pointed out in the course of the argument, even assuming the contract was one and indivisible, or a purchase in bulk, there was no evidence as to the total weight of the bread supplied so that it might be ascertained whether the ultimate effect of the transaction rather than its precise terms contravened the Order and was not in conformity therewith.

The case of *J. P. Santos & Co., Ltd. v. Slater* (1942) L.R.B.G. 359, cited by the appellant in support of this latter proposition

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is to this effect: "Where the form of a sale is in breach of a price control "order made by a competent authority appointed under regulation 44 of the "Defence Regulations, 1939, but the real effect is in conformity with the "Order, the seller has committed no breach of the Order." In that case despite the fact that the sale of one gross boxes of Lighthouse matches was for the sum of \$1.32 the 2% discount allowed by the sellers reduced it from \$1.32 to \$1.30 which was the maximum price fixed by the price control Order.

In the instant appeal, with 16% discounted from the charge of 24 cents reducing it to 20 cents the weight of the loaf in question should have been at least 53 ozs. or 3 lbs. 5 ozs. and not 2 lbs. 12 ozs. 13 drms.

The conviction must therefore stand and the appeal be dismissed with costs.

*Appeal dismissed.*

NAOMI HENRY and VICTORIA HENRY,  
Petitioners,

v.

MOHABEER,

Respondent.

1944. No. 212.—DEMERARA.

BEFORE DUKE, J. (ACTING):

1946. MARCH 14, 20.

*Practice and procedure—Immovable property—Declaration of prescriptive title—May be made in proceeding instituted by way of petition—Even if complications and difficulties are likely to arise—Civil Law of British Guiana Ordinance, cap. 7, section 4 (1); Rules of the Supreme Court (Declaration of Title), 1923, rule 23.*

*Practice and procedure—Petition for declaration of prescriptive title to immovable property—Opposition thereto—Affidavits filed in support—Leave to petitioner to file affidavit in reply—Power of Court to grant—Supreme Court of Judicature Ordinance, cap. 10, section 32.*

Where a person seeks to obtain a declaration of prescriptive title to immovable property, it is competent for him, even if complications and difficulties are likely to arise, to proceed by way of petition as authorised by rule 2 of the Rules of the Supreme Court (Declaration of Title), 1923 and section 4 of the Civil Law of British Guiana Ordinance, cap. 7.

*Incorporated Trustees v. McLean* (1939) L.R.B.G. 185, *Wills v. Eleazar* (1941) L.R.B.G. 12, 16, and *Cameron v. Chester* (1943) L.R.B.G. 57, 62, considered.

Where a petition is filed for a declaration of prescriptive title to immovable property, the Court may, if it thinks fit, grant leave to the petitioner to file affidavits in reply to those filed on behalf of the opposer.

Preliminary objection by the respondent Mohabeer to the petition filed by Naomi Henry and Victoria Henry for a declaration

## N. HENRY AND V. HENRY v. MOHABEER.

of prescriptive title to Plantation Arthurville. Wakenaam, Essequibo.

*C. Lloyd Luckhoo*, (*Ronald H. Luckhoo* with him), for respondent.

*A. J. Parkes*. (*T. Lee* with him), for appellant.

*Cur. adv. vult.*

DUKE, J. (ACTING): Upon this petition coming on for hearing counsel for the respondent MOHABEER urged that this is not a case of a simple nature, that the questions involved therein are difficult and complicated, and that on the authority of a statement in the judgment of LANGLEY, J. in INCORPORATED TRUSTEES OF THE CHURCH IN THE DIOCESE OF GUIANA v. McLEAN (1939) L.R.B.G. 185, the petitioners should not have proceeded by way of petition under rule 2 of the Rules of the Supreme Court (Declaration of Title) 1923, but should have proceeded by way of action as authorised by rule 11. Counsel for the petitioners, on the other hand, submitted that the case was neither complicated nor difficult; that rule 6 (4) provides for the cross-examination of any person who has sworn to an affidavit which has been filed either on behalf of a petitioner or a respondent; and that, in any event, a person who seeks to obtain a declaration of prescriptive title has a right to proceed by way of petition under the Rules of the Supreme Court (Declaration of Title) 1923.

The argument of counsel for the respondent is based on the assumption that an action may properly be brought by way of writ of summons claiming a declaration of prescriptive title. As to this, a difference of judicial opinion will be found in the Law Reports. In WILLS v. ELEAZAR (1941) L.R.B.G. 12, 16, CAMACHO, C.J. held that a declaration of title may not be sought in any other way than by way of petition. However, in CAMERON v. CHESTER (1943) L.R.B.G. 57, 62, — a case tried and determined in the county of Berbice — I held that the Supreme Court has jurisdiction, in a proceeding instituted by way of writ of summons, to make a declaration of title to property by prescription, and I expressed, in detail, my reasons for declining to follow the judgment of CAMACHO, C.J. Counsel for the petitioners did not submit that my decision in CAMERON v. CHESTER was wrong, and I shall adhere to it until a more detailed examination of the authorities convinces me that I erred, or until a court of appellate jurisdiction decides to the contrary.

In INCORPORATED TRUSTEES v. McLEAN, *supra*, LANGLEY, J. said that the procedure by way of petition under rule 2 of the Rules of the Supreme Court (Declaration of Title) 1923 —

is intended only for simple cases where evidence by affidavit is sufficient to meet the case. In cases where complications and difficulties are likely to arise, this procedure should not be adopted. The saving contained, in Rule 11 makes the intention quite clear and indicates alternative remedies.

The learned judge did not, however, lay down a mandatory rule, he merely enunciated what, in his opinion, ought to be a rule of prudence. What may seem a complicated or difficult case for one counsel may be the simplest of cases when viewed by another counsel. Section 4 (1) of the Civil Law of British Guiana Ordi-

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nance, chapter 7 and rule 2 of the Rules of the Supreme Court (Declaration of Title) 1923 confer a right on a person who seeks to obtain a declaration of title to property by prescription, to make application therefor by way of petition. If I were to accede to the argument of counsel for the respondent, I would be depriving the petitioners of a right conferred upon them by Ordinance and by rules of court. I am unable to elevate the learned judge's rule of prudence into the inviolability of a rule of law. The submission of counsel for the respondent therefore fails.

This petition, with the affidavits in support, was filed on the 2nd June, 1944. On the 30th June, 1944, MOHABEER filed a notice in the Supreme Court Registry opposing the prayer of the petition, and at the same time he filed affidavits in support of his opposition. The petition first came on for hearing before Sir John Verity, C.J. on the 26th March, 1945, when counsel for the petitioners applied for leave to file affidavits in reply to those filed by the opposer. Counsel for the respondent objected to the application. The learned Chief Justice, however, gave the required leave but reserved the right of the opposer to object at a later stage that the court had no power to grant such leave. Unfortunately it was not possible to have this point argued before, and disposed of by, the Chief Justice before he left this Colony.

Counsel for the respondent has submitted before me that the Court is not empowered or authorised under the Rules of the Supreme Court (Declaration of Title) 1923 to grant such leave. This is true. Rule 2 (4) requires affidavits in support of the petition to be filed at the same time as the petition, and rule 5 requires affidavits in support of an opposition to be filed at the same time as the notice of opposition, but the Rules are silent as to affidavits in answer to those filed by a respondent. Counsel urged that under section 4 (1) of the Civil Law of British Guiana Ordinance, cap. 7 a declaration of prescriptive title may be issued only "upon application in the manner prescribed by any Ordinance or rules of Court", and as the Rules of the Supreme Court (Declaration of Title) 1923 do not contain any provision authorising the Court to make an order giving leave to a petitioner to file affidavits in reply to those filed on behalf of an opposer, such power does not exist. Counsel referred to the judgment of LANGLEY, J. in INCORPORATED TRUSTEES v. McLEAN, *supra*, and submitted that the statement of the trial judge at page 184 of the report of the judgment, that a petitioner is entitled, as of right, to file additional affidavits dealing with new matter raised by an opposer is erroneous and should not be followed.

Counsel for the petitioners prayed in aid section 32 of the Supreme Court of Judicature Ordinance, cap. 10. which so far as is material, is as follows: —

Subject to the provisions of any statute, the Court may in any cause or matter make any order as to the procedure to be followed or otherwise which the Court considers necessary for doing justice in the cause or matter.

He urged that in this petition, which is a cause or matter within the meaning of section 2 of the Supreme Court of Judicature Ordinance the order granting leave to the petitioners to file affi-

davits in answer to those filed by the opposer, was necessary for doing justice in the petition.

The petitioners filed a petition claiming that they were in the undisturbed possession for over 30 years of a certain parcel of land known as Plantation Arthurville: the respondent opposed the petition and claims that he and his predecessors in title have been in the undisturbed possession for over 30 years of part of that parcel of land, which part is said by counsel for the respondent to be part of Plantation New Belle Plaine. The part of the parcel of land which is in dispute between the petitioners and the respondent is referred to as the northern half of the dam and the trench adjoining the same, in paragraphs 4 to 11 of the affidavit of RAM-LAKHANSINGH, in paragraphs 3 and 5 of the affidavit of JOHN SANJAY JAIKARAN and in paragraphs 3 to 5 of the affidavit of BAHADUR, all of which affidavits were filed on behalf of the respondent. In support of his claim the respondent has alleged among other things,—

- (a) that from 1903 to 1930 ISAAC HENRY the brother of the petitioners lived on and managed Plantation Arthurville, and that from 1903 to 1930 ISAAC HENRY, his wife and three sons were in the sole continuous and undisturbed possession of the said plantation; and
- (b) that the respondent has always been in the continuous and undisturbed possession of and has always exercised all the rights of ownership over the northern half of the dam and the trench adjoining the same without interruption from anyone; and
- (c) that the said northern half of the dam and the trench adjoining the same have always been occupied by the respondent and his predecessors in title as part of Plantation New Belle Plaine.

These affidavits raise entirely new matter, and I am of the opinion that where the affidavits filed under rule 5 of the Rules of the Supreme Court (Declaration of Title) 1923 raise entirely new matter the Court may, if it thinks fit, grant leave to the petitioners to file affidavits in reply thereto. Section 32 of the Supreme Court of Judicature Ordinance, cap. 10, is sufficient authority for the making of such an order. It is unnecessary for me to determine whether a petitioner can file an affidavit in reply without leave, but I might point out that, by section 2 of Chapter 10, the expression "pleading" in the Rules of Court, 1900 includes a petition.

Counsel for respondent has further submitted that the affidavits which were filed by the petitioners on the 16th April 1945, raised entirely new matter, that they were not filed in answer to any of the affidavits filed by the respondent, and they should have been filed by the petitioners at the same time as their petition. An examination of the affidavits, however, shows that they were indeed in answer to those filed by the respondent on the 30th June 1944. The affidavits filed by the petitioners on the 16th April 1945 relate to the issues raised by the respondent in the affidavits filed on his behalf. Without going into detail, it is certainly open to the petitioners to explain, for instance, that ISAAC HENRY was in occupation of Plantation Arthurville on their behalf, and that

## N. HENRY and V. HENRY v. MOHABEER.

any possession which the respondent may have had in respect of the northern half of the dam was with the permission of the petitioners. This submission also fails.

The preliminary objections are overruled. The question of costs will be determined on the conclusion of the hearing of the petition.

*Preliminary objections overruled.*

Solicitors: *F. Dias*, O.B.E., for respondent; *W. D. Dinally*, for petitioners

JOHN LAVINE BEARAM,

Appellant (Defendant),

v.

CONSTANCE EUPHEMIA BEARAM,

Respondent (Complainant).

1946. No. 43—DEMERARA.

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

DUKE, J. (ACTING) :

1946. MARCH 15, 22.

*Husband and wife—Maintenance—Complaint by wife for—Grounds of—Summary Jurisdiction (Magistrates) Ordinance, cap. 9, s. 41 (1)—More than one ground may be included in one and the same complaint.*

*Husband and wife—Maintenance—Complaint by wife for—More than one ground of—All grounds to be answered by husband.*

*Husband and wife—Maintenance—Complaint by wife for — Order made thereunder—Matrimonial offence on which order based not specified therein—Defect in order—Can be remedied on appeal.*

*Appeal—From magistrate's court—Decision reversed—Where finding of fact could not be supported having regard to the evidence.*

A complaint by a married woman under section 41 (1) of the Summary Jurisdiction (Magistrates) Ordinance, Chapter 9, may include therein more than one of the grounds of complaint therein specified.

*Tyrell v. Tyrell* (1928) 138 Law Times 624, applied.

Where more than one of the statutory grounds of complaint are included in a complaint by a married woman under section 41 (1) of the Summary Jurisdiction (Magistrates') Ordinance, cap. 9, the complainant is not required, at the close of her case, to elect the statutory ground of complaint on which the defendant is to give his defence, and the magistrate is neither empowered nor obligated to inform the defendant in respect of which statutory ground of complaint a defence was called for. The defendant, in such a case, must answer, if he can, all the statutory grounds of the complaint which are specified by the wife in her application.

Where an order made on the application of a married woman under section 41 (1) of the Summary Jurisdiction (Magistrates) Ordinance, cap. 9, contains no finding of the matrimonial offence upon which the order is based, such defect can be remedied on appeal.

*Brown v. Brown* (1898) 79 Law Times 102, and *Dodd v. Dodd* (1906) Probate 189, applied.

## J. L. BEARAM v. C. E. BEARAM.

Where the Full Court was satisfied that the decision of the Magistrate that a husband had deserted his wife could not be supported having regard to the evidence, the decision was reversed.

APPEAL by the defendant John Lavine Bearam from the decision of a Magistrate of the Georgetown Judicial District ordering him to pay maintenance to his wife the complainant Constance Euphemia Bearam.

*Lionel A. Luckhoo*, for appellant.

*J. L. Wills*, for respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by DUKE, J. (Acting) as follows:—

This is an appeal by the defendant John Lavine Bearam from the decision of a Magistrate of the Georgetown Judicial District ordering him to pay to his wife the complainant Constance Euphemia Bearam the sum of \$2.50 per week for her maintenance along with costs \$3.60 in default 3 days hard labour.

The respondent alleged in her complaint that her husband the appellant—

- (a) since the month of March, 1943 deserted, and still continues to desert, her; and
- (b) during the month of December, 1942 and up to the time the complaint was filed, on the 22nd May, 1943 was guilty of wilful neglect to provide reasonable maintenance for the complainant and by such neglect had caused her to leave him and live separately and apart from him.

Counsel for the appellant has drawn the Court's attention to the fact that the complaint alleges more than one ground upon which an application can be made by a married woman under section 41 (1) of the Summary Jurisdiction (Magistrates) Ordinance, Chapter 9. It was, however, held in *TYRELL v. TYRELL* (1928) 138 Law Times 624 that more than one of the statutory grounds of complaint which may be made by a married woman under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, may be included in one and the same complaint. The complaint in this case was therefore in order.

Counsel for the appellant has submitted that, at the close of the case for the complainant in the Magistrate's Court, the complainant should have selected the statutory ground of complaint on which the defendant was to give his defence: or, alternatively, that it was the duty of the Magistrate to inform the defendant in respect of which statutory ground of complaint a defence was called for, and that he failed so to do. The complainant was not required to so elect; and the Magistrate was under no such obligation, and he was not authorised to so inform the defendant. It is true that, generally speaking, a defendant in summary proceedings in the Magistrate's court is only required to answer one ground of complaint at a time, but as *TYRELL V. TYRELL* decides what it has decided, the necessary consequence follows, namely, that the defendant must answer, if he can, all the statutory grounds of complaint under section 41 (1) of Chapter 9 which are specified by his wife

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in her application. The judgment of the Full Court in *CLARKE V. CLARKE* (1931-1937) L.R.B.G. 195 illustrates that applications under that subsection are, as far as practicable, to be free from the ordinary technical rules of procedure.

In the minute which the learned Magistrate made at the time of his decision on the 30th October 1944 he omitted to state which of the above allegations he found to be proved; and the formal order is also silent on that point. In his reasons of decision, written on the 23rd December 1945, the learned Magistrate states that he found that the desertion, as alleged, was proved. We are bound to accept that statement as being accurate. Counsel for the appellant has, however, submitted that the order of the learned Magistrate is bad in that it does not contain the finding upon which it purports to have been based, and that the order cannot be amended to include therein a finding that the appellant was guilty of desertion. The order is certainly bad, and if the appellant were imprisoned under a warrant of commitment for non-payment of the costs he might be released under a writ of *habeas, corpus*. Counsel for the respondent has, however, referred us to *BROWN V. BROWN* (1898) 79 Law Times 102 and *DODD V. DODD* (1906) Probate 189, where it was held that if an order made on the application of a married woman under the Summary Jurisdiction (Married Women) Act, 1895 contains no finding of the matrimonial offence upon which the order is based, such defect can be remedied on appeal. We therefore hold that this Court is authorised and empowered to amend the formal order made under section 41 (1) of the Summary Jurisdiction (Magistrates) Ordinance, Chapter 9, by including therein a finding that the defendant deserted the complainant.

Counsel for the appellant has further submitted that the finding that the appellant deserted the respondent was unreasonable and cannot be supported having regard to the evidence. In order to deal with this submission, it will be necessary to set out the evidence in some detail.

The matrimonial home was at the house of the husband's sister. On the 4th May 1942, four days after the wedding, the appellant, who is a policeman, had to leave the matrimonial home as he was then stationed in an outlying part of the Colony; and he was not transferred to a place, within convenient reach of the matrimonial home, until about the month of November 1942. There had been differences of opinion between the husband's sister and the wife's mother, and differences of opinion had arisen between the husband's sister and the wife. The matrimonial home was not as convenient for a young married couple as it ought to have been. The husband promised to provide a matrimonial home separate and apart from the house of his sister. Houses were, however, difficult to obtain. The wife became ill and was taken to the hospital. She was discharged towards the end of February 1943 and it was arranged between her husband and herself that she was to spend one month at her mother's house. The matrimonial home, however, was not changed. On the 11th March 1943, before the expiration of the month, the hus-

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band asked his wife to return to the matrimonial home. The wife refused on the ground that the husband had promised to provide a home separate and apart from the house of his sister and that he must do so. The husband thereupon discontinued his visits to his wife at her mother's house. The wife went to the matrimonial home on five occasions between the 11th and the 25th March 1943: on four occasions the door was locked and on one occasion the door was unlocked but the appellant was not in. The wife wrote her husband two letters — on the 19th and on the 26th March 1943. The first letter was a very affectionate letter in which she asked that they turn over a new leaf and live the life to which they had pledged themselves; she further stated that she would like to see him to let them make up matters. In the second letter the wife pointed out that she had not seen her husband for 2 weeks and that he had not replied to the first letter. At the end of March 1943 the husband did not give his wife any money for her maintenance for the month of April 1943. On the 4th April 1943 the husband went to see his wife at her mother's house: the wife again refused to return to the matrimonial home and gave the same reason as before. The husband then said that he was not leaving his sister's house, and that, if his wife wanted to do so, she could put him before the Court. On the 5th April 1943 the husband met his wife on the bridge leading to her mother's house. He told her that he wanted her to go to the matrimonial home that night. The wife went there, and they had sexual intercourse. The husband told his wife that he wanted her home, that he wanted her to stay and that he was not going to let her go away. Eventually he took his wife back to her mother's house. At about 11.30 p.m., while the wife was speaking to her husband on the bridge, her mother called to her saying that she was standing too long in the dew and that she must come in. Husband and wife then kissed each other good-night.

Clearly, at this stage, there was no evidence whatever that the husband had deserted the wife.

On the 6th April 1943 the husband received a letter from Mr. C. Shankland, Barrister-at-Law, acting on behalf of the wife asking the husband to make a proper home for his wife and himself to live in, and to give his wife some money for her upkeep. In that letter reference was made to the lack of privacy in the room occupied as the matrimonial home. Upon receipt of this letter the husband went to the house of his wife's mother and used abusive language to her parents. He then knelt down in the yard, and swore that he would not "live" in a house with his wife or else he would "out" her light. There is no doubt that the husband acted in a most unseemly manner, and, in respect of his conduct, he was disciplined by the police authorities on complaint having been made by his wife and her parents. The wife told Assistant Superintendent of Police Roberts that she would go with her husband- if he were transferred to the country: she did not say that she was, in any way, afraid of her husband; she merely said that she would not be able to leave Georgetown

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until after she had had her baby. The wife told Mr. Roberts that her husband gave her no money. Mr. Roberts replied that her husband had told him that he was not giving her a cent until she returned to his home. At the end of April 1943 the husband did not give the wife any money for her maintenance for the month of May 1943. On the 22nd May 1943 she filed the complaint in these proceedings.

While we deplore the behaviour of the appellant on the 6th April 1943 towards his wife it appears that no similar outburst was made by him prior to the 6th April 1943. Further, it does not appear from the evidence that the words used on that occasion in relation to his wife induced any fear in her mind, or that she believed that he would or might kill her. He did indeed say something about not living with his wife any more, but those words were said in anger and, it would appear, were so understood. The dispute, and the only dispute, between the appellant and his wife was whether the matrimonial home was to continue to be at his sister's house or not. The appellant, although he agreed in principle that he should have a matrimonial home separate and apart from his sister's house, felt that his wife and himself should remain at his sister's house until they had certain things necessary for a separate household, and we are unable to say that the appellant's attitude was unreasonable or insincere. The respondent refused to return to the matrimonial home, and the appellant ceased to provide for her maintenance so long as she continued to reside in her mother's house.

In these circumstances, the learned Magistrate's decision that the appellant deserted his wife on or before the 22nd May 1943 cannot be supported having regard to the evidence. Counsel for the respondent did not submit that the evidence adduced in the magistrate's court established the second ground specified in the complaint, namely, that during the month of December 1942 and up to the time the complaint was filed on the 22nd May 1943 the appellant was guilty of wilful neglect to provide reasonable maintenance for his wife and by such neglect has caused his wife to leave him and live separately and apart from him. The reason why the respondent refused to return to the matrimonial home was not because the appellant did not deal fairly with the respondent's mother with respect to the maintenance of the respondent while she was spending time with her mother: the reason was that the respondent insisted that the matrimonial home should be removed from the house of the appellant's sister before she would return to it.

The appeal is allowed, the decision of the Magistrate is set aside, and the respondent's complaint is dismissed. In the circumstances of this case, there will be no order as to the costs of this appeal or as to the costs in the Magistrate's court.

Three years have passed since the 11th March 1943 on which date the respondent first refused to return to the matrimonial home. We express the hope that the appellant is now financially able to provide for his wife, his child (born in September 1943) and himself, a home which will be separate and apart from his

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sister's house. The record discloses that the appellant removed from his sister's house at some time prior to the 3rd August 1944.

*Appeal allowed.*

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

DUDLEY GIBSON, Appellant (Defendant),  
 v.  
 PERCY HINTZEN, P.C. No. 4645, Respondent (Complainant).

[1945. No. 494.—DEMERARA.]

Before Full Court: LUCKHOO, C.J. (Acting), BOLAND, J.

and DUKE, J. (Acting):

1946. MARCH 15, 22.

*Criminal law and procedure—Being found in a yard for an unlawful purpose—Unlawful purpose—Does not mean an immoral purpose—Summary Jurisdiction (Offences) Ordinance, cap. 13, s. 147 (iv).*

*Appeal—From magistrate's court—Finding of fact—Intent to steal—Reasonable doubt as to—Decision of magistrate reversed.*

Where a person is charged, under section 147 (iv) of the Summary Jurisdiction. (Offences) Ordinance, cap. 13, with being found in a yard for an unlawful purpose, the onus is on the prosecution to establish that the person was so found, not for an immoral purpose, but for an unlawful purpose.

Where a magistrate found that a defendant was found in a yard for an unlawful purpose, to wit, with intent to steal, and on the evidence there was reasonable doubt as to whether he had such intent, or whether he was in the yard for an immoral purpose, the decision of the magistrate was set aside.

APPEAL by the defendant Dudley Gibson from the decision of a Magistrate of the Georgetown Judicial District convicting him of being found in a yard for an unlawful purpose contrary to section 147 (iv) of the Summary Jurisdiction (Offences) Ordinance, cap. 13.

*John Carter*, for appellant.

*A. V. Crane*, acting Solicitor-General, for respondent.

*Cur. adv. vult.*

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

The Complaint out of which this appeal has arisen was laid under section 147 (iv) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13. That part of the Section makes provision for two sets of offences, viz:— where a person is found in any one of the places mentioned in the section *for any unlawful purpose*, and where being found does not give a satisfactory account of himself. It was under the former of the two limbs of that part of the section that the appellant was charged, the unlawful purpose being an intent to steal.

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It would be well before dealing with the facts in this appeal to state what evidence is necessary for the prosecution to adduce in each of the above instances, in proof of the offence.

In the former, the discovery upon the premises of the person doing the acts or things which of themselves constitute the unlawful purpose is necessary. In the latter, mere discovery upon the premises is sufficient.

Had the appellant been charged under the second limb of that part of the section and identity being established, to excuse himself of the offence he would have had to give a satisfactory account of his presence in such a place.

The learned magistrate found as a fact that the appellant at the hour of 1.15 a.m. on Sunday, the 8th day of April, 1945, was endeavouring to push open one of the windows by the steps of Jardine's house. Having failed in his attempt he then tried to raise another window which had a missing pane of glass and afterwards put his head through the opening of that pane when a blow was struck at his head with a stick by Jardine who stated that the blow partly came in contact with a dressing case in his house. The appellant was then seen to fall on the steps. He got up, walked down the steps, opened the gate and went away, at the same time wiping his forehead.

Jardine stated that he identified the appellant, as the person who attempted to open the window after he (appellant) fell, by looking through the gap caused by the missing pane.

The appellant was arrested at 8 o'clock that morning and was found to be suffering from a fresh bruise on his forehead and on his nose.

We are of opinion that, upon those findings of fact, and identity being satisfactorily established, the prosecution had made out a *prima facie* case so that from them the fact in issue may be inferred, but not in the sense that it must be inferred unless the contrary is proved. The legal burden to prove the offence still remains on the prosecution.

The appellant gave evidence and called witnesses to show that at one time he was a visitor to the Jardine's house. He stated that he slept at the Jardine's residence for a month and a half ending July 1944, and that Mrs. Jardine frequented his workplace at Sprostons during October 1944 after which he continued to meet her. He said he spent the evening of the 7th April, among other places, at the Savoy Hotel from where about 10 p.m. he had to be taken to his home the worse for liquor and did not recollect or was he able to say where he was from that time until 8:15 a.m. of the next day.

It was not denied by Jardine that the appellant used to visit his home often up to the month of July, 1944, and that he Jardine had warned the appellant not to return and this after appellant's mother had complained that Mrs. Jardine was encouraging the appellant at her home.

Apart from the evidence of the appellant, Mrs. Jardine admitted her husband told her in December, 1944, that if the appellant did not leave her alone he would put him in trouble. The

appellant did not admit that he was the person who was in Jardine's yard at 1.15 a.m. of the 8th day of April. His mother said that he never left the home after 10 p.m. of the 7th April and slept throughout the night. In these circumstances was the legal burden discharged by the prosecution? The law has repeatedly been laid down that where intent is an ingredient of a crime, there is no onus on the defendant.

The principle involved appears when fully considered to be no more than this. If the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, whether by positive evidence or by an examination of all the circumstances the crime as defined is not committed.

The learned magistrate never gave consideration to this aspect of the matter for after finding that the appellant was a trespasser when he entered the yard he proceeded in condemnation of the appellant's act as follows: —

"There was no explanation, therefore, forthcoming from him "as to why he was trying to gain entrance at the hour of 1.15 a.m. "at a place where he was forbidden to go. I could only conclude "that his visit at that hour of the morning, and the manner in "which he tried to gain access to the house strongly indicated "that he was there for an unlawful purpose, to steal."

He seemed to have cast the burden on the shoulders of the appellant to negative the fact that *no* crime had been committed. We can find no such burden in that part of the section creating the offence charged.

It would be interesting to refer to the case of *Attygalle and another v. The King* from Ceylon which engaged the attention of the Privy Council and is reported in (1936) A.C. p.338. The accused persons who petitioned for special leave to appeal to His Majesty in Council from a judgment of the Supreme Court of the Island of Ceylon, were charged for voluntarily and illegally causing the death of a person by means of a criminal operation. The accused contended (*inter alia*) that the judge completely misdirected the jury as to the onus of proof, in that, after referring to section 106 of the Ceylon Evidence Ordinance, No. 14 of 1895, which provides "when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him" he directed the jury that the burden was on the accused of proving that they had not committed the offence charged against them, they being the only persons present when the alleged offence took place.

The Judicial Committee of the Privy Council held that that direction did not correctly state the law. It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime had been committed. The jury might well have thought from that passage in the summing up that that was in fact a burden which the accused had to discharge.

The legal burden of proving the fact in issue is in our view an incidence which does not depend on whether the averment is positive or negative as in the Ceylon Ordinance, for such averment can be varied by a change of language. It depends on the rules of substantive law.

## DUDLEY GIBSON v. PERCY HINTZEN, P.C. No. 4645

Apart from the above principles it is open to an accused person to repel the inference of the outward and visible acts as in the present case by argument as by submitting that the facts proved only raise a suspicion as distinct from a legitimate inference; or by contradicting the evidence; or by giving evidence of other facts as the appellant has done to explain why the fact in issue should not be inferred.

When considering the guilt of a person accused of an offence of a criminal nature, the Court requires a high degree of probability. It must be satisfied beyond reasonable doubt.

The learned magistrate failed in our view to give consideration to the peculiar circumstances brought out in relation to the particular offence charged.

There were present in the case materials pointing away from the direction of any illegal intention on part of appellant, as an immoral as distinct from an unlawful act cannot suffice to constitute criminal liability.

There were two different sets of circumstances in evidence as related above by which such intent may be negated.

*Woolmington v. The Director of Public Prosecutions* (1935) A.C. 462 makes it clear that if upon a review of all the evidence in a case the jury are left in reasonable doubt the prosecution would have failed to discharge the burden which rests on it. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt.

But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

There is another aspect of the case which is important to consider in relation to the intent on part of the appellant on his visit to the yard as found by the magistrate. It is not disputed that the appellant was so drunk that he had to be taken home at the hour of 10 p.m. and it is alleged by the prosecution that at 1.15 a.m. of the next day, barely three hours after, he had conceived the intention to steal.

Evidence of drunkenness which renders an accused person incapable of forming the specific intent essential to constitute the crime charged must be taken into consideration with the other facts proved, in this case his association with Mrs. Jardine, in order to determine whether or not he had such intent.

In *Hawkins' Pleas of the Crown*, Vol. 1 Ch. 1 S.6, it is said "he who is guilty of any crime whatever through his voluntary drunkenness shall be punished for it as much as "if he had been sober."

So the law stood for many years but the law is no longer rigid and there are many decisions to the effect that where intent is of the essence of the offence it may be disproved by showing that the person was drunk at the time and his mind obscured by drink for the actual guilt or innocence of a man in foro conscientiae depends directly upon his intention.

The defence in this case apart from the other circumstances mentioned above was an alibi. The learned magistrate rejected the same. The recent case of the *King* against *William Goodwin* reported in (1944) 1 A.E.R. p.506 exemplifies the care which should be taken where an alibi is set up by an accused person and not accepted by the Court. The accused in that case was charged with an offence under the Prevention of Crimes Act 1871, section 7. He, at the trial set up an alibi, and as not infrequently happens with people who set up an alibi as their defence, the trial proceeded as if the only issue was whether he was the man who was seen by the police or not.

We are not satisfied that had the learned magistrate approached consideration of the whole of the circumstances as he should he would have come to the same conclusion. For the above reasons the appeal must be allowed with costs and the conviction and sentence set aside.

The offence for which the appellant was convicted is of too grave a nature for the proof thereof to rest upon the evidence we see on the record. He was sentenced to the maximum term of imprisonment, in addition deemed a rogue and a vagabond a stigma which, if the conviction stood, he would carry with him for the rest of his life.

*Appeal allowed.*

ROBERT VICTOR EVAN WONG, Judgment Creditor,  
GLADYS STUBBS, Judgment debtor.

The Colony of British Guiana, Garnishee.

1942. No. 158— DEMERARA.

BEFORE DUKE, J. (ACTING) IN CHAMBERS:

1946. MARCH 26.

*Practice and procedure—Attachment of debts—Debt due by Colony of British Guiana to judgment debtor—Garnishee order nisi—Application for—Cannot be granted—Rules of Court, 1900, Order 36, rule 73.*

A garnishee order nisi cannot properly be made against the Colony of British Guiana.

Application by Robert Victor Evan Wong that the Colony of British Guiana pay the debt due from the Colony to the judgment debtor, Gladys Stubbs in her capacity as the executor of Handel Hector Griffiths deceased who was the sole executor of Millicent Griffiths deceased, or so much thereof as may be sufficient to satisfy the judgment obtained by the judgment creditor against the judgment debtor.

There was no appearance by or on behalf of the judgment creditor Robert Victor Evan Wong in whose favour a garnishee order nisi had been made.

## R. V. EVAN WONG v. GLADYS STUBBS

A. V. Crane, acting Solicitor-General, for the garnishee, appeared to show cause.

DUKE, J. (ACTING):

On the 12th February, 1946 the Court, on the application of the judgment creditor Robert Victor Evan Wong made a garnishee order nisi calling on The Colony of British Guiana, the garnishee named in the order, to appear before a judge in Chambers on the 25th March, 1946 at 9.30 a.m. on an application by the judgment creditor that the said garnishee pay the debt due from them to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment obtained by the judgment creditor against the judgment debtor.

On the 21st March, 1946 there were filed in the Supreme Court Registry, (1) without prejudice, an authority signed by the Governor of British Guiana authorising the Crown Solicitor to appear for the Colony of British Guiana and to file all proceeding's and do all acts and things necessary in the matter of the garnishee proceedings and (2) under protest and without prejudice, an affidavit by Vivian Charles Dias the acting Crown Solicitor in which he stated that neither the Colony nor the Government of British Guiana is indebted to the judgment debtor in any sum of money whatsoever.

Upon the application by the judgment creditor that the garnishee order *nisi* be made absolute coming on for hearing, the Solicitor-General appeared on behalf of the garnishee, The Colony of British Guiana, but there was no appearance by or on behalf of the judgment creditor.

The learned Solicitor-General took the preliminary objection that garnishee proceedings cannot be brought against The Colony of British Guiana.

In ROBERTSON'S Civil Proceedings by and against the Crown and Departments of the Government, 1908 edition, page 611 it is stated that "Order 45, which concerns the attachment of debts, does not bind the Crown, and so garnishee orders nisi against Government Departments have from time to time been discharged with costs." This passage is cited with approval in ANNUAL PRACTICE, 1945, at page 851, in the notes to Order 45, rule 1 relating to "Cases where there is no attachable Debt ... 28. Debts from the Crown."

Rule 73 of Order 36 of the Rules of Court, 1900 is equivalent to the English Order 45, rule 1.

I therefore hold that a garnishee order *nisi* cannot properly be made against The Colony of British Guiana.

The learned Solicitor-General took other preliminary objections but it is not necessary to deal with them in these proceedings.

The garnishee order *nisi* made on the 12th February, 1946 is discharged with costs, and I certify for counsel.

*Garnishee order nisi discharged.*

S. S. M. INSANALLY v. JAMES GOBIN

S.S.M. INSANALLY, Appellant (Defendant).

v.

JAMES GOBIN, Respondent (Plaintiff).

1945. No. 499—DEMERARA.

BEFORE FULL COURT: LUCKHOO, C.J. (ACTING),

BOLAND, J. and DUKE, J. (ACTING):

1946. FEBRUARY 27, 28; March 29.

*Appeal—From magistrate's court—Question of fact—Decision thereon set aside—Where Full Court satisfied that it was wrong.*

The decision of a magistrate on a question of fact set aside where the Full Court was satisfied that it was wrong.

APPEAL by the defendant S. S. M. Insanally from the decision of the Magistrate of the Courantyne Judicial District awarding judgment in favour of the plaintiff James Gobin for the sum of \$60.

The appellant appeared in person.

*Mungal Singh*, for respondent.

*Cur. adv. vult.*

LUCKHOO, C.J. (Acting) delivered the judgment of DUKE, J. (Acting) and of himself as follows: —

In this appeal, the main ground argued by the appellant was that the decision was unreasonable or could not be supported having regard to the evidence, and he sought to support that ground by reference not only to the oral testimony but to the documentary evidence properly admissible in the case. He contended that the probabilities were distinctly in his favour and that the learned Magistrate erred when he gave judgment for the Respondent for the sum of \$60: on a claim for monies had and received to and for the use of the respondent on the 15th day of November 1942 and on the 4th day of February, 1943. It is necessary before dealing with this ground of appeal to set out the principle which should guide us in examining the evidence on the record, and reference to the case of *COGHLAN V. CUMBERLAND* (1898) 78 Law Times 540, is not altogether inapt for this purpose where Lord Lindley said :

"The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must re-consider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult

## S. S. M. INSANALLY v. JAMES GOBIN

to estimate correctly the relative credibility from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

In the later case of *Powell and wife v. Streatham Manor Nursing Home* (1935) A.C. p.243, it was held that where the question at issue is the proper inference to be drawn from facts which are not in doubt, the appellate Court is in as good a position to decide the question as the judge at the trial.

But where the judge has come to a conclusion upon the question which of the witnesses whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of the matter than the appellate tribunal can be; and the appellate tribunal will generally defer to the conclusion which the trial judge has formed.

Another important principle to be kept in mind is where the decision of a trial judge is based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal must in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.

It may, however, be that in deciding between witnesses a judge has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence or has given credence to testimony which turns out on more careful analysis to be substantially inconsistent with itself or with indisputable fact, in which case an appellate Court is not placed at any disadvantage the matter being susceptible of being dealt with wholly by argument.

Let us turn to a consideration of the facts in the present case.

The respondent who is in charge of the Postal Agency at No. 19 Courantyne, on the East Coast of the County of Berbice, is the owner of two pieces of land, one situate at Palmyra and the other at Plantation Kendalls, also called No. 19, six miles from the town of New Amsterdam.

As to Plantation Kendalls it would appear that he is the owner of lots 4 and 5 in Section B, as laid down and defined on a plan made by the late H. O. Durham, Sworn Land Surveyor, and dated 29th September 1930 after a partition by him under the District Lands Partition and Re-Allotment Ordinance, Chapter 169.

To the East of the said Section there is a trench which runs north and south and abuts Lot 10 in the ownership of one Bhugmania.

The respondent was of the opinion that that trench is a reserve common to all the owners of Section B; and in order to determine that fact, on the 3rd day of November 1942, on the advice of his Counsel, Mr. Mungal Singh, wrote the appellant with a view to

## S. S. M. INSANALLY v. JAMES GOBIN

retaining his services for the purpose of inspecting two cross reserves, and to measure the width of the trench 10 feet wide used as a rice field trench. In that letter the respondent intimated to the appellant that he had a plan of Durham's in his possession and that all paals laid down by Durham were in their places. The respondent considered it an urgent job for the appellant to perform.

The appellant promptly replied for we find on the 6th November the respondent offering to appellant the sum of \$18: to make the inspection and to provide for his conveyance from New Amsterdam to No. 19 and back.

In order to encourage the appellant to undertake the work, the respondent wrote "I am certain coming up "here wouldn't end "the matter. I am sure you 'will' have to give evidence before "the Supreme Court and that another fee for you."

On the 10th day of November the appellant received from the respondent the sum of \$20: being his fees in full payment for the purpose of *only* making an inspection of a trench and dam or (a reserve) at Plantation Kendalls.

The evidence discloses that on the 15th day of November the appellant made an inspection of the trench and dam as arranged, and ascertained that according to Durham's plan handed to him for that purpose and from the paals on the ground the trench which the respondent considered as a reserve to all the proprietors was within the boundaries of lot 10 the property of Bhugmania. But appellant informed the respondent that it would be best to clear up any doubt in the matter as to the correctness of Durham's plan and the rights over the trench as indicated by the location of the paals by the checking of the lots. What the appellant meant by checking on the lots is set out in a letter by him to the respondent and dated the 16th day of March 1943 in which he stated "I can undertake to check up the "facade of the estate and facades of the lots in relation to the plan to "ascertain and determine the situation as regards the trench in dispute, and "to plant paals, if necessary, for the small fee of \$10:, if you agree and send "me this fee also quickly, and the names of the parties with whom you have "the dispute, so that I can serve them with notices of the survey in time quickly."

The respondent denies that the appellant suggested to him, either expressly or impliedly, a survey of the lots but instead states that at his home that day at Kendalls appellant arranged with him for the sum of \$50: to prepare three plans of the said plantation and to supply those plans within two weeks, and respondent's claim is that he paid to appellant on the said day that sum but received no receipt therefor as the appellant said he had not his official receipt book with him, but *promised to post the receipt*.

On the other hand, appellant's version is that he never received any money on that day but on the following day in New Amsterdam the respondent paid him the sum of \$10: for a copy of a plan of Palmyra, respondent's other property. A letter exhibit A tendered at the hearing disclosed the fact that on the 30th day

## S. S. M. INSANALLY v. JAMES GOBIN

of November, 1942, the respondent wrote to appellant (that letter has not been produced) in relation to certain work being performed by the appellant for the respondent, for on the 3rd day of December the appellant in his letter Exhibit A which purports to be in reply thereto stated his inability to procure the kind of drawing paper that he wanted for the purpose, and that the work required at least 11/2 yards of paper.

Respondent's contention is that the work there referred to was the work which appellant had undertaken to do for the \$50: paid him, namely to prepare three plans of Kendalls. The appellant, on the other hand, contends that the letter supports his oral testimony that on the 16th day of November he agreed to make for the respondent a copy of the plan of Palmyra. An examination of Durham's plan of Kendalls shows that it would require about 11/2 yards of drawing paper to make one copy. The latter portion of that letter is in answer to certain enquiries by the respondent with respect to a sub division of house lots 4 and 5, Section B, Kendalls. This reference is important having regard to the contents of the letter of the 16th March 1943 above referred to.

There seemed to have been a lull in the correspondence between the parties but on the 29th day of January 1943 the appellant wrote the respondent, apparently after a meeting with him, suggesting that it was up to the respondent to send him a fee of \$10: and the plan as early as practicable — that plan the appellant states was the plan of Kendalls for the purpose of colouring. No explanation about this plan is given by the respondent. Could it be the plan of Kendalls for the purpose of making three copies according to the agreement alleged by the respondent — when the respondent's story was that the appellant had promised to supply the plans within two weeks after the 15th day of November?

The sum of \$10: was forwarded to the appellant on the 4th day of February 1943 by registered post. The appellant claimed it as a fee, the respondent stated that it was paid as an addition to meet the cost of the drawing paper. It was unfortunate that the letter accompanying the \$10: remitted was not produced as the reason for the payment of the \$10: would no doubt have been therein disclosed.

The next letter in point of time and before it is alleged the appellant demanded the sum of \$25: to have the plan recorded, is that bearing date 16th March 1943. in which the fee for the sub division of lots 4 and 5 Section B, was reduced to \$40: and a clear statement that he (appellant) would be willing to undertake a survey for the price of \$10: in order to ascertain and determine the situation as regards the trench in dispute.

This letter was produced from the custody of the respondent yet we do not find any reply being made by him that he had already paid the sum of \$60: to the appellant for preparing and depositing three plans of Plantation Kendalls in which undoubtedly the question of the trench was in dispute.

The evidence of the respondent is that in March or April

## S. S. M. INSANALLY v. JAMES GOBIN

1943, he was asked by the appellant to pay \$25: to have the plan recorded. That on the 8th April the appellant rode to his home at Kendalls and there informed him he had deposited the plan and had paid \$25: out of his own money for doing so, all of which alleged statements were untrue as the respondent subsequently discovered on his visit to the sub-registry in New Amsterdam. It was in those circumstances he sued for a refund of \$60.

It should be observed there is no evidence that the respondent wrote asking for the receipt for the sum of \$50: which appellant promised to send in the month of November, 1942, nor any attempt on part of the respondent on whom, if the respondent's story is true, a big fraud had been perpetrated, to take any steps then to compel the appellant to refund that sum; until a year after when a letter by Mr. Mungal Singh on behalf of the respondent couched in the mildest terms was sent requesting the return of \$60: To that letter the appellant sent a vigorous reply in which he flatly denied the alleged agreement.

The appellant is a Sworn Land Surveyor and is entitled to practise his profession under the provisions of the Land Surveyors Ordinance, Chapter 167. Surveys are made, in accordance with the provisions contained in section 16 to 33 of the said Ordinance and it would seem hardly credible that the appellant with full knowledge of the requirements in the case of a survey would seek to record plans made by him without a survey of the terrain being made after due notice to adjoining owners as no plan can ever be recorded in the Department of Lands and Mines without a report or memorandum being lodged there by the surveyor. Not only would he run the risk of being prosecuted criminally and heavily fined for any false report or memorandum but he would also run the risk of having his certificate cancelled.

If, as the respondent alleges, the appellant agreed to prepare and deliver three plans of Plantation Kendalls and deposit them at the Registry he, (appellant) would have either to copy Durham's plan which would not have been of any benefit to him (respondent) or the appellant would have made his own plan shifting the boundary to exclude the trench in dispute and submit a report or memorandum to the Department of Lands and Mines which would have been false, and subject himself to the severe penalties of the law under the Ordinance, besides which no diagram can be deposited or recorded in the Registry until it has been certified by the Commissioner of Lands and Mines.

We cannot assume, nor for that fact the Magistrate should, that the respondent who is entrusted with a Government Postal Agency, the owner of immovable properties and a person who received his transport of Plantation Kendalls after a survey and partition by Mr. Durham, would be so ignorant as to what the appellant had to do in relation to the dispute which had arisen over the trench and be easily duped.

The respondent when he was recalled by the appellant admitted that his transport is based on Durham's plan and that the appellant suggested a survey after the inspection. At first he denied that he arranged to take the appellant to Mr. Singh but

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admitted, immediately after, that he did, which fact the appellant contends supports what was contemplated in the letter of the 3rd November 1942. "You will be needed to explain to Mr. Singh "something of your findings in connection with dam and trench." What therefore was the object of the visit to Mr. Singh and would the respondent on his own initiative enter into an agreement with the appellant as he stated without his counsel's advice?

The appellant contends that all these circumstances, which are not dependent on his oral testimony, supported as they are by his (appellant's) letter of the 16th day of March 1943 (to which the respondent never replied and bears the significance that it has no pencil writing observations like those produced and bearing dates 29th day of January and 1st and 7th April 1943), made the decision of the learned Magistrate unreasonable.

In another ground of appeal he complains of the wrong reception of evidence which was highly prejudicial to his case. We cannot find any direct reference in the learned Magistrate's reasons that he took into consideration what is clearly inadmissible evidence written on documents otherwise admissible.

Another attack made upon the respondent's case is that the plaint, the evidence led in support and the letter of demand of the 27th March 1944, are all inconsistent with one another and should have affected the mind of the Magistrate in coming to the conclusion he did. The appellant finally submitted to us that the learned Magistrate did not give due or any regard to the undisputed documentary evidence, the oral testimony by him (appellant) and to the catena of circumstances which weighed heavily in his favour; and the probabilities were in his favour for whom judgment should have been entered. The question which has arisen for our consideration is, in view of the statements of fact set out above, was the decision of the Magistrate unreasonable, or having regard to the evidence could it be supported? While the appeal Court is always reluctant to differ from a Magistrate where his findings of fact are based upon his view of conflicting testimony, yet where those findings are contrary to the weight of the evidence, and the Magistrate refrains from furnishing the grounds for his acceptance of the less weighty evidence, the appeal Court is bound to give what effect it thinks should be attached to the evidence as it appears upon the record: see *Morgan v. Morgan* (1943) B.G. L.R. p. 85.

The learned Magistrate, we find in his reasons, made a sweeping rejection of the story of the appellant when he said "I did "not believe any part of the defendant's evidence." He does not attempt to give reasons for the converse of the principle laid down in *Morgan's* case and in rejecting the evidence of the appellant *in toto* we have to consider whether he omitted to take into consideration facts which were proved or which he ought to have found to be established.

The learned Magistrate, from his reasons of decision, did not believe the appellant when he gave evidence as follows: —

"Plaintiff engaged me to make an inspection of part of Plantation Kendalls. He paid me \$20: I made the inspection on the 15th

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November, 1942, with the assistance of plaintiff's plan. Plaintiff asked me my opinion. I told him from the position of the paals it appeared that the trench belonged to Bhagmania of lot 10, and from his plan it was doubtful and I would have to check up on the lots."

The narrative which we have given in the earlier part of this judgment shows that these facts were clearly established, by documentary as well as by oral evidence. Despite this, however, the learned Magistrate did not believe "any part of the defendant's evidence." We have examined Durham's plan, and from our examination it is clear to us that what the appellant says he told the respondent after the inspection of the 15th November, 1942 is just what we would expect a land surveyor to tell him. The evidence of the appellant on this point is not unbelievable: on the other hand, it is consistent with all the probabilities of the case.

If the learned Magistrate had taken into consideration the evidence of the appellant as to what he told the respondent after the inspection, he would have asked himself the question, whether it was reasonable to find that the agreement as alleged by the respondent was in fact made between the appellant and the respondent, having regard to the fact that the appellant informed the respondent that a survey was necessary, and that the respondent was being advised by competent counsel who had recommended the employment of the appellant to make an inspection of the trench in dispute, and also having regard to the fact that the legal adviser actually saw the appellant and the respondent, in respect of this trench, on the evening of the day on which the agreement, as alleged by the respondent, was made. The respondent did not tell his counsel that he had made an agreement whereby the appellant was, for the charge of \$50: to supply the respondent with 3 copies of the plan of Kendalls, and he gives no reason for this surprising non-disclosure. It was part of the arrangement between the appellant and the respondent, in respect of the inspection, that after the inspection the appellant was to explain to the respondent's legal adviser something of his "findings in connection with dam and trench." If the agreement, as alleged by the respondent, was in fact made, why did not the respondent tell his legal adviser "you need not worry about what the "surveyor has found; I have paid him \$50; he will make 3 new plans and all "the difficulties with respect to the trench will be swept away?"

A court of Appeal must recognise that the onus is upon the appellant to satisfy it that the decision of the Court below is wrong, and in order to reverse that decision it must not only entertain doubts whether the decision below is right, it must be convinced it is wrong.

What then should be the attitude of this Court towards the judgment arrived at by the learned Magistrate under the circumstances set out above?

Has the appellant satisfied us that the learned Magistrate was wrong and his decision ought to be the other way?

## S. S. M. INSANALLY v. JAMES GOBIN

We are of the opinion that the learned Magistrate fell into error in drawing wrong inferences from the undisputed documentary evidence tendered by the appellant when he expressed a wholesale disbelief of the appellant's story although founded upon evidence.

There were certain governing facts contained in those documents which in relation to others led inevitably to a conclusion inconsistent with the finding of the learned Magistrate.

As *Lord Wright* said in the *Powell* case (at page 267) "In truth, it is not "desirable, in my opinion, to do more than note, as I think Lord Sumner was "stating, principles which will guide the appellate Court in the majority of "such cases. The problem in truth only arises in cases where the judge has "found crucial facts on his impression of the witnesses: many, perhaps most "cases, turn on inferences from facts which are not in doubt, or on documents: "in all such cases the appellate Court is in as good a position to decide as the "trial judge".

If in the present case the question was one of credibility only or where the probabilities were evenly weighted we would have refrained from interfering with the decision as cases which turn on conflicting testimony of witnesses and the belief to be reposed in them an appellate Court in the words of the *Powell* case can never recapture the initial advantage of the judge who saw and believed.

But the instant appeal in our opinion is not one of such cases. The learned Magistrate failed to take into account facts contained in some of those documents produced at the trial and which were material in estimating the value of the evidence given by the parties, and, that he gave credence to the testimony of the respondent which turns out on more careful analysis to be substantially inconsistent with itself, and in negation of the alleged agreement on which he found in favour of the respondent.

We have re-considered the evidence which was before the Magistrate; we have not disregarded the Magistrate's reasons for decision; we have carefully weighed and considered them; and, on full examination and consideration, we have come to the conclusion that the decision appealed from was wrong. Consequently, it is our duty not to shrink from overruling it.

For the above reasons we are of the opinion that the appeal should be allowed with costs, that the decision appealed from should be set aside, and that the plaintiff's claim in the Magistrate's Court should be dismissed with costs.

BOLAND, J.:

In the action which was tried before the learned Magistrate of the Corentyne Judicial District Judgment was entered against the appellant for the sum of \$60.00 and costs. In substance the case for the respondent was that he had paid to the appellant, a Sworn Land Surveyor, the abovementioned sum of \$60.00 to prepare three plans of his lands at Plantation Kendalls, Berbice, and that the appellant had failed to do so. In his plaint the respondent claimed the return of the sixty dollars specifying his cause of action as being one for monies had and received and the learned

Magistrate finding in respondent's favour gave judgment against the appellant for the amount mentioned in the plaint based on that cause of action. Strictly, of course, the action should have been for the return of money on a consideration that has failed. It has long been settled, however, that more particularly in matters coming before the magistrate in the exercise of his civil jurisdiction it is sufficient for a plaintiff in his written plaint to set out such particulars as would inform a defendant of the nature of the violation of his rights for which he files his plaint, and that no misdescription of his cause of the action shall vitiate the proceedings. Nevertheless it would be more satisfactory if the magistrate in such cases directed the plaintiff to amend his plaint so as to conform with the true classification of the cause of action.

As gathered from his submissions at the hearing on appeal the appellant who appeared before this Court in person seeks to impeach the judgment of the learned magistrate on the following grounds

- (1) The learned magistrate took into consideration evidence legally inadmissible
- (2) That the decision was unreasonable and could not be supported by evidence.

As to (1) appellant points to certain memoranda admittedly made by respondent himself on letters written by appellant to respondent which letters were properly received in evidence by the magistrate. These memoranda purported to describe what respondent did on or subsequent to the receipt of the letters. They were notes which respondent said he made for his own purposes as a record chronicling certain incidents in his relations with the appellant as regards the transactions between them. As the letters were admitted, these memoranda could not be physically excluded but it is clear that the learned magistrate was aware how they came to be there and the appellant has not satisfactorily established, as the burden falls on him to do, that the magistrate did in fact take these memoranda into consideration in making his findings.

As to (2) it may be observed that whilst at the trial the respondent as plaintiff had the burden of establishing his claim, on appeal it is on the appellant the burden lies of satisfying this Court that the decision of the magistrate is wrong and should be set aside. Moreover, as has been repeatedly declared, this Court will not interfere with the findings of fact of the magistrate even if this Court might not have arrived at the same conclusions, provided there was evidence before the magistrate upon which his findings of fact could be supported.

Appellant contends that the magistrate failed to give weight to the documentary evidence. This Court certainly would reverse the decision of the magistrate if wholly based on a wrong interpretation of documents or on incorrect inferences drawn by him from the correspondence passing between the parties, because as regards evidence of this nature the magistrate is not in a more advantageous position than this Court in assessing the value of the evidence as he would be in the case of oral evidence by seeing

## S. S. M. INSANALLY v. JAMES GOBIN

the demeanour of witnesses actually present testifying before him. But in this case it is manifest that each side had failed to tender certain letters and documents which were very material but which it is suspected might have been prejudicial to his case. It was for the magistrate watching the demeanour of the parties to conclude whether it was a case of wilful suppression or a genuine inability to find and produce the particular document.

Appellant has stressed that it is incredible that a man of the worldly knowledge of a postal agent in a busy district, as respondent is, would expect a surveyor to be able to furnish a plan of lands and record same at the office of the Lands and Mines without a survey. There is much point in this contention. But on the other hand, if these plans as is admitted were required by respondent for the purposes of a case he had then pending which was to raise the issue of the correct delineation of the lands, it is not so much outside the bounds of possibility that respondent believed that for the big consideration agreed upon appellant would be true to his promise to prepare such plans as would be of use to him in his case. Perhaps a thorough judicial probing of the evidence on both sides might have elicited that the parties were in *pari delicto* although no such defence was set up — nay, could not be set up by the appellant in view of his professional standing.

But the learned magistrate who made no such searching probe into the evidence took the view that plaintiff had made out his case, and I am not in a position to say that on the evidence before him that he was wrong — appellant has accordingly not discharged the onus of satisfying the Court that the decision should be reversed — and the appeal therefore should be dismissed and the judgment of the Court below should be upheld.

*Appeal allowed.*

# REPORTS OF DECISIONS

IN

## THE SUPREME COURT

OF

## BRITISH GUIANA

DURING THE YEAR

# 1946

AND IN

## THE WEST INDIAN COURT OF APPEAL

[1946].

EDITED BY

E. MORTIMER DUKE, LLB, (LOND.),

Barrister-at-Law, Middle Temple; Solicitor-General, British Guiana.

EAST DEMERARA, BRITISH GUIANA:

THE "ARGOSY" COMPANY, LIMITED, PRINTERS TO

THE GOVERNMENT OF BRITISH GUIANA.

1953.

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