JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1948.

NEWNHAM ARTHUR WORLEY.	— Chief Justice.
JOSEPH ALEXANDER LUCKHOO	— First Puisne Judge.
FREDERICK MALCOLM BOLAND	— Second Puisne Judge. (Acted As First Puisne Judge May 19 to September 10).
DONALD EDWARD JACKSON	— Acting Second Puisne Judge. (From January 1 to June 30; from September 1 to 15; from November 6 to December 31).Acting First Puisne Judge. (From September 16 to November 5).
RICHARD JOSEPH MANNING	— Acting Second Puisne Judge. (From September 16 to November 5). Acting Additional Judge. (From November 6 to December 31).

WEST INDIAN COURT OF APPEAL.

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

METHOD OF CITATION.

These Reports will be cited as (1948) L.R.B.G.

LIST OF CASES REPORTED

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CASES
DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

Ex Parte SURUJBALLI

(1947. No. 569.—Demerara)

BEFORE FULL COURT: WORLEY, C.J., LUCKHOO, J. and JACKSON, J. (Acting).
1947. DECEMBER 12; 1948. JANUARY 6.

Practice and procedure—Prerogative writ of mandamus—Jurisdiction of single judge to grant—Application for writ—To be made in the first instance to single judge—Power of judge to refer application to full bench of judges—Where impracticable or inconvenient for single judge to exercise in the matter the jurisdiction vested in him—Otherwise, full bench of judges has no jurisdiction—Where application made in the first instance to Full Court—Order nisi *made thereon—Discharged—Supreme Court of Judicature Ordinance, Chapter* 10, s. 26*—Non-compliance with.*

It is obligatory in the first instance for an application for the prerogative writ of mandamus to be placed before a single judge, and it is only when it is considered impracticable or inconvenient for him to exercise in the matter the jurisdiction vested in him, that it may be referred to the full bench of judges.

Where an application was made in the first instance to the Full Court for the prerogative writ of mandamus, an order nisi made on such application was discharged on the ground that there was non-compliance with the provisions of section 26 of the Supreme Court of Judicature Ordinance, Chapter 10.

ORDER nisi made by the Full Court on the application of Joseph Surujballi calling upon William Arthur Orrett the Licensing Authority constituted by the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22) and Allan Burton Vernon Vaughn the Licensing Officer appointed by the said Licensing Authority for the Police County of Georgetown, to show cause why the said Licensing Authority and|or Licensing Officer should not accept for registration a certain motor vehicle as a hire car within the meaning of the said Ordinance, as amended by section 2 of the Road Traffic (Amendment) Ordinance, 1946

(No. 21), pursuant to an application made to them on the 21st October 1947, and on divers occasions thereafter.

E. M. Duke, acting Attorney-General, for the Licensing Authority and the Licensing Officer, took the preliminary objection that the Full Court had no jurisdiction to make the order *nisi.*

S. L. van B. Stafford. K.C.. for the applicant Joseph Surujballi.

Cur. adv. vult.

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

On the 27th day of November, 1947, this Court on an application made *ex parte* by Joseph Surujballi granted an order nisi calling upon William" Arthur Orrett, the Licensing Authority constituted by the Motor Vehicles and Road Traffic Ordinance 1940, (No. 22 of 1940) and Allan Burton Vernon Vaughn the Licensing Officer appointed by the said Licensing Authority for the Police County of Georgetown, to show cause why the said Licensing Authority and|or Licensing Officer should not accept for registration a certain Motor Vehicle as a hire car within the meaning of the said Ordinance, as amended by section 2 of the Road Traffic (Amendment) Ordinance (No. 21 of 1946) pursuant to an application made to them on the 21st day of October, 1947, and on divers occasions thereafter.

The application to this Court for the order nisi was intituled "In the Full Court of the Supreme Court of British Guiana." Service of the said order was effected both on the Licensing Authority and Licensing Officer on the 2nd day of December 1947, and it was made returnable for the 12th December, 1947.

On the 11th December, the Crown Solicitor acting on behalf of the parties served gave notice that the Attorney-General proposed to take a preliminary objection that the Full Court had no jurisdiction to grant the order and that it should be discharged.

On the matter coming on for hearing, the learned Attorney-General submitted that the Full Court had no jurisdiction to grant the order nisi as it is now an appellate Court only with no original Civil Jurisdiction to which an application for mandamus could be made.

He referred the Court to the provisions contained in section 26(1) of the Supreme Court of Judicature Ordinance, Chapter 10, which reads: —

> "subject to any statutory provision, every action and proceeding and all business arising therefrom shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial and down to and including the final judgment or order, except any proceedings on appeal, shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing took place."

Then follows sub-section 2 "For the purpose of those proceedings a single judge shall be vested with and may exercise the whole of the original jurisdiction of the Court."

The above section is under the caption "Jurisdiction and Law." The marginal note to the section is "Original Jurisdiction."

"Court" by section 2 of the said Ordinance means the Supreme Court constituted by this Ordinance, and includes a judge when exercising any of the jurisdictions conferred on him by this Ordinance, by any other Ordinance, or by the rules.

The Supreme Court constituted by this Ordinance is dealt with in Part 1 A—Constitution and Judges—where by section 3 (1) "From and after the commencement of this Ordinance there shall continue to be one Supreme Court in this Colony which shall be a Supreme Court of Record and shall be called The Supreme Court of British Guiana." That Court by sub-section 2 has and may exercise all the authorities, powers and functions there set out, which include all the authorities, powers and functions conferred upon and exercised by the Supreme Court as constituted by the Supreme Court Ordinance, 1893 (No. 8 of 1893).

On reference to that Ordinance we find that by section 3 the Supreme Court of Civil Justice and the Supreme Court of Criminal Justice were united and consolidated together and constituted under and subject to the provisions of that Ordinance, one Supreme Court of Justice to be called "The Supreme Court of British Guiana." It provided by section 11, unless the contrary was in any case expressly provided by that or any other Ordinance, for all the jurisdictions and powers of the Court to be vested in and be exercised by the Full Court, and by section 30 "the Court" (which term included a judge) was empowered to hear and determine all the actions and matters mentioned in the said section. The same section conferred upon a single judge what was known as and called a limited Civil Jurisdiction. In 1915 when the Supreme Court Ordinance No. 10 of 1915 was passed, section 25 (which corresponds to section 26 of the Revised Edition of the Laws by the late Sir Charles Major) gave to a single judge, subject to any statutory provision, and so far as is practicable and convenient, the whole of the Original Jurisdiction of the Supreme Court of British Guiana. Major's edition divides section 25 into two sub-sections numbering them section 26 (1) and (2) and substituting the word "those" for "such" appearing in line 8 of the original section 25.

On an analysis of this section we have come to the conclusion that although an unlimited jurisdiction subject to any statutory provision was conferred on a single judge of the Court, yet the whole of the Original Jurisdiction still resided in the Supreme Court of British Guiana. Some meaning must be given to the words in the latter part of the section "for the purpose of such proceedings a single judge shall be vested:" not shall have and exercise the whole of the original jurisdiction. If the Full Court had been divested of all its original powers the words appearing in the section would, we are of opinion, never have been used.

When one looks at section 58 of The Supreme Court Ordinance 1915 which repealed The Supreme Court Ordinance 1893 and provided that where the "Full Court" or the "Limited Civil Jurisdiction" is referred to, "the Supreme Court of British Guiana" shall be read in lieu thereof; except that wherever an

appeal from a single judge is referred to the "Full Court" shall be taken to mean the Full or Appeal Court, it is evident that a distinction was being drawn between a full bench of judges of the Supreme Court and the Full Court sitting as an appellate Court from an appeal from a single judge.

On the 7th January, 1921, assent was given to the West Indian Court of Appeal Ordinance (No. 2 of 1921) to provide for appeals from the Supreme Court to the West Indian Court of Appeal constituted by an Act of the Imperial Parliament. By section 7 of the Ordinance, the right of appeal from a decision of a single judge pronounced on the hearing of any appeal under the Magistrate's Decisions (Appeals) Ordinance, 1893, to the Full Court sitting as an appellate Court was taken away and became solely vested in the newly constituted Court of Appeal, and then only on a question of law involved in the case. Section 15 saved any appeals to the Full Court which were pending at the commencement of the Ordinance. Full Court there mentioned must inevitably be given the meaning Full or Appeal Court. The Schedule to Ordinance No. 2 of 1921 prescribes the sections of the Magistrate's Decisions (Appeals) Ordinance, 1893, as amended by Ordinance No. 16 of 1917, which were repealed. They affected only the jurisdiction of the Full Court when sitting as an Appellate Court and not it's Original Jurisdiction.

The Appeals Regulation Ordinance 1922 (No. 33 of 1922) which came into force on 30th December, 1922 made further provision with respect to appeals from the Courts of the Colony to the West Indian Court of Appeal. Section 6 of the Ordinance provided that "on the commencement of this Ordinance there shall be a Court of the Supreme Court which shall be styled the Full Court of the Supreme Court of British Guiana and is in this Ordinance referred to as the "Full Court" and subsequent provisions conferred on that Court jurisdiction to entertain appeals from a single Judge and from Magistrates.

The Attorney-General has contended, arguing on the wording of section 6(1) and the long title of this Ordinance that the Full Court is nothing but a creature of this statute, perpetuated by subsequent legislation as an appellate Court only.

In our opinion this argument overlooks the fact that the Ordinances of 1921 and 1922 were limited to the appellate side of the function of the Supreme Court and in our view the correct interpretation is that the Ordinance of 1922 only re-created a former branch of the Supreme Court which dealt with appeals the existence of which had temporarily disappeared. It appears to us that this must be so if any proper meaning is to be given to section 25 of Ordinance 10 of 1915 now appearing in the law as Section 26 Chapter 10 in which the words "so far as is practicable and convenient" appear in two places.

In the result therefore we are unable to accept the submission of the learned Attorney-General.

It seems however, that the words "Full Court" in the title of the application are unnecessary and perhaps misleading; and that what the draftsman meant to indicate was that he desired a hearing of this important application for a prerogative writ by a full court of judges, the Crown Office rules in England assigning

such an application to a Divisional Court. But is it in the first instance competent for this Court, the Supreme Court to entertain the application in view of the imperative nature of the provision contained in section 26 of Chapter 10? That section provides that subject to any statutory provision (and there is none in this case) every action and proceeding and all business arising therefrom shall so far as is practicable and convenient be heard, determined and disposed of *before a single Judge* .... and he is vested with and may exercise the whole of the original jurisdiction of the Court.

By section 2 of the Supreme Court of Judicature Ordinance 1931 (No. 16 of 1931) a further section numbered 26 A was introduced whereby a single judge may, subject to the rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction vested in the Court.

This strengthens the view we have formed that it is obligatory in the first instance for an application of this nature to be placed before a single judge, and it is only when it is considered impracticable or inconvenient for him to exercise in the matter the jurisdiction vested in him that it may be referred to the full bench of judges. It is not open to an applicant to over-ride these provisions and to choose his own forum. This the applicant has done, and whilst this Court would have had jurisdiction to entertain the application had it been found at an earlier stage not practicable or convenient for a single judge to hear and determine it, as the matter stands the order nisi will have to be discharged on the ground that there was a non-compliance with the provisions of section 26 of the Ordinance.

It remains to consider the question of costs. Although we have discharged the order nisi, we have done so not because this Court would in no circumstances have jurisdiction to make it as contended by the Attorney-General but because the applicant has not taken the steps incumbent on him under section 26 which are a condition precedent to his application being entertained by this Court. In the circumstances we think the proper course is to make no order as to costs.

Order nisi discharged.

Solicitors: *R. G. Sharples; V. C. Dias,* acting Crown Solicitor (for Attorney-General).

S. SINGH *v.* E. O.SUBRYAN.

SAMUEL SINGH, also known as IVAN ABRAHAM SUBRYAN,

Plaintiff,

v.

ERIC OSMOND SUBRYAN,

Defendant.

(1948. No.13.—DEMERARA.)

BEFORE WORLEY, C.J.

[1948. May 19, 20, 21, 25, 26; June 1, 2, 3, 4, 7, 8, 9; September 9, 10, 13, 15, 16.]

Will—Propounding of—Onus on propounder—To show righteousness of transaction—That will propounded did express the true will of the deceased.

Will—Testamentary capacity—Soundness of mind—Not particular state of bodily health—To be considered.

Will—Testamentary capacity—Nature of—What is required for the purpose.

Will—Testamentary capacity—Degree required—Where will made by testator during illness—In accord with previous intention formed when in a state of health.

Will—Testamentary capacity—Delusion.

Will—Undue influence—Not where contents of will the wish and will of testator.

Practice and procedure—Costs—Will propounded—Next of kin justified in putting propounder to the proof—Positive case set up by them fails—Next of kin to bear their own costs.

The vital and essential issue in a case of the propounding of a will is not whether a question of fraud has been made out, but whether the person propounding the will has discharged the onus cast on him by the law of showing the righteousness of the transaction, and that the paper propounded did express the true will of the deceased.

Finny v. *Gavett* (1908) 25 T.L.R. 186, 188.

In deciding upon the capacity of a testator to make a will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to. The latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of. His capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase and sale of property.

Banks v. *Goodfellow* (1870) L.R. 5 Q.B. 549, 567.

It is essential to the exercise of the power to make a will that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect: and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

Banks v. *Goodfellow* (1870) L.R. 5 Q.B. 549, 567.

A testator had, while in a state of health, compared and weighed the claims of his relations and had formed the deliberate purpose of rejecting them all in favour of an adopted brother but had omitted to carry that purpose into effect before the attack of illness under which he died. During that illness, he had acted upon such previous intention and had executed a will accordingly. In such circumstances, a less degree of

testamentary capacity to weigh those claims during his illness would be sufficient to show that the will executed by the testator really did contain the expression of the mind and will of the deceased.

Harwood v. Baker (1840) 3 Moore P.C. 282, 313, applied.

Though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains.

Banks v. *Goodfellow* (1870) L.R. 5 Q.B. 549, 566.

Nature of a delusion postulating the absence of testamentary capacity discussed.

In the act is shown to be the result of the wish and will of the testator at the time, then, however it has been brought about, though you may condemn the testator for having such a wish, though you may condemn any person who has endeavoured to persuade and has succeeded in persuading the testator to accept that view, still it is not undue influence.

Baudaine v. *Richardson* (1906) A.C. 154.

Although next of kin were justified in putting the propounder of a will to proof in solemn form and in watching and sifting that proof, yet if they have gone further than this and endeavoured to set up in opposition a positive case which has failed, thereby putting the estate to the cost of expensive litigation, they will be made to bear their own costs. This is especially so where charges of undue influence, or charges in the nature of conspiracy and fraud, have been introduced.

ACTION by Samuel Singh also known as Ivan Abraham Subryan against Eric Osmond Subryan to establish as the last will and testament of Ronald D'Arcy Subryan who died on the 29th October 1947, a document made and executed on the 7th October, 1947.

L. M. F. Cabral, for plaintiff.

S. L. van B. Stafford, K.C., (*P. A. Cummings* with him), for defendant.

The Chief Justice delivered judgment, orally, in favour of the plaintiff and made no order as to costs. On the 17th December, 1948, in accordance with rule 6 (4) of the West Indian Court of Appeal Rules, 1945, the Chief Justice communicated his reasons for the judgment to the Registrar, in writing, as follows: —

WORLEY, C.J.: In this matter the plaintiff propounds as the last Will and Testament of Ronald D'Arcy Subryan who died on the 29th October, 1947 a document made and executed on the 7th October, 1947. The plaintiff is the sole executor and sole beneficiary named in the alleged will. The defendant is a brother of Ronald D'Arcy Subryan (hereinafter called the deceased). In his pleadings he puts plaintiff to the proof that the will was duly executed and alleges that the deceased at the time the will purports to have been made was not of sound mind, memory and understanding and did not know and approve the contents thereof. He also alleges that the execution of the will was obtained by the undue influence of the plaintiff and one Figueira. By way of counterclaim he alleges that the testator died intestate and asks the Court to pronounce an intestacy.

The principles of law by which a Court of first instance should be guided in a case of this nature are well-known and admit of no dispute. They are set out in the judgments of the West Indian Court of Appeal in the cases of *Straker v. Luke* 1946 (No. 3 Trinidad) and in *Walsh v. Severin* reported in B.G.

L.R. 1939 at p. 243 and are concisely summarised in the following passage from the judgment in *Finny v. Gavett* 1908 (25 T.L.R. 186 at p. 188):

> "The vital and essential issue in a case of this description is not whether a question of fraud has been made out,but whether the plaintiffs have discharged the onus east upon them by the law of showing the righteousness of the transaction and that the paper propounded did express the true will of the deceased."

It will be convenient first to set out briefly the relationships of the parties and the course of events leading up to the making of the alleged will and the death of the testator. The deceased was the youngest son of one Johnson Subryan who was a Chief Interpreter in the Immigration Department of the Government. Johnson Subryan was twice married and had two children by his first wife who are only remotely concerned in this case. By his second wife he had four sons, three of whom survived him, namely. Cecil, Eric, the defendant and Ronald, the deceased. Cecil was born in 1899, Eric in 1904 and Ronald in or about 1914. The second wife died in 1916 and a sister-in-law, Miss Evangeline Abraham, then came to live with the father to keep his house and look after his children.

About 1923, Johnson Subryan and Miss Abraham jointly bought a property of about 40 acres known as Kitty Farm adjoining the village of Kitty, just outside Georgetown. At the time of his death, Johnson Subryan also owned some property in Regent Street, Georgetown which had formerly belonged to his second wife.

In 1918, the three sons, Cecil, Eric and Ronald inherited shares in lands at Mahaica on the death of a half-brother.

The two elder sons, Cecil and Eric, both received a secondary education in the Colony and in 1920 Cecil was sent abroad to study medicine in Dublin and London and eventually qualified as a doctor. He obtained an appointment in the Medical Service of the Colony, and returned here in 1926. For a short time he was stationed in Georgetown but for the greater part of his service he has been stationed in country districts. In September and October, 1947 he was officiating as Health Officer, Demerara.

After Eric, the defendant, left school he worked for a time in the Customs Department and about 1925 was sent to England to study law, but never entered any Inn of Court. He ascribes this to his father's failure to send him sufficient money. He studied accountancy and commerce in London and worked there for two years or so, and in 1929 returned to" British Guiana. He lived with his father for a time and was then sent to supervise the farm lands at Mahaica. After that he worked for a time in two Government Departments and assisted his father in collecting rent. In 1937 he went to Aruba to work for the Lago Oil Company and has lived and worked there ever since. He has since paid two short visits to the Colony.

The plaintiff's born name is Samuel Singh and he is a distant cousin of the deceased and his brothers. He was born about 1920 and, according to the defendant's evidence, lived with Johnson Subryan's mother till her death in 1923 when he was adopted by Miss Abraham and thereafter lived with Johnson Subryan and his family first at the Immigration Depot, then at Queens-

town and finally at the house built on the land at Kitty by Miss Abraham after Johnson Subryan's retirement from Government Service.

Johnson Subryan died testate in 1940 and by his will (Exhibit C) he appointed Miss Abraham as sole executrix, devised to his youngest son Ronald all his properties in Regent Street and all moneys that he died possessed of, and to Miss Abraham his half interest in the land and buildings known as Kitty Farm. He expressly excluded from his will his two eldest sons in the following terms "I give nothing to my son Dr. Cecil R. Subryan as I have spent a large sum of money on him for his education as a Medical Practitioner. I also leave nothing to my son Eric O. Subryan as on him also I spent a large sum of money on his education in England and otherwise." The net valuation of his estate was about $8,300.

For several years before his death, he and Miss Abraham appeared to have been in financial difficulties; the Kitty farm and house were mortgaged and loans taken from money lenders. To relieve the position most of the land at Kitty was sold during 1940-41 and developed as a housing estate, now known as Subryanville, but the house and eight acres of the farm were retained. During this period the deceased and plaintiff worked on the farm with the hired labour: there was no money to spend on their education which, in the case of the deceased, did not go further than a year at a secondary school. The plaintiff attended the Government Primary School at Kitty with frequent interruptions when required to work on the farm.

After Johnson Subryan's death Miss Abraham, deceased and plaintiff continued to live in the house and to work on the farm. Miss Abraham died in 1943 and by her will appointed the deceased as her sole executor. She gave legacies of $1,500 each to the defendant and to the plaintiff "and to no other" and devised the residue of her estate to the deceased. Owing to the development of the village of Kitty and the increase in land values, the property there appreciated in value and is now valued at about $32,000.

After her death deceased and plaintiff continued to live together in the house. The plaintiff, realising his educational handicap, put himself to study bookkeeping and eventually obtained a post, on Dr. Subryan's recommendation, with Booker's Drug Store and has worked there ever since. The deceased continued to manage the farm and his other affairs. Neither of them married. At some time long past the plaintiff's name was changed to Ivan Abraham Subryan and the evidence was clear that he was always known by that name and was regarded by members of the family and by people outside as a brother.

I turn now to the narrative of the events relating to the last month of the deceased's life. The deceased was normally a healthy and active man and, although it was said that his mother was subject to epileptic fits, there was no evidence that he himself was epileptic or in any respect mentally deficient or mentally abnormal. On Thursday, the 25th September, 1947, he and the plaintiff went to a party at Clonbrook where the deceased danced and drank and enjoyed himself until the early hours of the morning. The next day he complained to the plain-

tiff of griping and took some laxative pills. At that time he was supervising the building of a bungalow near to his home and on the 27th he went over to the bungalow as usual. On Sunday, the 28th the plaintiff noticed that the deceased was looking bilious and, with his consent, called in Dr. Cecil Subryan who treated him for malaria and insomnia. On Saturday, the 4th October, Dr. Subryan took the deceased to the Public Hospital where he underwent tests for typhoid fever which were negative in results. The deceased was in the habit of giving a dinner to the poor annually on the anniversary of his father's death and had arranged the dinner for Sunday, 5th October. He sat up most of Saturday night supervising the arrangements and attended the dinner on Sunday. On Monday 6th, according to the plaintiff, he was up and about as usual. The alleged will was made during the afternoon or evening of Tuesday, 7th and at the time it was made those present in the house, besides the deceased, were the plaintiff and the two attesting witnesses, L. A. Figueira and S. M. Jervis. Ishmael a servant and the cook who was in the kitchen. The chauffeur, Samaroo, was also on the premises. I shall consider later in more detail the evidence as to what took place that afternoon. Dr. Subryan saw the deceased on the 8th, 10th and 11th but not again until the 15th October, when the plaintiff reported to him that the deceased was delirious. Dr. Subryan and the plaintiff took deceased that evening to the Public Hospital where he was admitted by Dr. Lethem. From the 16th until his death he was attended by Dr. Bettencourt-Gomes, Senior Physician of the Hospital, and on the 16th he gave Dr. Gomes an account of his illness. Further tests for typhoid fever as well as for malaria and for streptococci were made and on the 21st a positive result for typhoid was obtained. Deceased was immediately isolated but his condition worsened and a crisis was reached on the 25th. On the 29th October he died of toxaemia from typhoid and was buried on the 30th. The following day the will was deposited in the Registry by the plaintiff and was inspected by Dr. Subryan on the 1st November. A caveat was entered by the defendant's attorney on the 2nd December, 1947 and this action was subsequently started by a writ on the. 9th January, 1948.

The body of the will is in the handwriting of the attesting witness Figueira and the attestation clause in the handwriting of the attesting witness Jervis. The signature of the testator is in the handwriting of the deceased and he has written the date underneath it. The handwriting is firm and clear and an alteration in the attestation clause has been initialled by the testator and Figueira. So far as regards the formalities required by law, I was satisfied that the will was in order and was signed by the testator in the presence of the two witnesses, who signed in the presence of each other.

This and the other questions raised are, however, of minor importance as compared with the vital question as to whether or not at the time he signed the testator had testamentary capacity; for, as was said in *Harwood v. Baker* 1840 (3 Moo. P.C. 282 at p.291),

> "If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he

had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity."

The requirements of a sound disposing mind are, as laid down in the same case, that

"a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his, property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property",

and he has not that capacity if he is

"incapable of doing a rational act of an important nature, requiring thought, judgment, and reflection, or (on account of great exhaustion of his bodily and mental powers) of resisting undue influence and control."

The degree of capacity required and the meaning to be ascribed to the words "sound mind" were considered by Hannen J. in *Boughton v. Knights* 1873 (L.R. 3 P. & D. 64 at p.66): —

"These words do not mean a perfectly balanced mind free from all influence of prejudice, passion and pride. The law does not say that a man is incapacitated from making a will if he proposes to make a disposition of his property moved by capricious, frivolous, mean or even bad motives. We do not sit here to correct injustice in that respect. Our duty is limited to this, to take care that that, and that only, which is the true expression of a man's real mind shall have effect given to it as his will."

The infirmity of mind suggested by the defendant in this case is (as in *Harwood v. Baker*) not an incapacity arising from any constitutional or long-established infirmity of mind, but one occasioned by a recent accession of bodily disease affecting the brain, and producing torpor, and thereby rendering the mind incapable of exerting those faculties which are essential to a sound mind and memory. In order therefore to form an accurate opinion of the condition of the mind of deceased at the time of making his will, it will not be necessary to go further back than the 26th September, 1947 when he was first seized by the illness which terminated in his death. Before that time the deceased was fully competent to make a disposition of his property and he had, in fact, made two prior wills, one a holograph will dated 16th June, 1939 witnessed by one Cummings and by Ishmael; the other a typed document dated the 23rd August, 1943 was witnessed by a solicitor, Mr. Ogle, and his clerk, Proctor, both of whom are now dead. In both these wills the deceased left his whole estate to his aunt, Miss Abraham.

The effect of disease on testamentary capacity was considered in the case of *Banks v. Goodfellow* (1870 L.R. 5 Q.B. 549) where it was said (at p.567)

"In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For, most men, at different periods of their lives, have

> meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they could in comprehending business in some measure new."

And at page 565: —

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing: shall be able to comprehend and appreciate the claims to which he ought to give effect: and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

And at page 566: —

> "though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains."

As to the evidence of capacity, the most important witnesses are naturally the doctor or doctors who attended the deceased in his last days and, next to them, those inmates of his house who were in the habit of attending him in his illness and who would have the most frequent opportunities of watching and observing the condition of his mind during the progress of the disease. Unfortunately, in the present case, Dr. Subryan. the only doctor who was in attendance on the deceased at the time the will was made and the plaintiff, the person who was most often in attendance on him, are both interested parties on opposite sides, and the only other regular inmate of the house, Ishmael, who was called as a witness by the defendant, was so thoroughly discredited that even counsel for the defence appeared to renounce all confidence in his evidence.

Before passing on to consider the evidence I may refer to one judicial pronouncement, relevant to the present case, on the effect of evidence of previous intention of the testator on the proof of his testamentary capacity. In *Harwood v. Baker* it was said (at page 313)

> "If their Lordships had found from the other evidence that Mr. Baker had while in a state of health, compared and weighed the claims of his relations and had formed the deliberate purpose of rejecting them all in favour of his wife, but had omitted to carry that purpose into effect before the attack of illness under which he died; and that during that illness he had acted upon that previous intention, and executed the will in question,—less evidence of the capacity to weigh those claims during his illness might have been sufficient to show that the will propounded really did contain the expression of the mind and will of the deceased."

The evidence as to the deceased's mental capacity falls naturally into two classes, namely, factual and opinion or expert evidence, and the former may be sub-divided into that of medical and lay witnesses. The witnesses of fact were Doctors Subryan and Gomes who attended the deceased and, for the plaintiff, the two attesting witnesses, Leonard Figueira and Stephen Jarvis, Samaroo, the chauffeur, one Langford, a plumber and Hezekiah

Rowe, a carpenter, these last two being employed on the construction of the bungalow: for the defendant, one Hamblyn, an odd-job man, Ishmael, servant and farm-hand, Moonsammy, a Sanitary Inspector and one Charles Singh. The expert witnesses called for the plaintiff were Dr. Gomes and Dr. Hugh and for the defendant Dr. Subryan and Doctors Smith, Nehaul, Giglioli and Bayley.

Except for Dr. Subryan, none of the expert witnesses called for the defence heard any of the oral evidence.

Before considering this evidence in detail, I will endeavour to summarize the general characteristics of typhoid fever, its effect on the mental condition and the various types which it may take, taking as my main authority the British Encyclopaedia of Medical Practice Vol. 5 pp. 51 *et seq.* But while considering the general characteristics it is necessary to keep in mind Dr. Giglioli's opinion that "the description of a disease is always abstract. In practice you find as many variations as you find patients: but with sufficient consistency to enable the medical man in most cases to make a diagnosis."

Typhoid fever is a result of infection by the bacillus typhosum which enters the body through the alimentary tract and incubates in the intestines, the incubation period being normally about fourteen days but varying from five to twenty-three. This period is usually free from symptoms, but diarrhoea and vomiting are sometimes present at the beginning. Typical typhoid stools are semi-liquid and resemble pea-soup. The onset is insidious with initial symptoms of persistent and severe headache, weakness, abdominal pain and diarrhoea or constipation et cetera These symptoms gradually increase till after a few days the patient is compelled to take his bed. The next stage is the febrile period which usually lasts three weeks. The bacilli invade the blood stream causing a condition of septicaemia, to which the normal reaction is fever and a high temperature, and the production of an anti-body which "softens up" the bacilli so that they can be destroyed by other cells. This result in the production of toxic substances which pervade the whole blood stream, penetrate the brain cells and affect the mental condition. By the end of the first week the face presents a characteristic, languid apathetic aspect and there is a characteristic rash. The pulse is steady and the temperature reaches its maximum of 103° or 104°. In the second week of the disease the symptoms become aggravated though the headache disappears. Prostration increases; wasting and muscular weakness become apparent and the patient, left to himself, lies low in the bed. Towards the end of this week delirium is not infrequent and is generally of a low muttering character. Temperature remains at a high level, 103° or so, with slight morning remissions.

At the beginning of the third week the symptoms are at their height and, in favourable cases, gradual improvement is to be expected but, in severe infections, complications, such as haemorrhage or perforation, may occur, or the patient pass into the "typhoid state". This condition is only seen in very severe cases: the patient becomes utterly helpless, profound nervous disturbance is shown by trembling of the hands and tongue, twitching, and carphology, i.e., aimless picking at the bedclothes. Even

in these cases gradual recovery may take place. In the more usual type of case the third week witnesses a progressive fall in the morning temperature, the evening fall following more slowly. Diarrhoea usually becomes more severe.

In the typical case the fourth week is signalized by convalescence. Relapses occur in about 10 per cent, of cases. They are most frequent about a week or ten days after the temperature has reverted to normal, due to a re-infection of the blood stream. Mild attacks are more likely to be followed by relapses than are more severe ones. The onset is more sudden than in the original attack and is often attended by a rigor and the fever more quickly reaches its maximum. The relapse is usually shorter and milder than the original attack but sometimes ends fatally.

In addition to relapses during convalescence, recrudescences may occur before the temperature has fallen to normal and, in this way, indefinite prolongation of an attack of typhoid becomes possible.

Mental symptoms are not uncommon and acute toxic confusional states occur during the febrile period. The effects on the nervous system are referred to in greater detail in Tidy's Synopsis of Medicine 7th Ed. at p. 16.

There is a great variability in the clinical manifestations and course of typhoid fever and there is, in particular, an ambulatory form in which febrile disturbance is generally slight and the patient may keep about during the whole or greater part of his illness. The patient may not feel ill enough to go to bed and sometimes mental deterioration may be the first symptom of the disease. If in ambulatory typhoid treatment is delayed and the patient is exhausted by activity during the first week or two of the disease, the outlook may be very grave and the ending fatal.

The Medical text books to which I was referred generally express the difficulty of early diagnosis, though Manson-Bahr in Tropical Diseases (11th edition at page 336) says that the disease may in many cases be conveniently diagnosed by a glance at the patient as he lies in bed. "He has a dull heavy toxic-laden appearance in the early acute stages of his disease, with a moist face and flushed cheeks." The text books generally also emphasize the necessity of prophylaxis: "The patient should be isolated, and there should be immediate and adequate sterilization of everything leaving the patient or used by him. Feeding utensils should be boiled after use."

I pass on now to consider the evidence of Dr. Subryan and Dr. Gomes as to their observations while in attendance on the deceased. Dr. Subryan said that on the 28th September in the evening the plaintiff called him in saying that the deceased was feeling feverish. He went to the house about 5 p.m. and found the deceased sitting in a chair. Deceased said he had been out of sorts and feverish for about seven days, had had diarrhoea since the 25th, and had a headache and couldn't sleep. His pulse was strong and his temperature 99.6°. Dr. Subryan treated him for malaria giving him mepacrine, an injection of quinine and some sleeping tablets. He next visited on the afternoon of the 29th and found the deceased in bed. The doctor examined a stool which had been kept for his inspection and found it resembled the typical typhoid stool. He gave another injection of quinine, told

the patient that his general condition and stool gave cause to suspect typhoid and advised him to go to hospital. The deceased refused to go saying he was busy with his new house and didn't feel very ill. The doctor counselled bed and a liquid diet, continuation of chlorodyne for the diarrhoea and mepacrine for the fever. He visited again on the afternoon of the 3rd, Friday, and found the deceased sitting with others on the gallery. The deceased complained of continued diarrhoea, vomiting and disturbed sleep. His temperature had risen to 101.2°. His general condition, according to the witness was typical of typhoid but deceased again refused to go to hospital. Dr. Subryan then arranged to take him the next morning to the Central Laboratory where three tests were made: the Widal blood test for the typhoid "anti-body", a blood culture for Bacillus typhosum and a blood smear for malarial parasites. On the 4th the deceased complained of griping pain and Dr. Subryan prescribed sulphaguanadine and a mixture of bismuth and opium.

On Sunday, the 5th at about 5 p.m. the witness visited again and found the deceased dressed and on the gallery and, according to his evidence, as he was coming up the steps deceased came out on to the porch and said he was expecting the doctor to take him to hospital for blood tests. "I told him he'd gone the morning before. He looked puzzled and we went into the bedroom. Deceased had an anxious expression, headache and insomnia, feeling much weaker, loss of flesh more marked, temperature 102.2°." The witness asked the deceased for a history of his movements during the last two weeks, but got no answer. "I advised him to go to hospital, he made no reply. I recommended he should have a nurse, he made no reply. I told him to keep in bed and stick to liquid diet. For the first time I became suspicious of mental disturbance such as loss of memory, loss of power to concentrate. That evening plaintiff came to my house and I advised him to keep an eye on Ronald's books, papers and receipt books."

The witness visited deceased again on the afternoon of the 6th, Monday, and found him in bed with a temperature of 102.8°. He observed pallor and tremor of the hands and carphology. The expression was apathetic and dull and the patient did not speak. By this time witness had received reports on the malaria and Widal tests which were both negative and he told the deceased so. The negative result of the Widal test was inconclusive as it merely showed that the presence of the anti-body which combats the typhoid bacillus had not been detected: it did not exclude the possibility that the Bacillus was nevertheless present. The result of the culture test when received later was also negative. Dr. Subryan, however, stated that he was certain on the 6th that the deceased was suffering from typhoid and advised him again to go to hospital. He formed the opinion that the deceased was very dull and apathetic, and didn't appreciate what was being said or the gravity of his condition.

Witness did not visit the deceased on the 7th because he could not get his car to start. In cross-examination he said that he did not think the patient was in a critical condition that day but was "just low".

On the 8th he went on inspection duty on the East Coast

and called in at his brother's house en route accompanied by County Sanitary Inspector Moonsammy He found the deceased sitting on a gallery and says the patient felt "warm" but he did not take the temperature as he had no thermometer. He again noticed pallor and tremor of the hands. He said that having heard from plaintiff that his patient had been pottering around with paint in the new bungalow he examined his gums for signs of lead-poisoning by absorption from the paint, but saw no evidence of it. The deceased's stool was offensive in smell so he prescribed an antiseptic powder of mercury and chalk and a common white mixture because the deceased complained of straining at stool. The witness further said that, in the course of conversation, the deceased told him he had given plaintiff "his authorisation to look after his affairs." The witness and Moonsammy talked of a nephew who was studying in America but deceased took no part in the conversation. That afternoon the doctor enquired at the Public Hospital but there was no vacancy.

Dr. Subryan did not visit deceased again until the 10th he found him in bed looking very ill with a temperature of 102.8°, a dry cough, and crepitation in the lungs. He again advised hospital but got no reply and told the deceased to keep to liquid diet. On the 11th he visited in the morning, found the patient in bed with a temperature of 100.6°, expression dull and apathetic, carphology, pulse full and regular. He did not visit the patient on the 12th, 13th or 14th as he himself had influenza.

On the evening of the 15th the plaintiff came and told him that Ronald was speaking out of his head, and on going to the house he found the deceased in quiet muttering delirium. He insisted on taking the deceased to hospital and as a special favour got him admitted for the time being into the Police Ward. He handed over the deceased to Dr. Mary Lethem and gave her the history of the case. He told her that the Widal test had proved negative and suggested the possibility of lead poisoning. He also told her "now there is no fever", meaning, he said, that very evening. The Hospital Case Sheet (Ex.MM) has the following history notes recorded by Dr. Lethem. "2 weeks ago-fever and diarrhoea. Widal: culture: slide-neg. Now fever has gone, diarrhoea still — no blood. Pulse 80-100 but now Delirium? Painter's colic." The hospital temperature chart (Ex. MM) shews a temperature of 101.8° at 8 p.m. that evening.

He did not see the deceased from the 16th to 18th as he was out of town, but visited him daily after that. On the 25th he was alarmed at the deceased's condition and sent for the plaintiff telling him to get a priest and to write to Eric. Later the same day he saw the deceased again and subsequently told the plaintiff that Ronald wasn't worse and he needn't be unduly alarmed.

His case notes were put in evidence as Ex. KK

Dr. Subryan said that he diagnosed the case as one of ambulatory typhoid in which the patient walks about, will not lie down and goes on until he collapses. I understood him to mean not the mild ambulatory type, but the type described by Drs. Smith and Giglioli as obstinate ambulatory typhoid in which the

patient is over-stimulated by the toxin and in which the prognosis is usually grave. Calculating the onset of the disease from the 25th September, he put the worst period, when the patient was exhibiting the most toxic appearance, from the eleventh to the twenty-first days. *i.e.* from the 5th to 15th October. In his opinion the deceased's memory for recent events was impaired and his power of concentration gone during this period.

Dr. Bettencourt-Gomes attended the deceased at the hospital from the 16th October to his death on the 29th. On the 16th he got from the patient a case history which he recorded as follows (Ex. MM): "About three weeks ill. Gradual onset. Fever then diarrhoea and vomiting. Was up till a week ago when he had to go to bed. Diarrhoea never stopped. Vomiting stopped about a week ago. Fever stopped about 10 days ago and only started yesterday. Slightly delirious recently. Yesterday had two or three rigors". As a result of this history and his examination of the deceased, Dr.Gomes noted, as possible causes, urinary infection, septicaemia and enteric and he caused tests to be made in respect of these three and also for malaria. All were negative except the blood culture for typhoid. Penicillin was administered which brought down the temperature temporarily but it rose sharply again on the 17th and thereafter followed an irregular course, with another sharp rise on the 25th, and then dropped with the final exhaustion and collapse of the patient. Dr. Gomes said that on the 16th deceased spoke sensibly and gave a coherent sensible history. In his opinion, the deceased's mental condition was then perfectly normal and remained so until a week or so of his death. He was satisfied that while in the hospital deceased suffered from nothing but typhoid and thought it unlikely that deceased had had malaria within the past three or four weeks.

The plaintiff gave evidence of going to the party with the deceased on the 25th September and of the deceased's subsequent indisposition. He said that on the 28th Dr. Subryan diagnosed diarrhoea and slight attack of malaria, gave the deceased an injection and some tablets and told deceased to keep a stool. He said that the deceased took an active part in the preparation of the dinner and on Sunday; the 5th received the poor persons invited to the dinner. On Monday, the 6th, he was up and about as usual. On Tuesday, the 7th, the deceased got up as usual, measured out milk for distribution to customers and fed the fowls. About 7.15 a.m. as the plaintiff was leaving for work the deceased said he was short of money to pay the workmen and asked the plaintiff to lend him $200. The plaintiff agreed and drew the money from his Post Office Savings Bank account. The Savings Bank Book was tendered (Ex. H) and shews a withdrawal of $200 on that day. Plaintiff returned from work at about 4.30 p.m. and handed deceased the money. He had previously on the 16th September lent the deceased $250. Plaintiff said that the deceased then wrote out, signed and stamped a promissory note for $450. This document (Exhibit J) is undoubtedly in the handwriting of the deceased and is dated the 7th October, 1947. The handwriting is firm and clear. The document is stamped and the stamps cancelled by the deceased.

The plaintiff said that about an hour after this he saw the deceased scrutinising a sheet of foolscap which had writing on

it". He enquired "What more business?" and the deceased said he was making a fresh will. Plaintiff asked why and the deceased replied "I'm not feeling bright and if anything should happen to me and I leave no will Eric and Cecil will skin you alive." Deceased ground his teeth as he said this. Plaintiff queried this and deceased then said "If they tried to do that to the woman who mothered them what about you? They will jump down your throat. It was Aunt Eva's wish that if I should die without marrying you should get what I leave." Deceased then told plaintiff that he was leaving him everything but if he should sell the Mahaica lands and get a good price he could give Cecil and Eric something out of it and some gifts to Ishmael and one Robert Allison, a cousin, who lived with the deceased from time to time. The deceased then said that he had sent for Leonard Figueira and Jervis and that he was going to make the will himself because Mr. Ogle was sick and would probably himself need a will. Deceased then talked about Ogle.

Figueira arrived about 6.15 p.m. Deceased was then in a Berbice chair in the bedroom and in reply to Figueira's enquiry how he felt said "same way: diarrhoea still bothering." Deceased then told Figueira that he wanted him to write out and witness a will and had sent for Jervis who could not come before 7 o'clock. When Figueira protested that he was no lawyer the deceased said "My lawyer is sick and in any case it's easy. I'll tell you what to write." Deceased then sat Figueira at the desk, and gave him paper and a fountain pen. At that stage plaintiff asked if deceased wished him to leave the room but deceased said "No, I want you to hear." The deceased sat in the Berbice chair still holding the foolscap sheet and Figueira wrote the will at deceased's dictation. Figueira twice interrupted, first to ask deceased for plaintiff's real name and deceased told Figueira to write both the plaintiff's names: the other interruption was at the end when Figueira said "That is all? You're sure you haven't forgotten anybody like family and charity?" Deceased replied "No, that is all. Give it to me and let me read it. We'll have to wait on Jervis now". He took the will and read it and when he had done so said it was all right. They then talked about the bungalow.

When Jervis arrived deceased said he wanted him to witness the will and gave it to Jervis to read. When Jervis read the will he said "A strong man like you making a will already. You just got little dysentery and fever. You think you going to die?" Deceased said "Who knows". Jervis then took Figueira's chair and deceased said "I want you to copy this part" shewing him a part of the foolscap sheet he was holding. Deceased got up from his chair, told Jervis to leave a space of two lines for the signature and shewed him where to start copying. Deceased turned to the plaintiff and asked for his porridge which plaintiff fetched from the kitchen and brought back to the room. It was then just after seven o'clock. While Jervis was writing Ishmael came to the door, looked in and turned back. When Jervis had finished deceased got up from his chair, went to the desk, looked at what Jervis had written, signed his name and wrote the date on the will in the presence of plaintiff, Figueira and Jervis. Figueira and Jervis then signed and the

deceased went back to his Berbice chair. A few moments later Figueira left and Jervis stayed talking to deceased about the bungalow for about half an hour. After Jervis had left the deceased shewed plaintiff that he had put the will in a book and locked it up in a drawer. He then played the radio on the gallery and went to bed about 9 o'clock.

The plaintiff said that all the time on the 7th, the deceased was perfectly sensible and spoke and behaved normally and nothing appeared wrong with his memory. He moved about the room without assistance.

He further said that on the 8th deceased got up, dressed, measured out the milk and fed the fowls as usual. Plaintiff went off to work, got back from work about 4.30 p.m. and was with the deceased until he went to bed at about 8.30. During the evening deceased played his radio and behaved perfectly sensibly and normally.

Plaintiff put in evidence two books recording the sale of eggs and milk by the deceased to the Main Street Presbytery and a Mrs. Veecock, (Exhibits K. and L.). Daily entries in the deceased's handwriting appear in these up to the 8th and 11th October, respectively. He also put in evidence two receipts for payments to workmen for work done (Ex. 01 and 02). Ex. 01 is dated 2nd Oct. 1947 and is in the deceased's handwriting; Ex. 02 is dated 10th Oct. 1947 and apparently written by the recipient, one Roberts.

On the 9th and 10th the deceased was up and about as usual and perfectly normal, but still had diarrhoea and felt feverish. Plaintiff said that on the 10th he dropped in and told Dr. Subryan of the deceased's condition and Dr. Subryan replied they must wait a few days till the tablets acted. On the 11th the plaintiff came home at midday and found deceased in the bedroom. He persuaded the deceased to agree to go to hospital but found that both hospitals were full up. The deceased told plaintiff that he was short of pyjamas, towels and socks and would require some more for the hospital. Plaintiff said that on Sunday, the 12th Dr. Subryan came and diagnosed lead poisoning. Plaintiff alleged that the deceased's gums were slightly bluish on that day.

Plaintiff did not go to work after Saturday, the 11th, as Monday, the 13th, was a holiday and he had arranged to take leave from the 14th. He said that on Sunday and Monday the deceased's mental condition was normal and that he first noticed abnormality on the night of Tuesday, the 14th, when the deceased started to talk about a Mr. Stone being dead, which was untrue. On the 15th in the morning the deceased was normal, but in the afternoon had high fever and ague. Plaintiff could not contact Dr. Subryan until the evening by which time deceased was delirious. When deceased left for the hospital, he handed over his keys to the plaintiff.

Plaintiff said he was at home on the afternoon of Sunday, October 5th, but had no knowledge of Dr. Subryan having called that afternoon nor did he hear the deceased say that he was waiting for the doctor to take him to hospital. He said the deceased was not wearing a collar and tie that day so could not have been expecting to go. He also denied that the doctor

had called on the afternoon of Monday, the 6th. He denied that he heard any thing about typhoid until about the 19th or 21st October when Dr. Subryan told him that typhoid was suspected.

The witness Leonard Figueira said that he was a tenant and a very close friend of the deceased and visited him frequently and that his wife often did sewing for the deceased. He said that about a week before the dinner for the poor on October 5th, deceased complained of diarrhoea and slight fever. On Saturday, the 4th, he told Figueira that he no longer had any fever and between then and the 15th the witness saw him on several occasions but the deceased never complained further of having fever. Figueira assisted in the preparation of the dinner and said that the deceased was with him under the house sitting on a chair supervising the cooking from about 10 p.m. till 4 or 5 a.m. on the Sunday. Deceased then went up to bed but was present during the serving of the dinner from about 10 a.m. till 2 or 3 p.m. On Monday, the 6th, from 5.30 to 7 p.m. the witness upstairs talking with him. Apart from the 7th, he again saw assisted deceased in clearing up after the dinner and then sat the deceased on the 11th and 12th and said that on all these days the deceased appeared to be perfectly normal and sensible. He said also that on the 12th the deceased told him that Dr. Subryan had said the sickness might be poisoning from the new paint on the bungalow. He saw the deceased four times in hospital, the last time being on the 21st and deceased still spoke quite sensibly and normally.

On Tuesday, the 7th about 5.30 p.m. he received a message through his wife which had been delivered by Ishmael and went round to deceased's house an hour later. He let himself in and found the deceased in a Berbice chair in the bedroom wearing a shirt and trousers and not wrapped up. Plaintiff was also there. In reply to his enquiry the deceased said that he felt "neither better nor worse. No fever: only diarrhoea bothering me. All the same I feel stiff in the joints but I have no temperature." The two northern windows facing the sea were wide open and a strong breeze blowing in. Figueira then related the writing of the will at deceased's dictation, his account resembling closely that given by the plaintiff. He said that when Jervis came in and was told he was wanted to witness a will he said "You only got a little diarrhoea you think you going to die!" Deceased replied "You never can tell. The doctor himself doesn't know what's wrong with me." When deceased handed Jervis the paper for copying, he folded it so that only a few inches shewed. After the deceased had signed and dated the will, he shewed Figueira where to sign and he and Figueira initialled a correction in what Jervis had written. Figueira only had a glimpse of the sheet of paper from which the deceased appeared to be dictating. It was handwritten and not typed but he could not say in whose writing. He said the deceased spoke normally in his ordinary way, very slow, soft and deliberate, nothing jerky or spasmodic. While waiting for Jervis to come deceased talked about the bungalow and said he'd had difficulty in getting paint-oil that day.

The witness said: "Throughout that evening the deceased spoke normally and sensibly and nothing wrong with his memory.

Nobody influenced him to my knowledge as to whether or how he should make the will. I never influenced him on any previous occasion."

Stephen Jervis, a Detective Police Constable, said that he was a tenant and a good friend of the deceased and visited him regularly. He was present at the dinner on Sunday, the 5th and deceased's behaviour was quite normal. Apart from the 7th he saw the deceased at his house about three times before his admission to the hospital and saw nothing abnormal about him. He first noticed abnormality in the hospital on the 17th when the deceased said something in connection with a lost cheque which the witness knew to be not true. On the 19th when he saw deceased again he appeared to be normal.

On the 7th witness received two messages from the deceased, one through the witness's wife and the other a telephone message recorded on a slate at Brickdam Police Station. He telephoned the deceased's house and said he would be round about seven o'clock. There was a discrepancy between the evidence of Jervis and the plaintiff as to whether the latter or the deceased answered this call but. in my view, it was of no importance. When he arrived there he found deceased, plaintiff and Figueira present. He then related the circumstances of his copying the attestation clause, and said that he drew the deceased's attention to the correction and told him to initial it. He also said that deceased told Figueira to put in the date and his address. He denied that any one in his presence made any suggestion to the deceased as to how he should make his will.

After Figueira had left, witness and deceased talked about the bungalow and the witness jokingly suggested that deceased had probably got sick because he did not "stand his hand" and buy rum for the men. Deceased replied that he had bought three bottles for the foundations and four bottles for the first rafters. Jervis suggested closing the windows against the breeze but the deceased said he could stand it.

The witness said that while he was there the deceased spoke and behaved quite sensibly and his memory appeared quite perfect.

Felix Langford, a plumber, said that he was engaged by the deceased in July, 1947 to install plumbing and a septic tank in the new bungalow and the deceased came regularly twice a day to see to the work. On Sunday, the 5th, he saw deceased in his yard at the dinner. On Monday, the 6th. deceased was at the bungalow twice. On Tuesday, the 7th, the deceased arrived about midday in his car dressed in collar and tie and jacket and told the witness he had been looking for materials. He came again in the afternoon and again on the 8th and the 9th. On Saturday, the 11th, witness saw the deceased at his house and was paid $45 for work done. Up to then, the witness said, the deceased was sick but perfectly sensible.

Hezekiah Rowe, a master carpenter, said he was engaged on the building from August, 1947. On Monday, the 6th, he saw the deceased at the bungalow and on Tuesday the 7th deceased came again about midday with a hasp and staple saying he had just bought them in town. Witness identified the bill, Exhibit P1, as the one given to him with the hasp and staple. He saw

the deceased at the bungalow that afternoon and again on Wednesday, the 8th. On Friday the 10th he saw deceased at the house and asked for money. He saw Dr. Subryan's car at the house and said deceased on that day hurried him out saying he was not to let the doctor see him.

Edgar Samaroo, deceased's chauffeur, said that on Tuesday, the 7th, in the morning the deceased instructed him to pick water coconuts. Having done this, he drove the deceased to Georgetown and left the coconuts, on deceased's instructions, at the Charlestown Saw Mills where the deceased spoke to one of the directors. They then drove to Water Street. The deceased said he could not get paint-oil and went into the shop of Rodrigues and Rodrigues, at the same time instructing the chauffeur to buy some putty at Psaila Bros. Witness failed to get the putty and returned to the car. Deceased came out of Rodrigues and Rodrigues carrying a small parcel. After making other calls witness drove the deceased back to the new bungalow. On the way deceased instructed him to deliver a verbal message about eggs and fowls to Mrs. Veecock. At the bungalow he saw deceased speak to the carpenters.

On Wednesday, the 8th, on the deceased's instructions, he paid two small bills at Booker's Office and Booker's Garage (Exhibits P3 and P4) and went to Psaila's again for the putty. (Exhibit P2). On Saturday, the 11th, on the deceased's instructions, he bought and paid for some copra meal (Exhibit P5) and on the same day paid two telephone bills (Exhibits RR1 and RR2). He received the instructions and money for these payments from the deceased and on all these occasions he said the deceased spoke all right.

In cross-examination he said that on Tuesday, the 7th, after driving the deceased back to the house the deceased told him to pick up and shell coconuts after "breakfast". While he was shelling coconuts in the yard the deceased came to the window and said "Don't worry about the shelling. I want them on Friday. Try and get them done". The witness then went to sleep in the car until about 5.30 p.m. when he rounded up the cows and calves. He went into the house about 6.30 or 7.00 p.m. and saw Ishmael in the drawing room at the radio, and deceased, plaintiff, Jervis and Figueira in the bed room. He turned back and went into the kitchen where he waited until plaintiff came out with a cup and then went into the bedroom to tell deceased that he was going home. The deceased replied "Come early tomorrow." The witness further said that up till the 7th deceased said he felt feverish but the witness heard nothing about diarrhoea until the deceased went to hospital.

According to this witness the first signs of abnormality appeared on the 15th when deceased started to ask him about a missing cheque.

The defendant's witness John Hamblyn was a sort of hanger-on of the deceased. He corroborated the witnesses who had spoken of the deceased's presence at the dinner on Sunday, the 5th, though he said that the deceased was sitting and lying in his car. He said that on the Thursday before the 5th, deceased had asked him to peel five hundred coconuts and on Tuesday, the 7th, he went to deceased's house about 8 a.m. for that pur-

pose. He saw the deceased lying on his bed in pyjamas and wrapped in a blanket up to his waist. Deceased complained of being awfully sick with a stomach pain, and unable to sleep or keep down food. "I asked him if he were going to die. He said he didn't know. I offered to pray for him and he said yes." The witness kneeled down and prayed beside the bed and after that went into the yard to peel coconuts. He finished this around midday and went upstairs to tell the deceased who was still lying in bed. As the witness was going downstairs he met the plaintiff coming in and plaintiff said he was on leave owing to his brother's illness. (The plaintiff denied this meeting).

The witness said that the deceased's appearance was changed. "While speaking he closed his eyes and didn't seem to be breathing fluently." But in cross-examination he said that the deceased sat up in bed whilst speaking to him. "I shook hands with him. He was sitting up. His handshake was good because his hand was good." He also said "I told him I'd come to peel the coconuts. He said all right. He didn't ask me any questions about what coconuts. He answered sensibly what I asked him. All he said to me was sensible."

The witness Moonsammy who accompanied Dr. Subryan on October the 8th said that he heard the deceased telling the doctor "I gave an authorisation to Ivan to look after everything," but did not hear any conversation leading up to this remark. The doctor then suggested the deceased should go to hospital but there was no reply. Dr. Subryan then wrote a prescription on a paper, gave it to the deceased telling him to send it to Mr. Khan for the medicine. After that witness and Dr. Subryan talked about the doctor's nephew who was studying in the United States but deceased took no interest in this.

The witness said that deceased was dull and not inclined to speak. He based this on his failure to reply to the suggestion to go to hospital. He also gave evidence of a conversation with the deceased in hospital on the 20th in which the deceased shewed signs of delusion, but this is of minor importance.

Charles Singh, a property owner, called by the defendant, said that in September he spoke to the deceased about buying a plot of land at Subryanville and on the 9th October he went to see the land in question. He arrived at deceased's house between 9 and 10 a.m. and found the deceased in bed and Samaroo, the chauffeur, in the room. The deceased was not able to discuss business and said he had diarrhoea and fever and added that Dr. Subryan suspected typhoid. The witness then left. Samaroo was not questioned about this meeting.

The defence witness Ishmael was one of a number of orphans who were "adopted" by Johnson Subryan but were treated as menials or errand boys. After Johnson Subryan's death Ishmael continued to work on the farm and lived in a room built for him by the deceased under the house. He was sick and did not work from the 20th September to the 19th October.

He said that the deceased started to shew signs of illness on the night of Saturday, the 4th, but took part in the dinner on the following day. Witness was present when Dr. Subryan visited on the Sunday and the Monday. He said that he was present in deceased's bedroom when Hamblyn arrived on Tuesday, the

7th, and left when Hamblyn started to pray. The plaintiff left for work as usual that morning but the witness did not see him return. At about 3.30 p.m. the plaintiff called him upstairs into deceased's room, where deceased was lying in a Berbice chair, and he was instructed by the plaintiff that deceased wished him to go and call Figueira and Jervis. He went to their houses and left messages with their wives. He admitted Figueira to the house at about 4.30 p.m. and followed him to the deceased's room standing outside. "I heard Figueira ask Ronald how he was feeling. I heard no reply. Ivan was in the room. He looked at Figueira and smiled. Then Figueira sat down at the chair of the writing desk. I saw him take up pen and paper. Ronald's fountain pen. Figueira started to write. Nobody spoke to him while he was writing: neither Ivan nor Ronald spoke. Ronald was in the Berbice chair lying back. His eyes looked sleepy but not closed. I didn't see anything in his hands. His back was turned to me……..I could almost see Ronald's face. If he had spoken I would have heard." The witness then went down to put up a calf and while he was doing this the plaintiff called to him to deliver some coconuts to one Validum and he then saw Validum coming downstairs. In the cross-examination of the plaintiff counsel for the defendant had put to him the suggestion that Validum came to the house about 3 p.m. to see the deceased and the plaintiff had refused to allow him to do so; that at this time the deceased was groaning and tossing about and that plaintiff had said to Validum that he had been trying to get Dr. Subryan. Also that Figueira was in deceased's room at the time. These suggestions were categorically denied by the plaintiff and Validum was not called as a witness.

To continue with Ishmael's evidence; after delivering the coconuts to Validum he returned upstairs and went back to his former position at the doorway and was still there when Jervis arrived about seven o'clock and entered the room. Deceased was still in his chair. "I saw Figueira shew Jervis the paper on the desk. Jervis took it up like he was reading it and smiled. Then Ivan told me Ronald wanted some water and I went for it and brought it. I gave the water to Ronald in the bedroom. Jervis and Figueira were still there." The witness then took the cup back to the kitchen and went downstairs. He said that during the whole of the time that he was upstairs he did not see any paper in the deceased's hand nor hear him speak. He did not know that a will was being written in the bedroom but thought that they were writing a receipt for rent.

On Friday, the 10th in the early morning he heard the shower bath going upstairs and saw the deceased coming out of the bathroom. "I asked who told him to bathe. He said Ivan told him to do so." Usually he and the plaintiff used to sponge the patient with warm water.

The witness admitted that originally he had given a statement to plaintiff's counsel in November, 1947 and had been subpoenaed by the plaintiff but since then had had a quarrel with the plaintiff and decided to go over to the other side. For a week or so before giving his evidence he had been boarding and lodging with Dr. Subryan. He was cross-examined on the statement made to Mr. Cabral (put in evidence as Exhibit EE). He

admitted that the statement was true except for certain things which he had concealed because, he said, the plaintiff had told him to. In that statement he had said that it was the deceased who told him to call Figueira and Jervis and that when he went to the deceased's bedroom between 5.30 and 6 p.m. he saw Figueira writing something while the deceased was talking with him as if telling him what to write, so he withdrew immediately. He also said that he looked in again after Jervis' arrival and saw Jervis writing something and withdrew immediately. In the statement he also said that the deceased was quite normal and acting and talking sensibly the whole of that day and night up to when he went to bed and he added (and this he confirmed as true in cross-examination) "He could walk about by himself easily that night. I saw him walk to the latrine that night but he had some fever."

The story told by the witness on oath of what took place on the afternoon of the 7th was in itself highly improbable. One cannot imagine that conspirators engaged in concocting a will would tolerate the presence of an outsider who might well betray them. The witness admitted having made inconsistent statements as to what took place on the afternoon and evening of the 7th and I regarded him as not worthy of credit in respect of these matters.

I pass on now to review the opinions of the medical witnesses as to the deceased's mental condition on the 7th. Dr. Gomes heard the evidence of Figueira and gave as his opinion that, if that evidence were true, the deceased had normal testamentary capacity on the 7th, and if a few hours earlier, deceased had written the promissory note (Exhibit J), that fact would strengthen his opinion. He also thought that the evidence of the open window, if true, shewed a probability that the deceased had no fever. He said that there is no reliable uniformity of mental deterioration in typhoid cases, that a patient may be dull at one time of day and normal at another and that no doctor who had not seen the deceased on the 7th could be certain he lid not have testamentary capacity on that day. In his opinion it was certainly possible that the deceased could have had that capacity.

Dr. Hugh heard the evidence of the plaintiff and gave his opinion that, if that evidence as to deceased's actions on the 7th were true, the deceased certainly had testamentary capacity on that day. He agreed generally with Dr. Gomes' opinion. Cross-examined on Dr. Subryan's notes, he thought that they were in-consistent with the evidence of deceased's actions on the 4th and 5th October. He did not agree that failure of memory was a marked feature at the onset of typhoid fever and he thought that the temperatures and symptoms recorded in Dr. Subryan's notes were not sufficient of themselves to account for mental confusion. Toxaemia in typhoid did not become apparent until the end of the second or beginning of the third week, reckoning from the first appearance of the symptoms, and from the history given him he would estimate October 6th as the beginning of the second week. He distinguished between mental asthenia or dullness caused by toxaemia, and delirium which is the reaction to a high temperature.

Dr. Subryan gave it as his opinion, as a medical practitioner, that deceased would have been capable of making a will at any time up to the 4th October, but was incapable from the 5th to the 15th, during which period his memory seemed to have failed and his power of concentration gone. He based this opinion on his observation of deceased's general apathetic condition, his failure to reply to questions, the tremors and twitchings on the 6th, 8th, and 11th and the delirium on the 15th. The witness further said that, assuming deceased had signed an "authorisation" on the 7th, he did not think he was in a condition to understand the nature of it, although an authorisation would be expedient in the circumstances. In his opinion the involuntary twitching of the hands would be mastered by voluntary movements and would not affect the handwriting. He thought it very unlikely that the deceased had no fever on the 7th, but if it were so in fact he would ascribe it to prostration and physical exhaustion, resulting from prolonged diarrhoea.

In cross-examination he swore it was not possible that deceased could have had a sufficient lucid interval on the 7th to make a will, in this differing from all the other medical witnesses. While under his care the deceased progressively deteriorated but he thought that at the period Dr. Gomes saw the patient there was a remission. He thought that the deceased might have written the promissory note (Exhibit J) as the result of suggestion and not realised it was a promissory note, and that he might have dictated the will from a blank sheet of paper and not understood what he was doing, thinking that it was an authorisation, all this as the result of a confused toxic psychosis. He did admit that the deceased might have appreciated the meaning of these two documents but he thought "the suggestion was there." Similarly with the milk books: he was of opinion that the deceased might have filled them in without knowing what he was doing.

Dr. Nehaul, Government Bacteriologist and Pathologist, gave evidence of the tests which he made in the Central Laboratory. As regards the blood culture he stated that the best chance of isolating the typhoid bacillus is during the first week of the disease. In the second or third weeks the percentage of positive cultures falls and after that the percentage falls further. In this case, however, a positive result was obtained from blood taken on the twenty-third day.

He said that so far as temperatures are concerned, comparing those given by Dr. Subryan with those recorded in the hospital, they were consonant with the previous course of the same disease and he gave as his opinion that the patient when admitted to hospital was in the third or fourth week of the disease, but he was not prepared from the record data to draw any conclusion as to how long prior to the 15th the patient had been delirious or mentally confused. He agreed assuming the accuracy of the data recorded by Dr. Subryan on the 5th, 6th, 8th, and 10th, that he would expect the temperature and mental condition of the patient on the 7th to be similar to that on the 6th and 8th. He said that it was possible for the patient to be delirious in the early course of the disease and then for the toxaemia to decrease, with consequent improvement in the mental condition, followed

by an increase in the toxaemia and a worsening of the condition. He would not disbelieve it if told that the patient might have had periods when his mental condition was better though not normal. There are cases of typhoid in which the mental faculties are not dulled or disturbed.

Under cross-examination he agreed that no doctor who had not seen the deceased on the 7th could reliably say that he had not testamentary capacity on that day, though the witness thought that if a doctor knew the state of deceased's mind on the 6th and 8th he could hazard an opinion as to its state on the 7th. Shewn the will (Exhibit A) he thought it unlikely that if the deceased dictated it and referred to it as his will, he did not realize that it was a will. Similarly, as to the promissory note, he was of opinion that if the deceased wrote it with his own hand then he understood what he was writing, but he was not prepared to draw from that any inference as to the writer's mental condition without further enquiry, though he added "I would not expect a typhoid patient who was lethargic or mentally confused to be interested in writing out a document such as Exhibit J." He thought that the entries in the milk book indicated that deceased took a rational interest in his business. If there were mental confusion it would be reflected in the speech and if there were noticeable tremor of the hands at the time of writing the promissory note and signing the will it would be reflected in the handwriting.

Generally, he agreed that there is no reliable rule that a typhoid patient must suffer from mental disturbance and, even if he does, he may have intervals of mental normalcy. He agreed that the temperature charts and Dr. Subryan's notes are not inconsistent with the possibility of the patient having testamentary capacity on the 7th and that the best evidence as to this would be an intelligent and truthful witness who was present at the time.

He did not accept the view that the peak of the toxaemia in typhoid is at the second or third weeks and, so far as he was concerned, if a typhoid patient gave him a clear history of the disease he would say that the patient's mind was in order.

As to the ambulatory type he said "During the ambulatory stage the lethargy is not noticeable to the casual observer. It would be difficult for a medical man to observe it. The diagnosis of typhoid is difficult at that stage. Marked lethargy could not co-exist with the ambulatory stage," though he would not say that there is no mental disturbance in that stage. Finally he gave as his opinion that an ambulatory case would most probably have testamentary capacity.

Dr. Smith is the Superintendent of the Mental Hospital at Canje. He had not heard any of the evidence but based his opinion on Dr. Subryan's history of the symptoms and condition of the deceased and on the probabilities. On the general characteristics of typhoid fever, his opinion was that when toxaemia has caused death he would expect it to affect the patient mentally and this deterioration would generally shew itself between the twelfth and twentieth days. When the typhoid state had once manifested itself he would expect it usually to be steady though spasmodic cases occur. In any lowering of consciousness

the judgment is the first faculty to be affected then the reasoning power, recent memory, other memories and the senses. The impairment of will power would come somewhere about the middle of this series. The motor sensorium would be the last to be affected. Lucid intervals occur in typhoid cases when the patient may be able to converse sensibly but in his opinion impairment of the judgment may still be there because the toxaemia is still there. He defined judgment as the capacity to reason over and choose between alternatives and between right and wrong; expediency or otherwise and the assessment of moral values.

He thought that any typhoid case would be at the worst period mentally about the fourteenth day, especially if it were a severe case and, if in a toxic state, would be inclined to be apathetic and more responsive to suggestion. He agreed that there is no reliable fixed rule of uniform mental deterioration in typhoid cases and that a patient with ambulatory typhoid while up and about might have mental capacity to make a will. He further agreed that a doctor who had not seen the patient could not dogmatise about his mental condition. As to what would constitute satisfactory evidence of mental capacity. Dr. Smith postulated a standard which could rarely be reached in practice in the Courts. He appeared to think that the only satisfactory opinion would be that of a trained psychiatrist who had examined the patient with a view to determining the mental condition and, while not denying that a physician should be able to determine it, he thought that unless the physician was specially trained as a psychiatrist, or unless at least his examination were directed specifically to ascertaining the mental condition, his observations would not be of much value. He did however agree that the next best evidence would be an intelligent and truthful witness who had seen and spoken to the patient. He described two types of ambulatory typhoids, the mild type in which the typhoid state does not appear and the obstinate type in which the patient is stimulated by the toxin and insists on walking about.

Assuming the correctness of Dr. Subryan's notes, the witness was of opinion that the illness began on the 22nd September and impairment of the faculties on the 3rd October. "On the general tenor of the notes I would say that the patient was not on the 7th in a fit condition to make a will. He would probably know to whom he was giving his property. As to knowing the extent of his property, very doubtful. As to weighing the claims of others not present I should say that by this time his judgment would be so reduced that he would not be capable."

Shewn the promissory note he thought it would be possible for a patient on the fourteenth day of typhoid to write it and that if deceased wrote it he probably knew what he was doing. Shewn the will and told of the circumstances in which it is alleged to have been written, the witness had no particular comment to offer except "You might expect him to write it himself but you are dealing with an ill man and his judgment might have been affected." He agreed that the will was simple and rational, no sign of weakness in deceased's signature or handwriting, and if he had dictated and executed the will as alleged it was probable that he knew what he was doing. Further he agreed that if the evidence were true as to the conversation that afternoon it shewed that the deceased's

memory was all right in that particular direction. He did not question the sufficiency of deceased's memory on the 7th but he would expect his judgment to be affected.

As to the deceased's tolerance of the breeze he thought it suggested either that he had no fever or that the toxic stimulation had made him reckless but "if he was up and dressed, moving about and refused to have the windows shut it could be taken that he was feeling all right."

According to the deceased's behaviour as described by the lay witnesses he thought that the deceased may or may not have had proper judgment but if Dr. Subryan's notes are correct he thought it very unlikely that the deceased did have such judgment. He agreed that it was difficult to reconcile this behaviour with the picture of deceased given in Dr. Subryan's notes, but said that the mental condition might vary from day to day, though the judgment would remain impaired.

Further cross-examined, however, he said this: - "I think it's a waste of time looking in the notes for evidence of loss of judgment. It's too elusive a thing. The notes cannot, taken by themselves, reliably decide a question of loss of judgment or not on the 7th October. There is no direct reference to any loss of judgment. I wouldn't expect the notes to indicate anything relevant to loss of judgment. They're clinical notes of the course of the disease……My opinion was not based on any facts but on the general course of the disease as shewn in the notes, including the fatal ending, and the high degree of probability."

On the other hand, in re-examination he gave it as his opinion that the recorded clinical notes would be of more value than evidence of conversation in arriving at an opinion on the mental condition especially if the conversation was not conducted with a view to testing that capacity. He thought that Dr. Subryan's notes shewed that mental retardation had started on the 6th and had possibly reached the stage of loss of judgment and mental confusion. He did not think that any one at this late stage could say what was the man's mental condition at any particular date but his opinion was that the probabilities were it must have been very poor.

He agreed that there was nothing in Dr. Subryan's notes to shew that the deceased could not have written the promissory note on the 7th and that if the deceased made a choice between two or more persons as his beneficiaries that would be an exercise of his- judgment especially if his choice were based on the behaviour towards him of these persons. He also agreed that if the deceased inspected the work being done on the house and bought materials for it that would also be an exercise of the power of judgment but not in any very high degree.

Dr. Giglioli's opinion was also based primarily on Dr. Subryan's notes. He thought that these notes taken as a whole are consistent with the final diagnosis of enteric. As regards the general characteristics of typhoid fever he thought the actual beginning is always difficult to place but once the diarrhoea and fever begin the increase of toxaemia is usually progressive and reaches its peak at any time between the fourteenth and twenty-fourth days but more frequently during the third week. Impairment of the mental condition is characteristic but not invariable.

Referred to the hospital charts he thought the fever chart incompatible with typhoid fever which had started the day before, that is on the 14th, and he thought that the delirious phase described by the patient as recent must be associated with the fever which the patient admitted having had ten days previously, which would put the delirium somewhere around the 6th or 7th October. The discrepancy in the description of fever in the two sets of notes might be explained by a remission, a fairly frequent condition in typhoid, in which the temperature drops but not usually to normal and the patient would have a feeling of being; but for the medical man examining the patient there would still be a temperature. This phase might be followed by a recrudescence or relapse and the disease resume its course sometimes in aggravated form. During such an intermission of the fever he would expect an improvement in the mental condition. According to the hospital notes a remission would seem to have occurred between the 6th or the 7th October and the but according to Dr. Subryan's notes the case would seem to have followed a regular progressive course.

He agreed that there was no reason why the deceased should not have been perfectly normal mentally on the 16th October. In the average case of enteric he would as a matter of general principle expect mental dullness around the fourteenth day.

Shewn the promissory note and the will and given a resume of the manner of the alleged execution the witness said "I: it points to anything at all it points to his feeling up to writing the promissory note but not up to writing the will. He may not have wanted to do it or not felt up to it, etc." He agreed that no one who had not seen the deceased on the 7th could give a definite opinion one way or other and that the best evidence would be that of intelligent persons who saw the deceased on the day.

It was possible that deceased had capacity on the 7th, but from the reference to recent delirium in Dr. Gomes' notes he would doubt it. He admitted, however, that if it were shewn that the patient were in fact delirious on the 15th, such evidence would date more precisely the word "recently" and he would not necessarily have drawn the inference that the delirious period should be placed around the 6th or 7th October.

He distinguished the two types of ambulatory typhoid and said that the true ambulatory type is not seriously ill or in stupor. He thought that if the patient of his own will decided to do something important the indication was either that stupor was not present or was present only in a small degree.

He did not think the fact that deceased on the 7th had the windows open to the breeze necessarily indicated that he had no appreciable temperature.

Dr. Bayley gave an opinion based on Dr. Subryan's notes and thought that they were consistent with typhoid from the beginning. He would expect from these notes that the peak of toxaemia would be reached in the first week of October and he would not expect the patient to be in full possession of his faculties around that period. He himself had not found any difficulty in diagnosing typhoid fever even in the earliest stage and has never seen a serious case which had not had mental impairment around the peak period of the fever.

On the whole of this evidence I saw no reason to doubt that the malaise of which the deceased complained on the 26th September was due to an infection of the typhoid bacillus. The typical typhoid stool which Dr. Subryan saw on the 29th indicated this and there was no evidence of any subsequent fresh infection. The question was what course did the disease take and what was the degree of its severity? According to Dr. Subryan and the opinions of the medical experts based on his notes, the disease would appear to have followed the normal course with the peak of temperature and toxaemia occurring round about the 7th October and followed a regular progressive course with delirium on the 14th and 15th October followed by some remission or at least an improvement in the mental condition after admission to hospital. On the other hand from the evidence of the plaintiff, Figueira, Jervis and other witnesses who speak as to the deceased's movements between the 4th and the 14th of October, the case would appear to have been one of the mild ambulatory type with the deceased not feeling ill enough to take his bed and with little or no degree of mental impairment. The subsequent flare-up on the 15th and the eventual fatal ending would be consistent with the prognosis of this type given in the medical text books and by some of the medical witnesses.

The question I have to answer therefore is which of these two versions is the true picture, and to answer that question it is now necessary to examine the credibility of the witnesses and weigh the conflicting evidence. Where witnesses may be supposed to speak under bias, any opinion or judgment formed by them must be received with caution and the facts to which they depose as forming the ground of that opinion must be closely examined. Both the plaintiff and Dr. Subryan are personally interested in the outcome of this case and under such circumstances their evidence as to the capacity of the deceased at the time of execution requires to be watched with great caution and jealousy. The same caution must be exercised in receiving the evidence of the attesting witnesses if there are any circumstances which create suspicion of inaccuracy or lack of integrity. Both the plaintiff and Dr. Subryan were guilty of some exaggeration and perhaps of some deliberate untruths in their evidence on the matter of the family relationships and this has to be borne in mind in weighing the credibility of their evidence as a whole.

It will be most convenient to consider first Dr. Subryan's evidence by which the opinions of those of the experts who assumed the accuracy of his notes, largely stand or fall. I was unfavourably impressed by his general credibility. Questioned as to his relations with his father, he first denied any estrangement but later admitted that they had had differences both over money matters and over his marriage and that his father up to his death had not forgiven him. He represented that the plaintiff was merely one of the several adopted "errand boys" and had assumed the name of Subryan of his own accord, but had to admit that he had introduced the plaintiff to the manager of Booker's Drug Store as his brother. He was also untruthful when questioned as to his father's and deceased's retention of his academic certificates, cap and gown until his letter to the deceased (Exhibit JJ) was put to him in evidence.

It was clear from his action in sending the deceased for tests on the 4th October that he suspected typhoid at an early but his subsequent conduct impelled me to reject his claim to have been certain on the 6th October that the deceased had typhoid fever; it seemed to me more probable that when he received the negative results of the Widal test made on the 4th, he put the possibility of typhoid at the back of his mind, even if he did not exclude it altogether. To say this is not to impugn his efficiency as a physician, for Dr. Nehaul himself said "Diagnosis of typhoid is difficult in the early stages and it is unusual for the ordinary doctor to diagnose it for about two weeks. The practice is to treat for malaria or other fevers first. If the patient doesn't respond you may begin to think of typhoid. You don't think of typhoid straight away unless there are cases in the neighbourhood or a friend or relative has it. If you find a pea-soup stool should think of typhoid." Dr. Subryan's conduct seems to me consistent with this practice for he prescribed mepacrine, a specific for malaria and sulphaguanadine, a specific for diarrhoea and dysentery, but not, according to Dr. Giglioli, effective in typhoid. He also prescribed a purgative which, according to the majority opinion, is contra-indicated in typhoid owing to the possibility of perforation of the intestines but which is according to Dr. Nehaul, usually prescribed for "painter's colic," the chronic form of lead poisoning. Dr. Nehaul described two types of lead poisoning, acute with diarrhoea and chronic with constipation. Dr. Subryan himself said that he examined the deceased for evidence of lead poisoning on 8th October (according to the plaintiff on the 12th) and it is clear from Dr. Lethem's notes that he must have given her the impression that painter's colic was at least a possibility. Indeed from her notes it would appear that she received the impression that this was the strongest possibility.

I found also I could not accept his evidence as to the twitching and trembling of the deceased's hands and his opinion that these involuntary movements would not be reflected in the handwriting, an opinion which was contradicted by Dr. Nehaul. According to the medical text-books, these symptoms only occur in the "typhoid state" and are inconsistent with the true ambulatory type. No other witness spoke to having observed these involuntary movements and the defence witness Hamblyn who claimed to have shaken hands with the deceased on the morning of the 7th said that the deceased's hands were "good".

Another difficulty in accepting his evidence was his failure to point out to Dr. Gomes the inaccuracy of the deceased's statement that he had had no temperature for ten days. He admits that he saw the case history on the 20th October and discussed the case with Dr. Gomes on that day, but can offer no explanation why he did not point out this important error.

His conduct generally also appears to me to be inconsistent with his evidence of the gravity of the deceased's condition. He says that as early as the 29th he told the deceased "If it were malaria, as he thought, a few days in hospital would get him better, but if typhoid it would have to run its course and he'd need all his strength to pull him through." There is no specific cure for typhoid and, apart from giving a patient such relief as is possible from each symptom as it arises, all that a doctor can

do is to see that the patient has suitable food, complete rest and careful nursing. When the deceased was undoubtedly really ill on the 15th, Dr. Subryan was able to use his influence to secure him a place in the hospital. If the deceased had been seriously ill ten days earlier there would seem to be no good reason why this same favour could not have been sought. At least one would have expected the doctor to insist upon a nurse. Yet he left his brother to the care of the plaintiff, who was away during working hours, and of wholly untrained and unskilled persons such as Ishmael and the cook.

Again the danger of infection from a typhoid patient is notorious and Dr. Subryan did himself less than justice when he attempted to deny this danger and said that he did not order the patient to be isolated or warn the other inmates of the danger of infection because adequate precautions could only be taken by a qualified nurse. He admitted also that he knew that the deceased had a farm and sold milk and that he did not give any warning that deceased must have nothing to do with the handling of the milk. It was to my mind incredible, bearing in mind that he was at the time Health Officer Demerara, that, had he really believed his brother to be suffering from typhoid fever, he would not have taken such a precaution. I did not overlook the explanation offered in re-examination that he thought my question regarding the distribution of milk referred to the lands at Mahaica. I regret, however, that I cannot accept this explanation. The cross-examination at the stage the question was put concerned the house at Kitty and I have no doubt that at the time he answered my question he knew that it referred to Kitty. The subsequent explanation was merely an after-thought when he realised the implications of his admission. Again if the deceased had been at the peak of the febrile toxaemic stage round about the 7th, it is extraordinary that Dr. Subryan did not visit him at all on that day and only called in casually and without a thermometer on the 8th. His explanation that his car would not start on the 7th is wholly unconvincing: if he had intended to go and did not wish to hire a car, he could have telephoned for his brother's car to be sent for him. On the 9th again he did not visit the patient; nor did he visit after the 11th until the plaintiff sent for him on the 15th. If he were not fit enough to go himself, as he says, one would have expected him (had he believed that his brother was at the most toxic stage of typhoid) to have asked a fellow practitioner to visit the patient or, at least, to have enquired by telephone how the patient was getting on.

Finally, his conduct subsequent to his reading of the will seems to me inconsistent with his having then entertained the opinion that his brother had been mentally incapable on the 7th of October. I refer to his having entertained the plaintiff in his house on friendly terms up till November 8th, 1947 and also to his suggestion to plaintiff on November the 5th that he should give Mr. Fraser the work of probating the will. This suggestion was made after he had seen the will and Jervis had given a statement to Mr.Cummings. He said "I honestly intended that Mr. Fraser should get probate of the will. At that time I was not contemplating litigation against the plaintiff. My

brother's condition was still in my mind." Counsel for the defence suggested that this proposal was made with a view to a settlement after an alleged conversation with the plaintiff on November 3rd, but the witness himself made no such suggestion in his evidence. For these reasons therefore I was unable to accept Dr. Subryan's evidence of the deceased's symptoms and condition, which I thought he was clearly exaggerating in order to build up a picture of a patient in an advanced stage of confused toxic psychosis. It followed therefore that I could not accept his notes (Exhibit KK) as an accurate, contemporaneous record of his observations. He claimed to have written up the notes at night after his visits but admitted that they were unique in their contents. Whereas his other case notes contain only notes of his diagnoses and prescriptions, these contain curious and unnecessary details such as "Advised hospital—refused", "bed and slops", "on gallery" "took to hospital admitted". In short, they seemed to me to have been written for the purpose of refreshing his memory for this case.

The plaintiff's evidence also was open to criticism. He was guilty of some exaggeration in his picture of the relations between the three brothers. He was untruthful when asked if he had not requested the defendant to find him work in Aruba, until confronted with his own letters. He admitted that when questioned by Dr. Subryan about Ronald's will on the 25th he avoided the question. Whatever the exact terms of the conversation and whatever the value of plaintiff's explanation may be, he was not wholly frank arid truthful. In other matters he gave me, on the whole, a favourable impression but because of these lapses from the truth and because of his personal interest in the matter I thought it prudent not to rely upon his evidence except where corroborated by other evidence.

I pass on then to consider the evidence of Figueira and Jervis. Counsel for the defence suggested, as a rule of law. that if there is suspicion it cannot be allayed by the bare oath of the attesting witnesses; and as a further rule, that where it is known that the testator is suffering from a disease likely to affect his mind the person propounding the will must shew that a test was made to establish the existence of testamentary capacity. In support of the first alleged rule the most relevant case would appear to be Parker v. Duncan (1890) (62 L.T. 642) where Sir James Hannen said:

> "It is the duty of any man who expects that a will is about to be made in his favour to see that the testator receives proper and independent advice and he should take care that the testimony called in support of the will should not be that of himself alone but that it should be independent and impartial."

But I am not aware of any case in which it has been held that the attesting witnesses cannot supply such independent and impartial testimony. In the case cited the plaintiff propounding the will had refused to allow a lawyer to see the testatrix and the witness could not say that she had ever expressed any intention to leave her property to him. There are cases in the reports where medical or other evidence has been preferred to the evidence of the attesting witnesses, but such decisions are based merely on their own facts and the weight of evidence.

The other supposed rule was attributed to the cases of Whyddon v. Billinghurst and Maxwell v. Maxwell cited in Taylor's Medical Jurisprudence Vol 1. 9th Edition, page 798. Counsel laid over notarially certified copies of the reports of these cases from the Times Newspaper of 16th July, 1850 and 5th July, 1872 respectively. It is sufficient to say that" Whyddon v. Billinghurst does not purport to lay down any general rule and was a decision on the facts of the case. Maxwell v. Maxwell is of no assistance.

The witness Figueira impressed me as being careful and truthful. It was sought to impugn his impartiality on the ground that, having been a tenant of the deceased, he would become a tenant of the plaintiff if the latter succeeded in this case. Equally, it seems to me, it could be argued that if an intestacy declared he would become a tenant of the defendant or his brother Dr. Subryan. The credit of the witness was also attacked by suggesting that in 1946 he quarreled with his wife and with the deceased because he suspected them of misconduct and a retired police sergeant named Bland testified that Mrs. Figueira complained to him of her husband’s suspicions and ill-treatment. Figueira said that his wife did mending and sewing for the deceased with his full knowledge and consent up to August, 1947 and visited him during his illness. He denied that there was any foundation at all for the suggestion of these suspicions or allegations and pointed out that the deceased was god-father to one of his sons in 1946 and that he himself in 1947 drew a sketch plan for the deceased's new bungalow. Even the venal witness Ishmael did not support this allegation. He remembered the deceased standing god-father to one of Figueira's sons and he said that in 1947 Figueira would come to the house about twice a month and more frequently after the deceased fell ill and that Mrs. Figueira came regularly throughout those two years. He had never heard of any quarrel between Figueira and the deceased or of any break in Mrs. Figueira's visits. In my view the witness Bland was lying and the allegation was entirely baseless and reflected much discredit on its authors. Counsel for the defence also stressed a statement made by Figueira in cross-examination that he and the deceased used the same fountain pen. This is manifestly incorrect as the ink is different. In my opinion it was merely a slip which the witness would and could not have made had his attention been drawn to the inks and it does nothing in my view to discredit his testimony which I accept as true.

As regards the witness Jervis,attempts were made by the defence to impeach his testimony by the production of subsequent declarations manifesting a consciousness on his part that the will had been improperly made, but I was not inclined to give much weight to the testimony by which these declarations are evidenced. On the 1st November, Jervis was taken to Mr. Cummings's Chambers where he made a statement (which was not in evidence). On the 24th November, Mr. Cummings having prepared a statutory declaration took Jervis along to a solicitor's office where the declaration was made before a Commissioner of Oaths (Ex. X). In that declaration Jervis said (paragraph 6) "As soon as I entered the room the deceased spoke to me saying that he wanted me to witness his will. He spoke in a

jerky and hesitating manner and looked ill. I enquired was the matter and he said he had fever. I was concerned about his condition and suggested that the window should be closed. He handed me a document which he said Figueira had written. After reading it I said to him "Why are you making your will now, Ronald.' He did not reply." After saying that the deceased did not read the will while he was there and saying that the deceased signed it he added "I do not know whether in the state he was he fully appreciated what the document contained. I thought the bequest a. strange one knowing the amicable in which Ronald and his brother the doctor lived and how fond the deceased was of his nephews. That was my reason for asking him why he was making his will then. Had I known that the deceased had had typhoid fever I would never have signed that will having regard to his condition as it appeared to me at the time."

Cross-examined on these statements the witness said that the words were not his words but had been suggested to him by Mr. Cummings. He said that the deceased spoke normally and that Mr. Cummings had suggested that if a man had fever he would be bound to speak jerkily. In one instance at least Mr. Cummings admitted that a phrase denied by the witness had been supplied by him. I was told that it is a common practice for Counsel and Solicitors in this Colony to get prospective witnesses to make statutory declarations. If this is done it would be, in my opinion, only fair to the witness to ensure that the declaration is taken in his own words and that suggestions and cross-examination should be avoided. By neglecting this precaution the Counsel who prepared the statutory declaration in this case and who cross-examined upon it found himself gravely embarrassed.

Further to impugn Jervis's testimony, the defence also called the witness Wills, a Lance Corporal of Police stationed at Kitty ft seems that at some stage a report was made to the Police in connection with the will and an investigation made. alleged that he told Jervis he had heard enquiries were afoot and that Jervis replied "The will wasn't a false will. He signed as a witness but the afternoon he went Subryan had fever and wasn't talking too straight. Talking a bit wild. He said they asked him to sign and he signed it." Jervis admitted a conversation with Wills about the will sometime in December but said that it took the form of Wills offering for a money payment to give evidence on behalf of the plaintiff. I could not put any reliance upon the evidence of Wills and I think that Jervis's real mind was expressed in his answers to me at the close of his evidence. He then said, "I was surprised that he was giving everything to the plaintiff but I had no doubt at all that he fully understood what he was doing and was doing something he intended to do. If I had had any such doubt I wouldn't have signed the will. All the things that I have described Ronald as doing were done by him of his own accord with no prompting by anyone."

There was a sharp conflict of evidence as to the deceased's condition and movements on the morning of the 7th. If Langford, the plumber, Rowe, the carpenter and Samaroo, the chauf-

feur were to be believed, the deceased attended to his business during the week of 6th to 11th October and was well enough on the 7th to go to Georgetown in the morning and to visit the new bungalow twice that day. Figueria also said that deceased told him on the 7th that he had been looking for paint oil that morning. According to Hamblyn, however, the deceased was lying on his bed in pyjamas and covered up with a blanket from about 8 a.m. till 12.30 p.m. that day.

The first three of these witnesses appeared to me to be independent and unbiased and I saw no reason to doubt their evidence that the deceased did, in fact, attend to matters of business up till Saturday, the 11th, supported, as it was, by the entries made in the milk-books, and by the receipts produced.

It was however clear that the receipt for the hasp and staple (Exhibit P1), which Rowe said had been given him by the deceased on the 7th was dated 1.10. 47, (although at first sight the "1" looks like a "7") and it was urged upon me that this error must not only discredit Rowe but also throw doubt upon the testimony of Langford and Samaroo especially in relation to the events of the morning of the 7th. The clerk of Messrs. Rodrigues and Rodrigues who wrote the cash bill, Exhibit P1, was not called and it is possible that, as counsel for the plaintiff suggested delivery was not taken until the 7th but I think it more probable that the witness Rowe was misled, by reading the figure "1" as a "7", into the belief that the hasp and staple were given him on the 7th. I thought he was honestly mistaken over this and saw no reason to reject the rest of his evidence corroborated as it was by Langford.

Samaroo's evidence as to his instructions to buy putty on the 7th and his actual purchase the next day (which is substantiated by the. date on the bill) makes it clear that there is no question of his transposing to the 7th events which really happened on another day. His evidence therefore as to the deceased's movements on the morning of the 7th must be either true or deliberately false. His story that the deceased came to Georgetown that morning was corroborated by Langford and Figueira and it seemed to me impossible to reconcile their evidence with Hamblyn's. The only corroboration of Hamblyn's evidence was given by Ishmael who was quite unreliable. It was, of course, possible that Hamblyn was transposing the events of another day to the 7th. He appeared to be rather stupid and biased against the plaintiff and I did not regard him as a reliable witness. But even if his evidence were true it did not disclose any deterioration in the deceased's mental condition or failure of recent memory. In cross-examination he said that the deceased did not have to be reminded of the instructions that he had given previously for peeling coconuts and was talking quite sensibly.

I should add that Samaroo's credit was impugned on the ground that he had been convicted of a public mischief by making a false report to the Police. It so happened that he and his wife were charged jointly with this offence before me at the October Sessions 1947 when he pleaded guilty and the charge against his wife was withdrawn. I fined him $75. Reference to my criminal note-book shewed that his difficulties at that time arose out of family troubles and, in my opinion, the circumstances of his

offence were such as not to reflect adversely upon his reputation generally. He did, indeed, during the present case, give me the impression of being generally truthful.

As regards Moonsammy. I could not consider him an independent witness in view of his position in the Medical Department and I regarded his evidence with suspicion, particularly as he spoke only to having heard one pregnant sentence of the conversation between Dr. Subryan and the deceased.

The main part of the evidence of the defence witness, Charles Singh, falls to be considered later in this judgment. I did not accept it as reliable and I doubted the truth of his account of his visit to the deceased on the 9th. But, even if true, it was not inconsistent with the deceased having been in better condition, physically and mentally, on the 7th. The medical witnesses were mostly agreed that his condition would vary with the degree of toxaemia, a decrease being reflected in mental improvement and *vice versa.* There could be no doubt that, after the 14th at least, the deceased exhibited changes which were quite remarkable in their rapidity and degree. He was delirious on the 14th and 15th but quite normal when Dr. Gomes saw him on the 16th and on subsequent days. Jervis also spoke to finding him wandering in his mind on one visit and quite normal on the next. It may well be therefore that he exhibited similar changes, though not in such a marked degree, on the 9th and 10th. Indeed it would appear necessary to assume such a change before one could accept Ishmael's story of the deceased being well enough on the 10th to get up and take a cold shower-bath.

Before passing from this aspect of the case it remains to consider two statements attributed to the deceased which, it was alleged, shewed that he was suffering from delusions. The first is the statement by Dr. Subryan that when he visited deceased on the afternoon of Sunday, the 5th, he found him ready dressed and expecting to be taken to hospital for a test, whereas he had in fact already undergone the tests on the previous day. The plaintiff states that he was at home in the house that afternoon and denies that Dr. Subryan came that day. I felt I could not accept the unsupported word of either Dr. Subryan or the plaintiff on this alleged incident and the corroboration by Ishmael was equally unreliable. All the witnesses who spoke to being present at the preparation for and serving of the dinner that day were agreed that the deceased was present and took an active part and there was no suggestion from any of them that he was in any way abnormal or confused. The probabilities are therefore all against the truth of Dr. Subryan's evidence on this point. I could only accept it if I assumed that the deceased underwent a rapid, temporary deterioration: such a change would not have been impossible but I was not prepared to assume it on the sole basis of Dr. Subryan's word.

The other statement is the deceased's remark to the plaintiff about the conduct of his brothers when plaintiff enquired why he wished to make a will. Counsel for the defence contended that this shewed the deceased was suffering from a delusion as to the character and conduct of his brothers, particularly towards their aunt and that the existence of such a delusion postulated

the absence of testamentary capacity. In Dew *v.* Clarke (3 Add. 79 at p. 90) the Court denned delusion as existing

> "Whenever the patient once conceives something extravagant to exist which has still no existence whatever but in his own heated imagination and whenever having once so conceived he is incapable of being or at least being permanently reasoned out of that conception……I look upon delusion in this sense of it and insanity to be almost if not altogether convertible terms."

This definition has been approved of in subsequent cases, e.g., Boughton *v.* Knight 1873 (L.R. 3P. & D. 64). In the latter case Hannen J. after quoting this definition and giving an example of an undoubted delusion said

> "But a very different question no doubt arises where the nature of the delusion which is said to exist is this—when it is alleged that a totally false, unfounded, unreasonable, because unreasoning, estimate of another person's character is formed. That is necessarily a more difficult question."

I shall have occasion later to consider further the deceased's attitude towards his brothers and the evidence relating to his expressions on different occasions of his testamentary intentions. It is sufficient at this point to state that in my view the deceased was merely expressing a judgment on the character and conduct of his brothers. So far as regards Dr. Subryan, at least, it cannot be said that the judgment was wholly without foundation for Dr. Subryan admitted that his quarrel with Miss Abraham was over money matters. It may have been harsh and perhaps unjustified, more particularly as regards the defendant, but it was not the real motive for the disposition made in the will. It is not the function of the Court to act as a moral censor on a testator's opinion of his relatives, and in my view, the remark is in no way comparable with the insane attitude of the father towards his daughter which appeared in the case of Dew *v.* Clarke or with the obvious delusion as to the fact of the existence of his nephews shewn by the testator in Battan Singh *v.* Amirchand 1948 (1 A.E.R. 152).

To summarize this aspect of the case, the evidence 1 accepted satisfied me that the symptoms exhibited by the deceased up to the 14th October disclosed a case of mild ambulatory typhoid fever with little or no impairment of the mental condition. I was satisfied that he did in fact attend to matters of business up to the 11th and exhibited no abnormality up till the 14th; that his memory and judgment were not affected; that he of his own volition wrote the promissory note (Exhibit J) on the afternoon of the 7th, sent for the witnesses Figueira and Jervis and caused them to write the will as they related; and that he exhibited and possessed unimpaired testamentary capacity. Given the facts which I have found proved, there was nothing inconsistent with this conclusion in the expert evidence (apart from Dr. Subryan's) and much to support it.

I pass now to the circumstances which, it was contended, must excite the suspicion of the Court and, if not satisfactorily explained, induce the Court to pronounce against the will. In the first place it was contended that the circumstances of the making of the will and its having been written partly by Figueira and partly by Jervis suggested a conspiracy between the plaintiff and the attesting witnesses. It was urged upon me that suspicion

must be aroused by the sudden decision to make his will on that day, by the fact that he did not call in a solicitor to do it for him and that he might have been expected to write the will out in his own hand if he were *compos mentis* instead of having it written for him. In my view the circumstances generally do not support this suggestion. The deceased had previously made two wills, one written by himself and one made for him by Mr. Ogle. The intended beneficiary under those wills was dead and deceased must have been well aware that if he died intestate there might be difficulties over his estate and that the plaintiff would, in all probability, get nothing. It does not seem to me suspicious or strange that a man who was normally healthy should in these circumstances think of making a fresh will and if one could believe the evidence of Ishmael, it was not unusual for the deceased to talk of death or, if one could believe that Hamblyn had prayed for him, that might well have set him thinking of the advisability of preparing for death.

Mr. Stafford urged that if Mr. Ogle was not available and the deceased did not care to entrust the making of his will to another solicitor, he could have called on Ishmael and the cook as witnesses. It appears to me that the deceased, who had already once made a holograph will, might well feel himself capable of making another and that he might reasonably prefer to have as witnesses people of better standing than Ishmael and the cook, who might be attacked as being subservient to the plaintiff. A conspiracy implies generally some sort of preparation and planning. The circumstances in which the messages were sent to Figueira and Jervis appear to me to nullify the suggestion of any previous arrangement. One would expect conspirators to arrange before-hand a time of meeting and not to rely upon the chances of messages being received in time or to provide evidence against themselves by utilising Ishmael. Still more unlikely is it if they were concocting a will without the knowledge of the deceased or were inducing him to sign it when he was not in a condition to appreciate what he was doing, that they would have done so in a room with the door left wide open, and expose themselves to the possibility of interruption from the servants (as actually occurred with Ishmael and Samaroo), or from friends dropping in and even of Dr. Subryan coming to visit the patient without warning. This is not a case where the testator was or was thought to be in *articulo mortis.* Nobody at that time had reason to expect the patient to die; that is indeed evident from Dr. Subryan's own story. The conspirators therefore ran the risk not only of discovery or disclosure by the servants or visitors, but also the risk that the deceased himself, if he had any memory at all of what had taken place, might complain. He did in fact have many opportunities of complaining to Dr. Subryan, Dr. Gomes and to others, but never did so.

It was also urged that suspicion must be aroused by the story of deceased using as a model a document which was apparently either a holograph will or a draft for a will. It was suggested that, had he been mentally normal or acting of his own volition, he would either have written out the will himself or had the whole of it written by Figueira. There was no evidence as to where this document came from or what happened to it after-

wards. It was certainly not either of the deceased's previous wills for in them the attestation clause is different in form from that copied by Jervis; nor apparently was it in the deceased's handwriting for Jervis, who had the best opportunity, did not recognize the writing. There was, what I may call, the latent suggestion that it was something concocted by the plaintiff, perhaps with Figueira's assistance, and that deceased was induced to dictate it in the belief that he was dictating an "authorization" (whatever that may mean). The suggestion that the deceased could have been so deceived seemed to me pure phantasy, and wholly inconsistent with his mental condition. The circumstances generally, in my view, negatived conspiracy and, in any case, it would have been much simpler for the conspirators to have a will written out and then "induce" the testator to approve and sign it.

It was also suggested that the device of having each of the attesting witnesses write a part of the will was adopted in order "to "share the responsibility" in case of trouble. The short answer to this is that one would expect Figueira and Jervis in that case to see that the plaintiff (who stood to gain most) also took some part in the writing and not leave him with the easy loop-hole of an "alibi". Why the deceased adopted this course must remain a matter of speculation, but it does seem as if he had some reason. If he had merely felt disinclined to write it himself, he would probably have asked Figueira to write the whole document.

The next circumstance of suspicion is the preferment of the plaintiff and the exclusion of his blood relatives coupled with alleged evidence of his previous intentions. As I have already said the plaintiff made out the relations between deceased and his brothers to be worse than they were, just as Dr. Subryan and some of the other witnesses for the defence attempted to make out plaintiff's position in the house to be a menial one. Johnson Subryan did not mention the plaintiff in his will but there could be no doubt on the evidence that the plaintiff was accepted and treated by the three sons as an adopted brother and it was admitted that he had been a favourite of Miss Abraham. He had grown up in much closer association with the deceased than had the two blood brothers and had shared with him the same hardships. Although the deceased may not have felt any active enmity towards his brothers he does not appear to have had any affection for them and it was in my view quite understand-able that he should not have felt any obligation to provide for them. It is not uncommon to find that testators, when disposing of property which they have received from someone else, feel a moral duty to pass on that property in a manner which would receive the approval of their benefactor, or at least, to avoid a disposition of which they conceive the benefactor would not have approved. As regards the share of the property received from his father, the deceased may well have thought that the terms of the father's will absolved him from any duty towards his brothers. As regards the share received from Miss Abraham, he would certainly think that she would not have approved any portion of it going to Dr. Subryan and may well have thought she would have preferred the plaintiff to Eric. Indeed there was evidence that the deceased said that she had charged him to look after the plaintiff if he, the deceased, died unmarried. I

accept Mr. Fernandes's evidence that the deceased had said to him "The doctor is alright. He has no use for me" and that the way the deceased spoke led him to believe there was not a good relationship between the two of them, and I thought that the deceased's attitude towards the defendant was quite fairly represented by plaintiff's evidence that the deceased resented Eric's rather superior attitude towards him and complained that Eric also did not bother about him.

As to the evidence of intentions, Mr. Fernandes, whose integrity is unquestioned, swore that the deceased had told him "If anything should happen to him the person I would have to deal with would be Ivan." Ishmael said (and confirmed it in the witness box) that he had heard deceased tell the cook in 1946 that if he died the plaintiff would look after her as he had. The defence witness Singh said that when he was discussing the purchase of some property in September 1947 the deceased told him that he was reserving the southern part of the property to build a race horse stable for his brother Cecil, and that he expected Eric to return to the Colony and was building him a bungalow there. The defence witness Sealey, said that in August, 1947, he met at deceased's house one of Dr. Subryan's sons, named George, and that the deceased told him "The doctor didn't get anything in the estate but this boy would get some of his. There was a bungalow just built. He said he was building it for his brother who was abroad. There was a piece of land at the western end and he said he was reserving that for the doctor…….Ronald said he loved Ivan very much as his own brother and he would have a good share in the estate." In cross-examination he said "He told me about his will because I asked him, seeing George,if the family was getting together……I knew there had been disagreements in the family that is why I made the remark." The difficulty in accepting this evidence was the discrepancy between the statements said to have been made to Singh and Sealey as to the land being reserved for Dr. Subryan, and also the fact that neither defendant nor Dr. Subryan had any knowledge of these arrangements. The only witness whose evidence on this point I could unreservedly accept was Mr. Fernandes.

Mrs. Clarke, the wife and managing clerk of a practising solicitor, gave evidence that having heard the deceased was in hospital she went to visit him on the 17th October with one Khunan. According to her story the deceased said: "I'm glad to see you and I'd like you to bring Mr. Clarke. He (deceased) said he wanted to make a will to provide for Ivan, Eric and George. I said he looked fairly well and didn't look as if he were going to die and why was he talking about a will. He said he had promised his aunt when she was dying to look after Ivan". In cross-examination she said "He was talking to me normally and had no fever that day. He was perfectly sensible discussing things with me about the house which he had built and so on. He was saying that the worries over his painters and carpenters had caused his illness. His recollection as to the bungalow appeared perfectly clear. His memory seemed alright. He even remembered a promise to his dead aunt.....I was satisfied he was in a fit state of mind to make a will……..I would be surprised if he did not remember signing and dating a will on

the 7th October." This conversation was corroborated by the witness Grant, a patient in the Police Ward at the same time, who said that he stood by the deceased's bed while it was taking place. He said that Mrs. Clarke asked the deceased who was looking after his place and the deceased replied "He'd given Ivan an authorisation to look after the place. He then told her she must bring Mr. Clarke tomorrow to make his will. He wanted to provide for three of his relatives. He spoke of George, Eric and Ivan." The witness said that he never heard the deceased at any other time refer to making a will and he could not remember whether Mrs. Clarke first put the suggestion to the deceased.

There are several extraordinary features about this evidence. In the first place, although Mrs. Clarke said that the deceased was mentally normal that day and had no fever, the hospital chart (Ex. MM) shews a rise in temperature that day from 99° to 103° and at midday it was 99.6°. Mrs. Clarke said she saw the deceased between 12.30 and 1 p.m. Further I thought it probable that in saying deceased had said he had given the plaintiff an authorisation to look after his business, the witnesses putting into a more definite form a statement by the deceased that the plaintiff was looking after his place for him. Any suggestion that the deceased meant a written authority and that he was referring to either the promissory note or the will executed by him on the 7th October, would necessitate the inference that he had a recollection of what had taken place on that day. This in itself would exclude the possibility of his having been delirious or confused for, as Dr. Smith said, "There is no memory of delirium. You can only know if somebody tells you. You might remember you had been through a bad period and there was a hiatus but you naturally cannot remember delirium or unconsciousness."

These considerations apply equally to the remark alleged to have been made to Dr. Subryan on the morning of the 8th, that he had given the plaintiff an authorisation.

A further remarkable feature about the evidence of Mrs. Clarke and Grant was that, if the deceased really wished to make a will, he should have confined the expression of this intention to a chance visitor. There was no suggestion that he had sent for Mrs. Clarke or knew that she was coming to see him; nor did he ever repeat the expression of this intention although he saw Dr. Subryan and Dr. Gomes daily and could have asked either of them to arrange for a solicitor to see him.

Further, Mrs. Clarke admits that she took no steps to carry out the deceased's intentions until the following Wednesday, by which time he was isolated in the infectious ward and, according to her, although she had taken her husband there for the purpose of making a will, her husband refused to go in. She herself, as she admitted, was perfectly capable of making the will, if she thought fit, on the 17th or, at least, of taking the deceased's detailed instructions which either she or her husband could have embodied in testamentary form and taken to the hospital for execution. I found it difficult to believe that any one with her long experience in a solicitor's office should have delayed making the will because she thought "it would be time enough on the following Wednesday." For these reasons I was satisfied that, if

there were any conversation with the deceased about a will, these witnesses had not truly recollected or repeated what was said.

Counsel for the defence admitted that there was no positive evidence of undue influence but contended that the proximity and close association of the beneficiary to the testator was in these cases a circumstance of suspicion and he suggested that in the judgment in Straker v. Luke this proximity is treated as a species of latent undue influence; something which, though not actively directed to the making of the will, must over a long period have influenced the mind of the testator, and that though, when the testator is normal no amount of persuasion or advice avails to set aside a will, yet the Courts regard the matter in a different way when the deceased is sick.

The general rule as to persuasion and advice is stated clearly in Baudains v. Richardson (1906 A.C. 154).

> "If therefore the act is shewn to be the result of the wish and will of the testator at the time, then however it has been brought about (for we are not dealing with a case of fraud) though you may condemn the testator for having such a wish, though you may condemn any person who has endeavoured to persuade and has succeeded in persuading the testator to accept that view—still it is not undue influence."

The Court in Straker v. Luke held that, in the circumstances of that case, the sudden and substantial changes of testamentary dispositions made within a very short period when the testatrix Was in a very poor state of health and in close contact with the respondent who was to derive increased benefits under those wills, together with other circumstances, gave rise to suspicion requiring explanation which if not dissipated might lead to the belief that the sudden changes were not the result of the free volition of the testatrix.

The circumstances of the present case were very different. The only person who would have benefited under previous wills of the deceased was dead. The deceased was not in a very poor state of health, and although he was in daily and close contact with the plaintiff, he was also in contact with the brother who was attending him as his doctor and with other friends to whom he could, if he wished, have applied for assistance or advice. There was no evidence that the plaintiff at any time did attempt to suggest or persuade the deceased to make a will and, as I have already stated, in my view the circumstances of their life together and their mutual affection offered a sufficient explanation of the preference shewn to him.

Lastly, it was suggested that plaintiffs subsequent concealment from Dr. Subryan of the making of a will on the 7th October gave rise to suspicion. Dr. Subryan's evidence was that when he saw the plaintiff at his home at midday on the 25th he told him he had seen Ronald who was not worse and he, the plaintiff, need not be unduly alarmed. "I asked him if Ronald had made a will. He said we both made wills long ago." This version of the conversation was supported by the witness' wife, but her evidence, like Moonsammy's, I regarded with suspicion as she heard only these two sentences of the conversation. The plaintiff admitted that Dr. Subryan had asked him about a will and remarked that if people died without a will there might be trouble, and that he

replied that he himself had made a will after his narrow escape in the big fire in Georgetown and had given it to Ronald. While denying that he had said that the deceased had made a will long ago, he admitted that he deliberately refrained from telling Dr. Subryan that the deceased had made a will on the 7th. The explanation offered for this was that he remembered Ronald's words of warning to him before making the will, and it seemed to me to be a reasonable one however reprehensible morally the plaintiff's silence or concealment may have been.

It was also contended that his letter to the defendant written on the 25th October (Exhibit W) indicated by a tone of excessive optimism a desire to keep the defendant away from the deceased. In the letter plaintiff wrote: —

> "Dear Eric,
>
> By this you will know that Ronald is very sick: He has an attack of tyfoid (sic) fever and had to be taken to hospital. Cecil was attending to him when he was at home. The doctors at the hospital are confident that he will recover."

I thought the suggestion was unfounded. The letter was written and sent by air-mail, after the plaintiff had received from Dr. Subryan an assurance, according to Dr. Subryan, that he need not be unduly alarmed. According to the plaintiff, Dr. Subryan had said on the 25th "we are confident he will recover." Whatever the exact words used by the doctor, I thought it quite understandable that anyone writing to a relative overseas, having no cause to expect a fatal ending and desiring to avoid giving undue alarm, might exaggerate somewhat the assurances he had received from a medical man with knowledge of the case.

On the whole of the evidence therefore I found that the doubts and suspicions with which it was urged I ought to regard the plaintiff's case had been removed; and that it was established, as was the duty of the plaintiff to establish, that the testator did know and approve of the contents of the will and that he intended to and did actually execute it.

It remains to consider the question of costs. This is always a matter of discretion but there are, it appears, two principles by which the Court is generally guided in exercising this discretion. The first is whether the testator was really and substantially the cause of the litigation (See Boughton v Knight 1873 L.R. 3 P. & D. p. 79). The only grounds it seems to me on which that could be urged in this case are the testator's preference of the plaintiff, and his omission to employ a solicitor to draw his will. The former, as I have held, was the true expression of his intention adequately accounted for by the circumstances of his life.

The latter could not seriously be urged.

The second principle is whether the next-of-kin were justified in fully contesting the case. There are cases in the reports in which it has been held that although the next-of-kin were justified in putting the propounder of the will to proof in solemn form and in watching and sifting that proof, yet, if they have gone further than this and endeavoured to set up in opposition a positive case which has failed, thereby putting the estate to the cost of expensive litigation, they have been made to bear their own costs. This is especially so where charges of undue influence or charges in the nature of conspiracy and fraud have been introduced (See

Gillet v. Rogers 1913 108 L.T. 732; Barry v. Butlin 1838 2 Moo. P.C.C. 488; Nichols & Freeman v. Binns 1858 1 S. & T. Rep 239; Brogden v. Brown 1825 2 Add. 441). That is exactly what occurred in this case. In my view the defendant was only a nominal opposer and Dr. Subryan was the real instigator of the suit. He financed it and took an active part in finding the witnesses. The defendant's attitude that he would oppose any will however and whenever made which did not constitute him a beneficiary to the extent of one-third of the property, could receive no countenance from a Court of Probate. The defence, so far from having confined itself to cross-examination, endeavoured to set up a positive case supported by such obviously false witnesses as Bland and Ishmael and by what I have held to be the exaggerated and unreliable evidence of Dr. Subryan. In Broadbent v. Hughes (1860 24 J.P. 246) Sir C. Creswell said "A great deal of mischief would be done by allowing parties to resist wills on light grounds and to impose upon the parties propounding them the fearful amount of costs occasioned by such litigation. Therefore, although I do not condemn the defendant in costs, I cannot allow his costs out of the estate." I respectfully agree with this passage.

For these reasons, I found the will propounded to be valid, dismissed the counter-claim and made no order as to costs.

Judgment for plaintiff.

Solicitors : *N. C. Janki; H. B. Fraser.*

BRIJLALL and HEMRAJ,

Plaintiffs,

v.

CYRIL JAY JAY, JAGOO and JAMESIE BRIJLALL,

Defendants.

(1944. No. 453. DEMERARA).

BEFORE WORLEY. C.J.

1947. October 14, 15, 16, 17; November 3, 4, 6, 7, 11, 12, 13, 14, 15, 17, 22, 29; December 1; 1948. January 17.

Trespass to land—Action for—Essential nature of—Violation of right of possession—Not of right of property.

Trespass to land—Action for—Mere use of land without exclusive possession—Not sufficient to found action of trespass—For disturbance of that use.

Trespass to land—Action for—Jus tertii no defence to—Unless act complained of is done by defendant by authority of person rightfully entitled to possession.

Trespass to land—Action for—Mere de facto and wrongful possession — Sufficient to support action—Against any person who cannot show a better title.

Possession—Of land—Right to—Attached to title—Where possession doubtful or undetermined.

Possession—Of land—Vests in person entitled to possession—Where such person enters in assertion of such right.

Transport—Immovable property—Transport apparently of first depth of Plantation—Based on plan which purports to include second depth-Transport not opposed by Crown—Crown not deprived of ownership of second depth—Grant by Crown of second depth subsequent to transport—Grantee not estopped from setting up title derived from Crown.

Partition—Officer appointed to partition and\or re-allot land— Portion of the land occupied by an owner in severalty—Occupation not disturbed by officer—Portion of land to be included in officer's award—To be shown on plan—District Lands Partition and Re-allotment Ordinance, Cap. 169.

Estoppel—Boundaries of area to be partitioned—Decision of partition

Officer—That land claimed was not within the area—No appeal by claimant—Claimant estopped from questioning decision of Officer—District Lands Partition and Re-allotment Ordinance, Cap. 169.

Estoppel—Benefit under order—Taken by party—Such party cannot be heard to say afterwards—That order is invalid.

Immovable property—Transfer of—How effected—By transport only.

Evidence—Survey of land at request of one party—Lines drawn by surveyor on plan—Evidence of what witness has seen or done in relation to the land—Admissible—Such evidence not evidence of title or boundary —Whether lines are in accord with rights of the party—For determination by Court.

Transport—Immovable property—Plan defining land conveyed— Not merely illustrating metes and bounds—Plan criterion of what is conveyed—If land adequately and sufficiently defined with convenient certainty of what is intended.

Trespass is actionable only at the suit of him who is in possession of the land. This form of injury is essentially a violation of the right of possession, not of the right of property.

The mere use of land, without the exclusive possession of it, is not a sufficient title to found an action of trespass for the disturbance of that use.

No defendant in an action of trespass can plead the *jus tertii*, the right of possession outstanding in some third person as against the fact of possession of the plaintiff. It is otherwise of course if the defendant has done the act complained of by the authority, precedent or subsequent, of him who is thus rightfully entitled.

The mere *de facto* and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves, and is therefore sufficient to support an action of trespass against such person.

When the possession is doubtful, it is by law attached to the title.

Where possession in fact is undetermined, possession in law follows the right to possess.

As soon as a person is entitled to possession and enters in the assertion of that possession, or any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered.

If there are two persons in a field each asserting that the field is his and each doing some act in assertion of the right of possession, the person who has the title is in actual possession and the other person is a trespasser.

Ramsay v. Magrett (1894) 2 Q.B. 18, 25. 27, per Lord Esher, M.R, and Davey, L.J., applied.

The Crown is not deprived of ownership of the second depth of a Plantation by the advertisement and passing of what appears on the face of it to be a transport of the first depth only, even though it is based on a plan which on examination purports to include, as the first depth, the second depth or a portion thereof. A person who, subsequent to such transport, derives title from the Crown to the second depth is not estopped from setting up such title.

Madray v. Sealey (1940) L.R.B.G., 124 and *Gomes v. Currey* (1923) L.R.B.G., 12, applied.

If an officer appointed under the District Lands Partition and Re-allotment Ordinance, Chapter 169, to partition and|or re-allot land, finds an owner occupying a portion in severalty and does not disturb that occupation it is his duty to include that area in his award and to show it on his plan.

A. was appointed officer to partition and|or re-allot Plantation X. B. claimed a certain parcel of land as being his property and as being situate within the limits of the Plantation. A., being of the opinion that the parcel

of land was not so situate, rejected the claim. B. did not appeal in the manner or form, or within the time, provided by the District Lands Partitition and Re-allotment Ordinance, Chapter 169.

Held that B. was estopped from questioning the decision of the officer.

Sewdin v. Ferreira (1928) L.R.B.G., 40, applied.

A party who has taken a benefit under an order cannot be heard to say afterwards that it is invalid.

Maden v. Veevers (1842) 5 Beav. 503, 511. and *Johnson v. Newton Fire Extinguisher Co., Ltd.,* (1913) 2 K.B., 111, 114, applied.

No transfer of immovable property can take effect unless perfected by transport.

Mangru v. Kalla (1931-1937) L.R., B.G., 414 and *Surujpaul v. Ramdaya* (1942) L.R., B.G., 309, applied.

Lines drawn by a surveyor on a plan are not evidence of title or boundary but are evidence of what the witness has seen or done in relation to the land. It still remains for the Court to determine whether or not those lines are in accord with the rights or interests of the party on whose behalf they were laid down.

Lacon v. Matthews (1931-1937) L.R., B.G., 516, 520, followed.

When a plan is incorporated in a conveyance as defining the land and not merely as illustrating metes and bounds given in the conveyance, the plan is the criterion of what is conveyed, but it must always be a question of fact whether the plan gives "an adequate and sufficient definition with convenient certainty of what is intended to pass."

Llewellyn v. Earl of Jersey (1843), 11 M. & W., 183, and *Barton v. Dawes* (1850), 10 C.B., 261, applied.

ACTION by Brijlall and Hemraj against Cyril Jay Jay, Jagoo and Jamesie Brijlall claiming damages for trespass and an injunction-

S. L. van B. Stafford, K.C. and *J. A. Luckhoo.* for plaintiffs.

L. M. F. Cabral, for defendants.

Cur. adv. vult.

WORLEY, C.J.: The plaintiffs' claim is for $2,500 damages for wrongful entry upon land situate at "Section N, Volkert's Lust, Canje, Berbice", planting and cultivating rice thereon, and for an injunction in the usual terms and for costs.

The defendants admit entering and cultivating rice on the land in dispute but say the land is not in Pln. Volkert's Lust but forms part of a portion of the 2nd depth of Pln. Goedland held under Crown Grant No. 2897 and that they entered under a claim of right. The second and third defendants say and the first defendant admits that they acted merely as his agents and under his authority.

The parcel of land in question is described in the pleadings as 35 acres and in the evidence was referred to first as 33 acres and later as 29 acres.

The pleadings were amended several times during the hearing and it will be convenient to set out here the material parts. In their Statement of Claim the plaintiffs say that in the year 1937 and long prior thereto, to wit, from the year 1863 at least the plaintiffs and their predecessors in title were in sole continuous and undisturbed possession of that section of Pln. Volkert's Lust shown on a plan made by S. S. M. Insanally, Sworn Land Surveyor, dated 21st October, 1938, and recorded in the

Department of Lands and Mines on the 27th October, 1938, as section N, Volkert's Lust, and save for the trespass by the defendants hereinafter stated have continued and still continue in such and are entitled to immediate possession. Alternatively, the plaintiffs say that they and their predecessors and all other occupiers of the land in dispute possessed the same as of right *nec clam nec vi nec precario* for upwards of thirty years continuously next before action brought. They say that in and about the months of April and May 1944 the defendants broke and entered into a wired in area containing 65 acres being part of the said Section N and ploughed 35 acres of it, planted and cultivated rice thereon and reaped rice therefrom and wrongfully interfered with the plaintiffs' right in and to the said lands. By reason of the wrongful acts of the defendants the plaintiffs have been deprived of cultivating these 35 acres or of letting them to rice farmers. They also allege a further trespass in January 1945.

The defendants deny that they broke or entered into any wired in area of Pln. Volkert's Lust or any land owned or possessed or entitled to be possessed by the plaintiffs or either of them or trespassed or did any acts thereon or interfered with any rights of the plaintiffs. They say that the first defendant at all material times was and is the owner by transport of a portion of Pln. Volkert's Lust and of Pln. Goedland and as such he was entitled to enter upon and cultivate for himself a portion of the Second Depth of these plantations; and, in particular, the first defendant was at all material times a co-owner of and entitled to enter upon and cultivate such part of the second depth of Goedland as was entered upon or cultivated by him (if at all) under and by virtue of grant No. 2897 of Crown land in the year 1901 to the proprietors of the first depth Goedland.

Alternatively they plead that the first defendant is a successor in title to the said proprietors including James Patterson, Senior,and John Roland Patterson in respect of the first and second depths of Pln. Goedland and was authorised by them to do any acts complained of by the plaintiffs.

They further plead that the land alleged in the Statement of claim to have been wrongfully broken into and entered upon is a part of the land disposed of in Grant No. 2897 and that the first defendant and his said predecessors have been in sole undisturbed possession *nec clam nec vi nec precario* of the said land for the last 44 years and more up to the present.

They have also pleaded as matters of law: —

(a) That the plaintiffs are barred by the provisions of section 4 of the Civil Law Ord. (Ch. 7) and the Limitation Ord. (Ch. 184) from bringing or maintaining this action.

(b) That the plaintiffs have not complied with the Deeds Registry Ordinance (Ch. 177).

(c) That by reason of the conduct of the plaintiffs and their predecessors for 45 years last past, the plaintiffs are estopped from denying the rights of ownership of the defendant in the said land and the rights of the defendant to enter upon and interfere with the same in any manner whatsoever.

(d) They rely on the provisions of the District Lands Partition and Re-Allotment Ord. (Ch. 169) and on the survey and sub-division of Volkert's Lust by Sworn Land Surveyor Henry Ormonde Durham under the said Ordinance and his plan thereof dated 18th August, 1930 and deposited in the Department of Lands and Mines on the 30th October, 1930.

In reply the plaintiffs have pleaded that defendants claiming as they do licence for their acts through Patterson and Sealey as proprietors of Goedland are estopped from denying the accuracy of the plan of Goedland made by William Chalmers, Sworn Land Surveyor, dated January, 1876.

The principles of law applicable to the issues which arise on these pleadings are clear and undisputed, and are concisely stated in section 48 of Salmond's Law of Torts, 8th Edition, p. 217 *et seq* from which I quote: "Trespass is actionable only at the suit of him who is in possession of the land. This form of injury is essentially a violation of the right of possession not of the right of property". Again "The mere *de facto* and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves and is therefore sufficient to support an action of trespass against such person. No defendant in an action of trespass can plead the *jus tertii* the right of possession outstanding in some third person as against the fact of possession of the plaintiff. It is otherwise of course if the defendant has done the act complained of by the authority, precedent or subsequent, of him who is thus rightfully entitled".

It will be convenient here to refer to other propositions of law which may fall to be considered namely "When the possession is doubtful it is attached by law to the title" per Lord Esher M.R. in Ramsey v. Magrett (1894 2 Q.B. 18 at p. 25) and "where possession in fact is undetermined possession in law follows the right to possess" (*per* Davey L.J. *ibid* at p. 27). In this case Davey L.J. also cites with approval the dictum of Maule, J., in Jones v. Jackman (2 Ex 803 at p. 821): "It seems to me that, as soon as a person is entitled to possession and enters in the assertion of that possession or (which is exactly the same thing) any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field each asserting that the field is his and each doing some act in assertion of the right of possession I answer the person who has the title is in actual possession and the other person is a trespasser."

The first questions therefore which fall to be decided in the case are who was in possession of the land in dispute and in whom was the title?

The answer to the second question will to a great extent depend upon the question of fact as to whether the disputed land is part of Pln. Volkert's Lust or is within the area described as second depth Pln. Goedland.The most convenient approach will be to set out the history of these two plantations so far as it is known and it will also be necessary to consider briefly the general practice followed during the days of Dutch rule in making grants of land in Berbice.

According to the report of the Titles to Land Commission 1892

for the county of Berbice, Pln. Goedland is lot 15 on the east bank of Canje Creek and was first granted in 1770. Of Volkert's Lust the Commissioners say that it appears to be lot No. 16 on the east bank of the Canje Creek between Bachelor's Adventure and Goedland and that they have no information regarding the original Grant of this land. The first transport on record is dated the 22nd April, 1793. It would seem therefore that both estates were originally granted by the Berbice Association. (See Burge's Colonial and Foreign Law, New Edition Vol. IV. Part 1 p. 377). The general practice of the Dutch authorities was to issue grants of contiguous rectangular lots of uniform frontage or facade and uniform depth. In Berbice this frontage was normally 148.5 rods and the depth 1,018.5 rods giving an area of 500 Berbice acres. This was known as the first depth; the land lying behind and within the continuation of the parallel sidelines was known as the second depth and was only granted under certain conditions which are sufficiently set out in the judgment in the case of P. Madray v. E. Sealey & Ors. (1940 L.R.B.G. 124).

This geometrical arrangement had however to be modified when the plantation fronted the sinuous banks of a river or creek and provision is made for this in the Order and Regulations of Their late High Mightinesses The States of Holland (Carrington's Edition of the Laws of British Guiana vol. 1 p. 3) as follows: "If in the admeasurements irregular corners or angles occur from the course of the sea coast rivers or creeks or if from any other causes the back lands cannot be granted then to such plantation or plantations which cannot be measured off with those previously granted a facade so much greater or less must be given in order that so soon as possible the plantations which next follow may be measured off again in the regular direction". In the vicinity of Volkert's Lust and Goedland the Canje Creek changes direction prom North to West forming more or less a right angled bend and the estates affected by this bend are, reading from North to South, lot 13, now called Enterprise, lot 14 now called Speculation, lot 15 Goedland, and lot 16 Volkert's Lust. As these estates are on the outside of the bend it follows that the outer arc described by their back lines will be longer than the inner arc comprised of their facades.

The rule above quoted required an adjustment to be made so as to bring the estates back to the normal rectangular form as soon possible hence the necessary splay or "fan" would if possible have to be taken up entirely by one estate and one would expect to find this estate narrower in the facade and wider than normal at the back. The problem in the present case is to ascertain whether his splay or fan occurred in Volkert's Lust or in lot 13 Enterprise.

The earliest plan in evidence is the "Map of British Guiana containing the Colonies of Essequibo, Demerara and Berbice in which are described all the lands granted under the Batavian Government surveyed in 1798 and 1802 by Major Von Bouchenroeder" and I may note in passing that this plan appears also to have been in evidence in the case of Madray and Sealey above referred to. According to this plan the splay or fan occurs in lot 13 and lots 14 and 15 are shown with parallel sidelines starting from the bank of the creek and more or less at right angles to it and then bending at a sharp angle towards the South or South-

east. Lot 16 is shown with a bent northern sideline conforming to the southern sideline of lot 15 and with a straight southern sideline parallel to the back or bent portion of the northern sideline. This lay-out would appear to be consistent with the acreages of these lots as given in the Report of the 1892 Commission p. LVI, given as copied from a "Chart of Colony of Berbice. etc., dated 1804? (No. 1576) by C. Rulach and J. H. Widenman", namelv, "16 Volkert's Lust 500, 15 Goedland 500, 14 Speculatie 500, 13 800. (This is actually printed as 80 but it is obviously a printer's error).

No original plans of Goedland or Volkert's Lust earlier than 1876 have been produced. One Baron Schwiers who was at that time a part owner of Volkert's Lust caused the estate to be surveyed by William Chalmers, Sworn Land Surveyor, and in the -same year one Barrington Patterson the owner of first depth Goedland caused that estate to be surveyed by the same Surveyor (Ex. 'C' 'D' and 'M'). Exhibit 'C' has" a legend "surveyed and sub-divided as herein described at the request of Baron Schwiers and Edmund Bobb" and shows the plantation as consisting of:

(a) A rectangular parallelogram subdivided into lots 1 to 27 adjacent and parallel to the southern sideline of the estate. These lots are of varying width and are described as running from an irregular front line to the first depth of the estate. They are bounded on the North by a middle walk.

(b) The land lying between the middle walk and the front line of the lots on the one hand and the northern sideline on the other. This part is not subdivided but bears the legend "The property of Billy Page and Philip Munro" and comprises (i) the lands lying near the creek which form a sort of toe and conveniently described as the "jib": and (ii) the "fan", i.e. the land lying East of the jib and bounded by the northern sideline and the middle walk. The northern sideline is shown as starting from a point at the creek considerably west of the southern sideline (the creek bending sharply to the west) and formed at first by a public road and then by a sideline continuing on the same bearing as the road. The southern sideline and the middle walk are parallel on a bearing of N. 95.5° E. or S. 84.5° E. while the bearing of the northern sideline is N. 70° E. the resulting angle between them being 25.5°. In other words Chalmers's plan shows the splay or "fan" necessitated by the curve of the river as included in Volkert's Lust. The depth of the fan is not specified but assuming it was intended to go the whole length of the first depth, the area would be 680 Rhynland acres; the area of lots 1—27 and the jib combined is 518 Rhynland acres; the total area of the whole estate would be approximately 1,198 acres.

Chalmers's plan of Goedland (Ex. D) has the legend "surveyed and subdivided into lots 1 to 23 at the request of Barrington Patterson" and it shows the estate as a parallelogram consisting of twenty-three lots running approximately west to east from the creek to the first depth, bounded on the south first by a public road then by a sideline continuing on the same bearing and correspond-

ing to the northern sideline of Volkert's Lust in Ex. C namely N. 70° E. The middle walk and northern sideline are shown as parallel to and on the same bearing as the southern sideline and are depicted as running straight with no bend or deviation.

I may note here that neither plan is complete in that it does not show the whole depth of the estate and the lines are left open, the back lines of the estates not being shown. On the Goedland plan the southern sideline is marked for 750 rods: on the Volkert's Lust plan the northern sideline is carried 950 rods. The width of Goedland as shown is about 150 rods which with the normal depth would give an area of 500 acres approximately.

Next in point of time comes Crown Grant No. 2897 dated 18th November 1901, issued in favour of the proprietors of Goedland first depth (Ex. 'V'). This was issued on the application of James Patterson and others for an area of about 100 acres of Crown land situate between Boucher's Canal and the back boundary of Pln. Goedland. The application having been approved an area of 109.13 acres was surveyed in September, 1901 by Mr. Tronchin, a Government Surveyor. Attached to the grant is a diagram of the land granted which is described as a tract of Crown land surveyed as a second depth for the proprietors of Pln. Goedland. The area is shown as bounded on the west by the back line of First Depth Goedland and on the East by Boucher's Canal and as contained North and South within the continuations of the Northern and Southern sidelines of First Depth Goedland on a bearing of N. 83° West. The surveyors who have given evidence agree that this southern sideline corresponds to what is called the middle walk in Chalmers's plan of Volkert's Lust and that the land comprised in the Grant lies immediately to the North of the area therein demarcated as lots 1—27. In other words Mr. Tronchin look Chalmers's middle walk as the northern sideline of Volkert's Lust and rejected Chalmers's northern sideline. He therefore excludes the fan from Volkert's Lust and shews the whole of the back part of the first depth Goedland and the area comprised in the Crown Grant as contiguous to the northern sideline of lot 27. This area was re-surveyed in November 1944 by Mr. Cossou, a Government Surveyor (Ex. 'BBB').

Next comes a plan of Plantations Volkert's Lust, Bachelor's Adventure and Zorg also surveyed by Tronchin and dated 26th November, 1903. (Ex. E). This shows Volkert's Lust as consisting of the rectangle representing lots 1—27 and the jib or creek lands. The lands to the north of this are marked Pln. Goedland up to the extremity of the first depth and behind that as Crown land licensed to the proprietors of Pln. Goedland. In other words Tronchin again rejects the fan as being part of Volkert's Lust.

In 1929 or 1930 the proprietors of Volkert's Lust petitioned for partition and Mr. H. O. Durham, Sworn Land Surveyor, was appointed officer to partition and or re-allot the plantation under provisions of the District Lands Partition and Re-Allotment Ordinance 1926. He made his report and award on the 27th September 1930, (Ex. DD) attaching thereto his plan (Ex. H). This plan shows Volkert's Lust as consisting of the rectangle of lots 1 — 27 and the jib with a total area of 545.4 English acres, In a memorandum on the Plan he states that in defining the

boundaries of Pln. Volkert's Lust he had followed Tronchin's plan (Ex. E) and adds "Among the records of original plans in the Deeds Registry, New Amsterdam, Plan No. 81 not dated or signed shows Pln. La Prudence now called Volkert's Lust minus the area of lots 3, 4 and 5 section D as shown on this plan and Tronchin's" (Section D is the north-eastern part of the jib.) and "The plan of Volkert's Lust by William Chalmers dated January 1876 shows the northern boundary of lots 3, 4 and 5 aforesaid prolonged eastwards N. 71° 10' E. as the western boundary of this estate. His line actually surveyed would cut across the back lands of Pln. Goedland and Speculation which are also laid down among the original plans."

By transports passed in 1891 and 1909 one Billy Hiles became the sole owner of land described as Pln. Volkert's Lust save and except lots 1 — 27 as laid down and defined on the plan made by William Chalmers in 1876, and in 1933 one William Hiles, (who is a grandson and one of the heirs of Billy Hiles and the person or one of the persons from whom the plaintiffs claim to have purchased) caused a portion of the fan 282.9 English acres in extent to be surveyed by Mr. S. S. M. Insanally, a Sworn Land Surveyor. This portion, which lies between the middle walk of Chalmers's plan and Chalmers's northern sideline and is bounded on the west by the eastern line of the jib and on the east by Boucher's Canal, is marked Section N on Insanally's plan dated 21st October, 1938, (Ex. A). This plan therefore re-asserts the "fan" as being part of Volkert's Lust. It is admitted that the greater part of the land comprised in Crown Grant 2897 falls within Insanally's Section N and that the whole of the land in dispute in this case also falls both within Section N and within the area of the Crown Grant.

The position therefore is that Chalmers's and Insanally's plans shew the "fan" and the land in dispute as part of Volkert's Lust while Tronchin and Durham exclude it and make Chalmers's "middle walk" the northern boundary of that estate.

In contending for the correctness of Chalmers's plans Mr. Stafford relied strongly upon the maxim *omnia praesumuntur rite* esse acta and urged that in the absence of direct evidence to the contrary the Court must presume that the survey was properly made. In *Gibson v. Doeg* (1857 2 H & N 615) Pollock C. B. at p. 623 said "It is a maxim of the law of England to give effect to everything which appears to be established for a considerable course of time and to presume that what has been done was done of right and not in wrong". But, as was said in *Rolleston v. Sinclair* (1924 2 I.R. 157), the maxim "is to be called in aid only when there is a void to be filled up. If there is really evidence it must be acted upon". The question therefore in this case is whether there is evidence to rebut or avoid the presumption.

It is not disputed that the back lands of the First Depth of many of these old estates, although often delineated on plans, were really in fact marked out on the ground or exclusively occupied. The back lands were often open savannah or bush and the surveyors would have had to cut lines through the bush if they actually surveyed to the full depth. Until the coming into force of section 19 of the Land Surveyors Ordinance No. 20 of 1891 there was no obligation on a Land Surveyor when making a sur-

vey of land for the purpose of settling disputes or defining boundaries to place boundary marks or paals at corners or convenient distances along the lines and it was the practice of many surveyors in those days to leave the lines on their plans open at the back indicating the depth, if at all, merely by a reference to the length of the First Depth. This is what Chalmers has done in the plans of Volkert's Lust and Goedland. He does not mark any paals and it is not a necessary conclusion that he actually surveyed all the land to the full depth. Mr. Stafford has urged that the Court should at least presume that he surveyed the land to the depth shown on his plans but I do not think this would be a reasonable presumption for the depth shown is determined arbitrarily by the scale adopted and the size of the paper used and, as will be seen when plans of Pln. Speculation are considered, it would seem that if Chalmers had actually surveyed Goedland to the depth shown on Ex. 'C' he would have realised that even the depth shown on his plan encroached on the lands of Speculation.

The defendants, besides relying on the plan of Volkert's Lust by Tronchin and Durham, have put in evidence a number of plans of Speculation with the object of showing that the actual occupation of that estate as determined in those plans is consistent with the lay-out of Goedland and Volkert's Lust as shown in Bouchenroeder's plan and with Tronchin's diagram annexed to the Crown Grant and with his and Durham's plan of Volkert's Lust and is inconsistent with the lay-outs as shown by Chalmers. These plans are clearly relevant to the matter before me. Durham records that the northern boundary of Volkert's Lust as shown by Chalmers would cut across the back lands of Pln. Speculation. The northern sideline of Goedland must conform to the southern sideline of Speculation and the presumption is that Goedland was laid out according to the general rule as a parallelogram in which case its southern sideline would also conform generally to the northern sideline. It is in fact so shown in Bouchenroeder's plan. On this assumption it follows that if Chalmers's plans are inconsistent with the lay-out of Speculation they are also inconsistent with the lay-out of Goedland and Volkert's Lust.

The earliest plan of Speculation is one made of the northern of the estate, i.e., between the northern sideline and the middle walk by one D. Fraser, Sworn Land Surveyor, dated 9th January 1869 (Ex. FFF). It shows the western half of the first depth described as "paaled off" although no paals are marked on the plan and shows the northern sideline and middle walk as parallel and bending sharply to the south at a point 595 rods from the creek or 450 rods from the public road which runs north and south through this plantation, Goedland and Volkert's Lust. The northern sideline and middle walk dams are shown on the plan as far as the bend where a cross dam joins them which indicates that Fraser must have seen this on the ground and surveyed up to that point if no further. Beyond the cross dam no dams are indicated and the continuations of the lines on the deviated bearing are unclosed. This lay-out is confirmed by three other plans in evidence. The earliest of these is a plan of the northern half of Speculation surveyed by E. C. Klautky, Sworn Land Surveyor, and dated 30th March 1906 (Ex. GGG). This shows the whole of this half sur-

veyed and paaled from the Creek to the back line with bearings, distances and paals marked. It shows a bend or deviation corresponding with the plan of Fraser (which is referred to on Klautky's plan) and it shows the back lands lying beyond the cross dam as undivided and marked as savannah and bundury bush. It is quite clear from this plan that Mr. Klautky actually surveyed the first depth up to the back line where he set two iron paals and that his survey confirms the deviation indicated in Fraser's plan of 1869.

The next is a plan of the same half of Speculation surveyed at the request of the proprietor by Mr. Tronchin, dated 24th July, 1913 (Ex. MMM). It shows the full depth of the northern half the back portion of it being bent to the south at the point where the cross dam is marked as shown in Fraser's plan. It is apparent that Tronchin actually surveyed the whole depth as paals are marked, the back line shown and all distances and bearings recorded. The plan also shows the southern half of Speculation with its southern sideline dam and a ketting and the northern sideline dam of Goedland as far as the bend. Beyond this point the plan indicates a wire fence enclosing a portion of the southern half of Speculation running parallel to the northern half and conforming to the bend.

Last is a plan of a tract of Crown land in the rear of south half Pln. Speculation surveyed by L. S. Hohenkerk, a Government Surveyor, and dated 12th November, 1924 (Ex. LLL). The plan shows the whole of the First Depth of the south half of Speculation bending at a point and angle corresponding to the bend of the northern half as shown by Fraser in 1869, Klautky in 1906 and Tronchin in 1913. It shows the wire fence indicated in Tronchin's plan, the extremity of the First Depth measured and paaled, and the area of Crown land surveyed as a part of the second depth Speculation lying within the continuation of the sidelines of the First Depth southern half. The land to the south is marked as north portion of Pln. Goedland and as Crown land in the rear of Pln. Goedland. The plantation is bounded on the east by Boucher's Canal to the east of which again lies land held under licence by one Patoir.

On the other hand the plaintiffs have put in evidence a plan of the west half of Speculation "showing certain lots as marked thereon with the names of the parties who have purchased the same" made by James Shanks, Sworn Land Surveyor, and dated January 1842 (Ex. KKK). This shows the land between the Creek and the public road and a number of lots lying to the east of the public road which are stated to "go aback 830 roods from public road". The lines however are unfinished and there is nothing to indicate that there was any actual survey of the full depth. The plan is on a large scale and the actual area indicated is only 200 roods from the public road. I do not think there is anything in the plan necessarily inconsistent with the later plans of Speculation which show the deviation.

The plaintiffs have also put in a plan of Goedland made by J. P. Prass, Sworn Land Surveyor, at the request of Barrington Patterson and dated 22nd May, 1882 (Ex. YY). This plan shows the public road and the portion of Goedland adjacent thereto on both sides. The plan was based on Chalmers's plan of 1876 and

was done for the purpose of subdividing certain lots as shown in Brass's diagram, but it is clear that Prass was mainly concerned with fixing the subdivisions with relation to their facade to the public road. Only a very small portion of the estate is shown and I see nothing in the plan which suggests that it was intended that the lots should continue to the full depth on the same bearing and I accept Mr. Cossou's opinion that in this plan and in Shanks's plan the lines were only intended to show the general direction in which the lots started off. The evidence shows that it was the universal practice on these old estates to cultivate only the front land and use the back land as unfenced common pasture where cattle roamed freely and that it is only within the last fifteen years or so that the increased cultivation of rice has led to the assertion of exclusive occupation of parts of the back lands. It would seem that it was unusual for the trenches and dams to be made to the full depth of the estates. John Patterson, who claims to be the leader of the Goedland proprietors and on whose authority the defendants rely for their claim of right, said that on the northern sideline of Goedland there is a good trench for about 150 rods beyond which point the trench was overgrown but could be distinguished for some distance, its total length being about 700 to 800 rods. He said that the middle walk trenches went in for about the same distance and that the southern sideline trench goes in further than these and bends away to the south. He also said "there is no high dam to the north sideline beyond a certain distance but it is known to curve away to the right. When you get to the end of the trench it is known that the lots turn to the right. Years ago they were cultivated up to the end of the trenches, beyond that they have never been cultivated. Beyond the end of the trenches there is nothing to show one lot from another. Many years ago there was a wooden paal to show the boundary between Goedland and Speculation about 15 rods from the end of the trench. Beyond it nothing'".

It is not clear from my notes whether Patterson was estimating these distances from the creek or from the public road, which would make a difference of 145 rods, but in either case his figures would be inconsistent with the plans of Speculation above referred to which shew the bend at approximately 450 rods from the public road. But, since Tronchin's and Hohenkirk's plans show actual surveys of the southern half of Speculation inconsistent with the existence of a northern sideline trench in Goedland continuing without deviation beyond the bend, I cannot regard Patterson's figures as being any better than a layman's guess.

Turning to the northern sideline of Volkert's Lust as shown by Chalmers there is no evidence whatever, apart from Chalmers's plan, to indicate that there is or ever was on the ground any dam or trench corresponding with that sideline beyond the eastern boundary of the lands comprised in the jib. In 1901 Mr. Tronchin's attention was directed to this boundary in circumstances which I shall have to consider in more detail later, but he makes no reference to the existence of such a dam. His plan of Volkert's Lust 1903 shows the dam as ending at the northeastern corner of the jib and this of course was followed by Durham in 1930. Insanallv's plan shows the dam and trenches

ending at the same point in 1933. but he states in his evidence that he started to survey along Chalmers's line, that is. continuing" on the same bearing as the side dam but was stopped by Hiles who told him to take a more southerly bearing following a line of trees said to represent the line of an old fence. This brought him to the western end of a wire fence which demarcates the southern boundary of land occupied by one Abdul Omar, and, deviating again towards the south-east, he adopted this fence as the northern boundary of his section N. until he reached Boucher's Canal, which he adopted as the eastern or back boundary. Insanally found the back boundary of the first depth of lots 1 — 27 and marked it on his plan (Ex. A). He said that he crossed Boucher's Canal and entered the land to the East of it (now held by one Hicken from the Crown) looking for the continuation northwards of this back line (which would of course be the back line of the fan if it is assumed that Chalmers intended the fan to run to the full length of the first depth) but could find no trace of the back boundary north of Durham's iron paal which marks the north-east corner of lots 1 — 27. There is therefore no evidence of any paal, trench or dam marking the back line of the "fan".

The defendants also established by evidence a number of undisputed dealings by the Crown with the second depths of Plns. Speculation and Goedland and therefore with land which would be wholly or in part comprised within the 600 acres of the "fan" of Volkert's Lust. In 1914 by Crown lease L. A. 528, 75 acres of Crown land described as second depth Pln. Speculation southern half were leased to Ho-A-Yun and others, and it was for the purpose of this lease that Hohenkirk's plan (Ex. LLL) referred to above was made. By Permission 9684 leave to occupy the same 75 acres has since been granted to one Abdul Omar. In 1900 a Licence of Occupancy No. 2708 for 900 acres was granted to one Patoir (Ex. QQ) and the diagram attached to the licence shows the southern portion of this tract as bounded on the west by Boucher's Canal and on the south by the northern boundary of the back lands of lots 1 — 27 Volkert's Lust. It follows therefore that the southern portion of this tract would fall within the fan. This is the land now held by Hicken above referred to. In 1901 Crown Grant No. 2885 conveyed to the proprietors of Rose Hall a tract of Crown land traversed by Boucher's Canal (Ex. RR). The diagram attached shows the tract as bordering Patoir's land on the west and ending at the northern sideline of Pln. Volkert's Lust lots 1 — 27. This grant therefore also affected land included in the "fan".

In 1932 by permission 9685 Abdul Omar was authorised by the Crown to occupy the strip of Crown land lying between the southern boundary of his Permission 9684 and the northern boundary of Grant 2897, and it was then that he put up the wire fence previously referred to, and which Insanally adopted as part of the northern boundary of his section N. It is worthy of note that although in 1933 Hiles was claiming Section N as part of the fan by virtue of his transport of 1891, he does not appear to have raised any objection to Omar's occupation of this adjoining portion of the fan as a tenant of the Crown in 1932. Not only did he accept Omar's fence as his boundary for the purposes of survey but he and the plaintiffs all slipped into the mistake of referring

to that fence as the proper boundary. All these dispositions as well as Grant 2897 were adverse to the claim to possess the fan as part of Volkert's Lust, but the only evidence of any protest being made is in connection with the Grant. On the 20th September 1901 Feby Hyles (also spelt Phebe Hiles, the widow of Billy Hiles and the beneficial owner of more than half the undivided shares of the land comprised in the transport of 1891) wrote to the Crown Surveyor complaining that "Mr. Tronchin took away more than half of my land and surveyed it for the Goedland proprietors". (Ex. ZZ). Mr. Tronchin reported on this complaint on 10th October, 1901, as follows: "I submit herewith extract from plan of the Canje Polder showing the relative position of Pln. Volkert's Lust and Goedland. There are two places called Volkert's Lust therefore to make a distinction I have marked the smaller 'A' and the larger 'B'. A is the property of Feby Hiles and B is sub-divided into 27 lots owned by different persons. With reference to the encroachment complained of by Feby Hyles I must state for your information that she is not only occupying the whole of A but also a portion of that part of the first depth of Pln. Goedland lying between the prolongation of the sideline dam between A and Goedland and the sideline of B shewn in red on attached tracing. There is nothing on record either in this department or in the Registrar's Office at New Amsterdam bearing out Hyles' claim".

The tracing referred to is an extract from a plan of the East Coast and Canje Polder by William Chalmers dated 5th October, 1885. A is that part of Volkert's Lust which I have called the jib: B is, of course, the 27 lots as laid out by Chalmers. The tracing shows the front part of the first depth of Goedland and Speculation going away from the Creek at an angle and on a bearing consistent with Chalmers's plan of 1876. There is then shown a cross dam at right angles to this bearing and common to Speculation, Goedland and the jib. Beyond this dam or back line, the back lands of the first depth of Goedland and Speculation are shown by broken lines on a more southerly bearing and parallel to the northern sideline of lots 1—27: that is to say, with a bend consistent with the plans of Speculation above referred to but with this difference namely that these back parts are not only bent but also staggered, the northern sidelines of both Speculation and Goedland being shown as continuations of their middle walks. The portion marked in red by Tronchin lies east of the jib in the back lands of First Depth Goedland and is bounded on the north by a dotted red line on the same bearing as the southern sideline of the front part of First Depth Goedland. In other words it lies within the apex or beginning of the fan shown on Chalmers's plan of Volkert's Lust. It nowhere touches the portion of land which Tronchin surveyed for Grant 2897.

This is evidence that at that time the Hiles family was actually in occupation of a small portion of the fan and laying claim to a larger portion of it. Mr. Stafford has contended that the last sentence of Tronchin's minute is inconsistent with his having ever seen either Hiles's transports or Chalmers's plan of Volkert's Lust. It seems to me however improbable that Mr. Tronchin, who is described by one of the surveyors who gave evidence as a very careful man, having had his attention directed

to the claim would not have examined the claimant's transport and the plan referred to therein. His reference to the sub-division of Volkert's Lust into 27 lots suggests that he had probably seen Chalmers's plan and I think the more reasonable view (especially having in mind that he had been engaged in the survey of Boucher's Canal strip, and made the plan (Ex. RR) dated 11th September 1901) is that he was acquainted with Chalmers's plan and rightly or wrongly rejected the northern boundary of the estate as shown thereon.

I should perhaps refer briefly to the discrepancy between the diagram in Ex. ZZ and the other plans of Speculation, to shew that I have not overlooked it. The diagram is part of a key plan prepared by William Chalmers which was tendered in evidence by the defendants but rejected as it did not purport to be a survey. It must be remembered that Tronchin was using the diagram only to illustrate his report and that the lines marking the back portions of the first depth appear to be conjectural only. Even if the diagram is wrong in staggering the northern sidelines of Goedland and Speculation, I see no reason to suppose that this would have misled Mr. Tronchin on the point with which he was concerned, which was the common sideline between Goedland and Volkert's Lust.

My conclusion therefore is, on a consideration of the whole of the evidence that Chalmers's plan of Volkert's Lust was wrong in so far as it purported to include as part of that plantation any land east of the eastern boundary of the jib and north of what he terms the middle walk. Similarly his plan of Goedland was wrong if it purported to show (and this seems to me to be a matter of doubt) that the Goedland sidelines and lots continued the full length of the first depth on the same bearing within any deviation. I find therefore the land comprised in Crown Grant 2897 and therefore the area in dispute in this case to be part of the Second Depth Goedland.

Mr. Stafford however has argued that the legal effect of the advertisement and passing of the transports describing the land as "Pln. Volkert's Lust save and except lots 1—27 as laid down and defined on a diagram of the said plantation made by William Chalmers, Sworn Land Surveyor, dated 23rd June 1879" was to pass full property in the land described although it included land claimed by the Crown as Second Depth of Goedland. He submitted that the Crown had notice by the advertisement and deposit of the plan and not having exercised the right of opposition its ownership was destroyed. The same argument based on very similar facts was put "forward and rejected by Camacho, C.J., in Madray v. Sealey & Ors. (supra) where it was held that the Crown was not deprived of ownership by the advertisement and passing of transports based on a plan which included an area of Crown land and that the plaintiff was not estopped from setting up title derived from the Crown. The reasons for the decision are fully set out in the report of that case and I need say no more than that I respectfully agree with them. In Gomes v. Curry & Anor (1928 B.G.L.R. 12) Douglass J. at p. 14 said "Plaintiff and others acquired their full and absolute title before the defendants obtained theirs and a misdescription in the defendant's transport of the property transported cannot affect the absolute owner-

ship under a prior transport but the plaintiff has a still stronger position for the evidence shows that she is and has been for some time in possession of the strip of land the defendants say should not have been included in their title and the rule still holds *in aequali jure melior est conditio possidentis;* that being so how can a misdescription of the property in the defendants' transport affect the plaintiff ". In my view that passage expresses the position of the Crown in 1901 when Grant 2897 was issued: the Crown was the absolute owner of the land and must be presumed to have been in possession in the absence of evidence to the contrary.

Although the fan is described in Chalmers's plan of 1876 as being the land of Billy Page and Philip Munro there is no evidence that they or their predecessors in title were ever in exclusive possession of the portion covered by Crown Grant 2892; and Tronchin's minute of 10th October, 1901, shows that, even at that date, Phoebe Hiles was only actually occupying a portion of the back part of the first depth Goedland. If her occupation were referable to a valid title the occupation of a part might be constructive occupation of the whole, but as she and her predecessors were there in my view as trespassers, they could not acquire prescriptive title to any part of the "fan" not exclusively occupied by them.

Before I pass on to consider the effect of this finding of fact on the issues in this case, it may be convenient to deal with the plea of estoppel put forward by the defendants. In 1929 or 1930 petitions were sent to the Governor-in-Council asking for the partition of Pln. Volkert's Lust under the District Lands Partition and Re-Allotment Ordinance 1926, and for the appointment of Mr. H. O. Durham to be the officer to partition and re-allot, and as a consequence of this an Order-in-Council was duly made and Mr. Durham appointed (Exhibits FF, GG, HH and JJ). William Hiles stated that he himself signed a petition although his signature does not appear on the one put in evidence. (Ex.FF). He stated moreover that he and three others representing the heirs of Billy Hiles attended at Durham's statutory meeting to put forward their claims. He said further that he showed Mr. Durham his transport of 1891 as the basis of their claim and admitted that he and the other heirs received under Mr. Durham's award lot 1 in section B and lot 5 section E (both in the jib). Mr. Durham's awards published in the Gazettes of 25th October, 1930 and 13th December 1930 (Ex. E) show these awards and his Report to the Local Government Board (Exs. DD and EE) under the column "Nature of Claim" show the awards were made as "inherited from Billy Hiles who held transport dated 28th August,1891". Hiles admitted that he and his co-heirs did not appeal against the award but he said "the very disputed bit of land remained unsurveyed. I asked him why he didn't survey it. I wasn't satisfied with Durham stopping where he did. I knew the land was my grandfather's land and he should have gone as far as Boucher's Canal. I wanted Durham to survey the whole of the estate according to Chalmers's plan.By not doing it Durham was leaving out a big portion of grandfather's land. I wanted that to be partitioned too. I thought what Durham was doing was wrong and still feel so. When we petitioned for partition I

didn't expect him to leave out any part of Volkert's Lust or the land belonging to Billy Hiles that's why I was dissatisfied". He further stated that when he asked Mr. Durham why he did not go through with the survey Durham said he was stopping there and if Hiles wanted him to go on he would have to pay $300 for survey fees.

Mr. Cabral contended that the plaintiffs who claim through William Hiles were estopped from claiming the fan by Hiles's failure to appeal against Durham's award and relied upon Sewdin v. Ferreira (1928 L.R.B.G. 40). Mr. Stafford on the other hand contended that if the Partitioning Officer found a person in occupation of a definite portion of the estate which he held by Transport he might leave aside that portion and exclude it from his partition. It is quite correct of course that the officer is directed to have regard to the manner in which the land is being occupied in severalty by the joint owners but a consideration of the provisions of the Ordinance leads me to the conclusion that even if he finds an owner occupying a portion in severalty and does not disturb that occupation it is his duty to include that area in his award and to show it on his plan.

Section 16 of the Ordinance, now Chapter 169, requires the officer as soon as practicable after his appointment to convene a meeting of all owners and of all who claim to be owners of any part of or interested in the land and at the meeting to receive claims in writing from those who claim to be owners. In this case Durham received Hiles's claim when he was shown the transport of 1891.

By the provisions of section 7 the Officer is empowered, *inter alia*, to ascertain and determine the value and extent of every share or holding in the land, to enquire into and determine any claim made by anyone to be an owner of any part of the land and to do anything in his opinion reasonably necessary to carry out the purpose of the partition or re-allotment.

Under section 9 he may, if a Sworn Land Surveyor (as Mr. Durham was), prepare a plan to show the boundaries and extent of the land or the existing subdivisions, if any, thereon, or he may lay out the land into the lots to which after enquiry he determines each owner or person interested to be entitled.

By section 15 he is required as soon as practicable after he has done all in his opinion necessary to effect a partition or re-allotment of the land, to transmit a report to the Local Government Board setting out briefly the claims made in respect of the land and his decision upon each together with his plan of the land showing the proposed plan or re-allotment with the names of those entitled to the lots, and upon receipt of that report the Board may either approve or reject or send it back for further consideration.

Section 16 provides that a claimant to a share or holding who is dissatisfied with the decision of the officer may appeal to the Board or apply to the Court as the case may be, and that the decision of the officer or of the Board, as the case may be, shall be final if such application is not made within two months. In the present case, if Hiles is to be believed, he made a claim to the fan as part of Volkert's Lust and it was Mr. Durham's duty to enquire into and determine that claim and this involved a deter-

mination of the northern boundary of the plantation. In Durham's report to the Board there is no mention of Hiles's claim or his decision upon it. as is required by section 15 sub-section 1, and this may throw doubt upon the truthfulness of Hiles's evidence. But if the claim were made, as Hiles alleges, it is evident from Mr. Durham's memorandum upon his plan that he rejected it and determined the northern boundary of the estate to be as delineated by Tronchin and not as delineated by Chalmers. and this determination was approved by the Board. Hiles and his co-heirs accepted a benefit under the award and made no appeal against it. It seems to me that they are now estopped from questioning it both by the statute and also on the principle that a party who has taken a benefit under an order cannot be heard to say afterwards that it is invalid (See Halsbury's Laws of England 2nd edition vol. 13 page 454 and Maden v. Veevers 1842 5 Beav 503 at D. 511. and Johnson v. Newton Fire Extinguisher Co. Ltd. 1913 2 K.B. 1ll at p. 114).

These findings dispose of any claim by Hiles or those claiming under him to ownership of the land in dispute by virtue of his transport and I have already indicated that there is no evidence of an exclusive occupation by them adverse to the Crown such as would give them a title by prescription. It remains to be considered whether it has been established that there was occupation adverse to the grantees under the Crown grant subsequent to 1901. John Patterson who claimed to be the leader of the proprietors of First Depth Goedland swore that after the grant was made the grantees put up notice boards and kept the boundaries clear for ten years and that during his father's lifetime the land comprised in the grant was fenced in but the fence subsequently fell into disrepair and disappeared. I think it very likely that (he notice boards were erected and the lines cut since that was a condition of the grant but I doubt whether the land was ever fenced. Other witnesses describe the land as open savannah used as common pasture for cattle as far as the Canal. There is no evidence that the land was ever subdivided, William Hiles the grandson of Billy Hiles who was born, I think. in 1892 said that he had known the land since he was a small boy having lived there with his grandfather, who died in 1897, and then with his uncles James and Samuel who died in 1918 and 1923 respectively, and he claimed to have managed the family land at Volkert's Lust since their death. He said that his family first cultivated a part and that about 1914 his uncle rented that out to one Sangatia and that the family then cultivated "a portion below on the reef about four or five hundred rods from the public road and about 150 rods from the old Boucher's Canal. We also planted rice in low land between the reef and the canal". After his uncle's death Sangatia remained as tenant until his death in 1931 when his son Brijlall the present plaintiff took over the place. Brijlall continued the arrangement for a year and then at the end of 1932 offered to buy the land and the co-heirs all agreed to sell. This is the only evidence of any cultivation in the fan prior to 1942 and I do not find any corroboration of it in the other evidence. The plaintiffs say that Sangatia leased the whole area down to Boucher's Canal from Hiles from about the year 1926 and that they took over and eventually agreed to buy the whole area

but, they do not make any claim to have established exclusive occupation of any part of Crown Grant 2897 prior to 1942. In 1942 the plaintiff Brijlall with one Thakurdyal occupied and fenced in an area of 30 acres immediately to the south of Omar's fence and broke it or caused it to be broken and planted with rice. Then in 1944 an area of 33 acres was also enclosed and broken up for rice (whether by the plaintiffs or by the first defendant) and this area adjoins Brijlall's 30 acres and is bounded on the south by the northern sideline of lot 27 Volkert's Lust. Both areas are bounded on the east by Boucher's Canal. These two parcels therefore appear to comprise the lowland lying between the reef and the canal which Hiles claims was cultivated in rice by his family but the evidence both of the plaintiffs and of the defendants is that these lands showed no sign of previous cultivation or of having been previously broken for rice. Further, the 33 acres contain some reef land and only 29 are suitable for rice growing and on this reef land there is an old square and ponds known as Antonio's Reef which appears to have been occupied many years ago as a cattle shed and cow pen by one Antonio Mano or Mann who was apparently an owner of lots in both Goedland and Volkert's Lust (Exhibits UU and AAA). It would seem that until the two plots south of Omar's land were fenced in 1942 and 1944 there were no fences. Insanally claimed to have seen a fenced in area in Section N when he made his survey in 1933 but he admitted that he made no note at the time of the existence of the fence and could not speak as to its position and that even within the fenced in area there was no cultivation. He was obviously inventing at this point for the plaintiffs themselves do not claim to have fenced any part until 1942 and according to the plaintiff Hemraj, there was on the 30 acres in 1933 only one old fence about three or four years old running cross ways to Omar's fence and at a distance of about 110 rods from the canal. He said "it may have gone to Omar's fence but had been broken down." It must however be remembered that Omar's fence was not put up until 1932. Hemraj also said "When I was a boy cattle used to graze over this land right down to the Canal." The plaintiffs Hiles and Insanally all asserted that from the northeastern corner of the jib there was a line of sand koker and wild gooseberry trees with pieces of rusty wire hanging on them running for 100 rods or so in the direction of the west end of Omar's fence and marking the line of an old fence but they admitted that this line would not keep out cattle which roamed freely over all the back lands. Hiles claims that this line marked the boundary of his grandfather's occupation and Insanally adopted it on Hiles's instructions as giving the bearing of the north boundary of his Section N. I am doubtful whether this line really exists for it does not correspond to Chalmers' northern boundary and there would seem to be no reason for the course it takes, but, even if it does exist, it falls entirely within the First Depth Goedland and is no evidence of any occupation of the second depth. I conclude therefore that the plaintiffs have not shown that they and their predecessors have possessed the land in dispute as of right or have had exclusive occupation for any period prior to 1944. "The mere use of land, without the exclusive possession of it, is not a sufficient title to found an action of trespass for the disturbance of that use". (Salmond on Torts 8th Edition 218).

I pass on to consider the evidence as to the agreements entered into between the plaintiffs and Hiles and whether the plaintiffs were in possession of the land in dispute when the first defendant and his servants and agents entered in 1944. On 24th February, 1933, an agreement (Ex. K) was made between William Hiles, Sarah Alfred and Maria Hiles (three of the four co-heirs) of the one part and Brijlall the plaintiff and Oree his brother of the other part. Under the agreement the vendors agreed to sell and the purchasers to purchase all their right, title and interest in Pln. Volkert's Lust to which they were entitled under the transport of 1891 and 1909, Volkert's Lust being defined by reference to Chalmers's plan. The purchase price was to be $170.00. $20.00 down, the balance to be paid on the passing of transport which was guaranteed by the vendors. The expenses of transport and survey were to be borne by the purchasers. All the parties named signed the agreement. It seems however that Oree (who has since died) backed out when asked to put up the money for the survey and the second plaintiff took his place. At this stage it was agreed between Brijlall and Hiles that the latter should take back a part of the land agreed to be sold and Hiles in fact said that he kept back "the reefland," a piece of 100 acres in the angle between the Canal and Omar's fence and that he never authorised Insanally to survey this piece. It is significant that this reserved piece would include the very area in dispute in this case and it is typical of the contradictions and confusion in the evidence of this witness that Hiles himself should also have said that the agreement, Ex. K, contemplated just the land that Sangatia used to hold, which ended at Boucher's Canal, and that he told Insanally to "survey the land which Brijlall and his father had had."

It appears from the evidence of the plaintiffs that a second agreement was made about this time to which Hemraj was a party, but it has not been produced although Brijlall states that it was taken to their Solicitor's office. S20 was received by Hiles who also received $50 from each of the present plaintiffs which he paid to Insanally on account of survey fees which were fixed at $200. It seems unlikely that Hemraj would have paid this money unless he had something in writing to prove his interest. There was a conflict of evidence as to when Insanally actually made and completed his survey but I do not think it necessary to go into that. What is certain is that from about September, 1933 to August, 1937 he was serving a sentence of imprisonment on a conviction for perjury and did not make his plan until October, 1938.

There was also a conflict of evidence as to whether anyone from Goedland protested against Insanally's survey. On this point I prefer the evidence of James Patterson, who said he protested when he found Insanally on the land in August, 1933. On Ex. A, Insanally has noted that he began his survey on 6th March, 1933 and concluded it on 21st March, 1933 and that one Israel Chalmers as representing the proprietors of Goedland attended at intervals on the first day only. On this I would observe firstly that Insanally failed to give any explanation of his notice of survey dated 4th August, 1933 (Ex. G) and, secondly, that if Israel Chalmers attended Durham's survey of Volkert's Lust in 1930 as recorded on Ex. H, it is remarkable that he should not have protested at Insanally's survey in 1933.

In the meantime a fresh agreement had been made on 15th November, 1937, purporting to be between William Hiles, Sarah Alfred, Maria Hiles and Mary Nedd, (the four co-heirs) of the one part, and Brijlall and Hemraj the present plaintiffs of the other part, whereby the vendors agreed for the sum of $20.00 to be paid on the signing of the agreement to sell to the purchasers the same property as was sold under the agreement of 24th February, 1933. This time the cost of survey was to be borne by the vendors and the cost of transport to be shared by both parties. The agreement adds "the balance of the purchase money (which figure has been interpolated afterwards) is to be paid on the passing of the transport." The agreement is signed by William Hiles alone. On the same day an endorsement was made on the previous agreement purporting to transfer to Hemraj all of Oree's interest or share in the agreement. The endorsement is signed by William Hiles and by Brijlall "as executor of Est. Oree decease." On the 21st and 28th November, 1938, the sums of S20 and $50 were paid by William Hiles, Brijlall and Hemraj to Mr. Eleazar, a solicitor at New Amsterdam, on account of fees and disbursement for transport and for applying for Letters of Administration. The survey having been completed and the transports of 1891 and 1909 being available together with Chalmers's plan there would seem to have been no good reason why the matter should not have been put in hand but the fact is that transport has never been advertised nor passed and Mr. Eleazar is now dead. In spite of this the plaintiffs maintain that they have paid Hiles $500 for the land and $200 for the survey and Hiles admits to having received $500 though he alleges he has advanced the plaintiffs $100 balance of survey fees. No receipts are however forthcoming and it is clear that until 1942 the plaintiffs made no attempt to go into occupation. Neither of the plaintiffs nor Hiles was able to give any satisfactory explanation why the purchasers should pay twice over for the same piece of land nor why they should have paid in full before they were required to do so under the terms of the agreement nor why receipts were not given and taken. This part of their evidence is to my mind wholly incredible, and though it is clear that the plaintiffs made some arrangement with Hiles in 1933 and again in 1937, they have not told me the true story of their arrangements nor given any reasonable explanation of their failure to perfect their title. Nor is there any explanation as to why, if Hemraj acquired a half-share in the land in 1933, he did not join with Brijlall in asserting his rights in 1942.

Further, when Brijlall and Thakurdyal occupied and fenced in the 30 acres adjoining Omar's fence in 1942 they let out a part of it to one Sewraj Narain Padrat, known as Lilboy, and the receipts given him in that year, (Exs. 'X' 'Y' and 'Z') show the land described as Goedland. The receipts were written by Thakurdyal in his own name and Brijlall's and I do not accept Brijlall's evidence that they were given without his knowledge or authority, or that they related to land in First Depth, Goedland. At the end of 1932 John Patterson as "chairman" or representative of the proprietors of First Depth, Goedland, claimed from Brijlall and Thakurdyal money for the use and occupation of this 30 acres and sued them in the Magistrate's Court at New Amster-

dam, the summons (Ex. R) being signed by Mr. Eleazer. He was however; non-suited and advised he could prefer another claim. After this Brijlall and Thakurdyal appear to have started to describe the land as Volkert's Lust, for the receipt (Ex. NN) given to Lilboy on 29th November 1943 refers to rent for rice field at 'Volkert'.

All this evidence throws doubt on the *bona fides* of the arrangement made with Hiles and on the plaintiffs' belief that he was in a position to confer on them a valid title to the land.

Thakurdyal appears to have parted company with Brijlall at the end of 1943 when Hemraj the second plaintiff took his place and the plaintiffs determined to take over themselves the land which Lilboy had broken and cultivated in the 30 acres. They offered him *in lieu* an agreement to break up and cultivate the adjoining 33 acres to the south (Ex. AA) and $8.00 was paid on account. The agreement described the land as Volkert's Lust. According to Lilboy's evidence when the plaintiffs took him to see the land he found the defendants and others engaged in putting up. posts and wire and, not wishing to get involved in a dispute, he backed out and it is admitted that the plaintiffs returned him his S8.00 and took back their chit (Ex. AA). This supports the defendants' story that it was they who first fenced the land and broke it for cultivation.

The plaintiffs however say that it was they who fenced the land and produce a receipt for wire and posts in support dated 3rd April 1944 (Ex. N). They say that they had given out lots within the disputed area to prospective tenants when the first defendant and his men broke through their wire fence and turned off their tenants. The first defendant admits that the plaintiffs' tenants met him when he entered on the land but denied he broke through any fence or that there was any fence round the 33 acres at the time. I accept his evidence that he entered by the eastern side facing Boucher's Canal, which was admittedly not fenced at that time.

The evidence as to the fencing of the land is confusing and contradictory and I am really unable to find any preponderance of evidence one way or the other. I think the truth is that there was a race between plaintiffs and the first defendant to get possession and it would appear from the first defendant's admission that the plaintiffs had got their foot in first, though he denies that they had started work on the land. The position in fact was exactly that postulated by Maule J. in *Jones v. Chapman* and cited earlier in this judgment, of two men in a field, each asserting that the field is his and each doing some act in the assertion of the right of possession.

From my findings of fact set out above it follows that the right of possession lay in the grantees under the Crown grant, that is to say, in those who were proprietors of the first depth Goedland at the time of the grant or their heirs, executors, administrators and assigns, and the first defendant will be able to clothe himself with the right to enter if he can show either a title flowing by assignment from one of the original grantees, or alternatively, that he entered by the authority, precedent or subsequent, of someone whose title flowed by inheritance or assignment from an original grantee. The first defendant has sought

to establish a claim of right both as the owner of a lot in First Depth Goedland and also as the licencee of John Patterson and other owners of Goedland.

First defendant's claim as a proprietor of Goedland is based upon his transport No. 77 of 1943 dated 28th January, 1943 (Ex. U) whereby he and the third defendant acquired jointly one undivided half share of lot No. 1 Goedland as laid down and defined on Chalmers's plan of 1876, and subject to the terms and conditions contained in a declaration of conditions of sale notarially executed by Barrington Patterson on 25th June 1880 (Ex. CCC). Mr. Stafford contended that the effect of the declaration was to restrict the interest of the purchaser of a lot to the lot purchased without any interest or right (other than as provided in the conditions of sale) to any other part of the estate either as it then existed (*e.g.,* the sideline dams) or which might subsequently accrue to it (*e.g.,* Crown Grant 2897) and that no owner of a Goedland lot in 1901 would fall within the class of grantees, namely, proprietors of First Depth Goedland, unless he could also show that he had acquired from Barrington Patterson an interest in Pln. Goedland as such. This is a subtle refinement upon which I express no opinion, because I think he is on stronger ground in his second objection, namely that the defendant's transport does not convey to him any interest or undivided share in the land comprised in the Crown Grant. That land, having become the absolute property of the grantees, is subject to the general law of the Colony (Crown Lands Regulations 1898) and it is part of the law of this Colony that no transfer of immovable property can take effect unless perfected by transport. (*Mangru v. Kalla* 1931-37 L.R.B.G. 414 and *Surujpaul v. Ramdaya* 1942 L.R.B.G. 309).

But on the other hand, the first defendant has in my opinion established his alternative claim. It was proved and not contested that John Patterson falls within the class of grantees by right of inheritance and that he was claiming for himself and others a right in the 30 acres occupied by Brijlall and Thakurdyal in 1942. Although I am rather skeptical of defendant's story of a meeting of the Goedland proprietors at which they agreed to let him occupy the 33 or 29 acres (this may be one of the imaginative details with which both parties have adorned their case) I see no reason to doubt that he entered with Patterson's consent and that this was confirmed by the memorandum by Patterson on 12th August 1944 (Ex. W). I hold therefore that in law the first defendant and the others as his servants were in actual possession of the land in dispute.

But the plaintiffs in reply have pleaded that the defendants claiming through Patterson and Sealey are estopped from disputing the accuracy of Chalmers' plan of Goedland which is incorporated in the title deeds of the proprietors. Their argument, as I understand it, is that Patterson's title cannot be established except by reference to his transport which incorporates Chalmers's plan, and that his predecessors in title having adopted that plan by passing transports based upon it, he cannot now impugn it and cannot be heard to say that Pln. Goedland is something other than is delineated on that plan. The argument, I think, concludes that since the plan would not bring the second

depth of their land anywhere near Crown Grant 2897 there is no connecting link between the titles and the grant.

I hope I have rightly understood the argument for it appears to me to be unsound. In the first place it proceeds upon an assumption of fact which is not necessarily true, namely that Mr. Chalmers intended his unclosed and unfinished lines on his plans to continue in a straight line to the full depth of the estates. The evidence of the surveyors, Mr. Phang and Mr. Cossou is that this is only a presumption and as Verity J. said in *Lacon v. Matthews* (1931 — 37 L.R.B.G. 516 at p. 520).

> "Lines drawn are not evidence of title or boundary but are evidence of what the witness has seen or done in relation to the land. It still remains for the Court to determine whether or not those lines are in accord with the rights or interests of the party on whose behalf they were laid down".

It is, of course, good law that when a plan is incorporated in a conveyance as defining the land and not merely as illustrating metes and bounds given in the conveyance then the plan is the criterion of what is conveyed (see *Llewellyn v. Earl* of Jersey 1843 11 M. & W. 183 *Barton a. Dawes* 1850 10 C. B. 261 Halsbury's Laws of England 2nd Ed. Vol. 29 p. 406) but it must always be a question of fact whether the plan gives "an adequate and sufficient definition with convenient certainty of what is intended to pass". Further it seems to me fallacious to suppose that the ownership of the land comprised in the Crown grant depended in any way upon Chalmers's plan of Goedland or could in any way be affected by a misdescription of Goedland in that plan. It is contended for the plaintiffs that the effect of the acts of Schwiers and Patterson in adopting Chalmers's plans and in passing transports based on those plans was to estop them and their successors in title from denying the accuracy of those plans and, in particular, to preclude the proprietors of First Depth Goedland from claiming any part of the "fan" or from asserting that the layout of Goedland was other than shewn in the plan. Ex. D., even though they might only be able to occupy effectively such part of the estate as did not encroach upon Speculation.

But even if this contention were correct, it would not follow that the owners of the fan became owners of any part of "Pln. Goedland" (they do in fact claim it as part of Volkert's Lust) and the owners of the truncated First Depth Goedland and they alone would still be the only proprietors of Pln. Goedland. Nor could the acts of Schwiers and Patterson have any effect on the crown land lying to the rear of the First Depth. So far as the Crown was concerned a grant was being made of a specific and defined area described by metes and bounds, illustrated by a diagram and conveniently described as part of Second Depth Goedland so that its position could be and was ascertained by the prolongation of the sides of First Depth Goedland as originally laid out. The grant was made to "the proprietors of Pln. Goedland" and they were the persons who held shares in that estate by transport, whether the estate was Goedland as originally laid out or was Goedland modified by Chalmers's plan and the transport based on it.

There are other aspects of the evidence and other propositions law put forward to which I have not referred as I do not wish

to prolong this already lengthy judgment. They do not appear to me to be material to the decision of the case on the view which I have taken of the facts: I only refer to them to show that I have not overlooked them.

In the result the plaintiffs' claim for damages and for an injunction fails and is dismissed with costs.

Judgment for defendants.

Solicitors: *W. D. Dinally; Francis Dias.* O.B.E.

HILDRED IRIS CLARKE, Petitioner,

v.

ARTHUR BRANDON CLARKE, Respondent.

[1947. No. 481.—DEMERARA].

BEFORE MANNING, J. (Acting): (1948. SEPTEMBER 21, 29).

Husband and wife—Dissolution of marriage—Petition for—Separation agreement—Repudiation thereof by husband—Accepted by wife—Abandonment of wife by husband—Malicious desertion,

A husband deserted his wife on the 13th April 1931. Later, husband and wife entered into a separation agreement in the usual form. The husband agreed to pay his wife an allowance of $15 per month. The wife regarded the separation agreement as a mere temporary matter designed to bring her husband to his senses, and she made it clear that if he made a home for her she would join him, notwithstanding the separation agreement. The husband made payment of the allowance under the agreement. He left the Colony in November 1936, and since then he has not made any payment of the allowance. The whereabouts of the husband were unknown to the wife. If the husband had offered to resume cohabitation, the wife would have accepted. In 1947 the petitioner filed a petition for dissolution of marriage on the ground of malicious desertion. The citation was served on the respondent in England. On receipt of the citation he wrote a letter to the solicitor for the petitioner in which he stated: "I am not interested in any way, neither do I have any intention of seeing my wife

again. I am disgusted with the whole affair and I have come to the conclusion that I do not care what happens".

Held (1) that the husband had repudiated the separation agreement, that the wife had accepted the repudiation, that the husband had abandoned the wife, that the wife had been willing to resume cohabitation.

(2) that the husband was guilty of malicious desertion.

Pardy v. Pardy (1939) 3 A.E.R. 779, applied.

Petition by Hildred Iris Clarke for a decree of dissolution of her marriage with the respondent Arthur Brandon Clarke, on the ground of his malicious desertion.

L. M. F. Cabral, for petitioner.

Respondent, in default of appearance.

Cur. adv. vult.

MANNING, J. (Acting): In this petition for dissolution of marriage the facts were as follows: The parties were married on the 2nd June, 1927. On the 13th April, 1931, the respondent husband left the Colony without acquainting his wife and did not return until some time in September the same year. On his return he made no attempt to see or communicate with his wife. The latter then took legal advice, as a result of which a separation agreement was drawn up and. agreed to by both parties. This agreement was in the usual form and under clause 5 the husband agreed to pay his wife an allowance of $15 a month. In November, 1936, he left the Colony for good. Since that date he has failed to carry out the terms of clause 5. On the 6th August, 1947, his wife presented a petition under section 9 of the Matrimonial Causes Ordinance, asking for a dissolution of the marriage on the ground of malicious desertion. The respondent was served with the citation in England but did not appear. He wrote a letter to the petitioner's solicitor in which he stated "I am not interested in any way, neither do I have any intention of seeing my wife again. I am disgusted with the whole affair and I have come to the conclusion that I do not care what happens."

2. Whether there has been malicious desertion is a question of fact, and the point immediately arises as to whether there could have been any such desertion in view of the fact that in 1931 the wife had agreed that she and her husband should henceforth live separate and apart. Mr. Cabral, for the petitioner, has cited the local case of Davey *v.* Davey (No. 214 of 1946). In that case there had been a separation agreement in 1940 and in 1945 Mrs. Davey petitioned the Court for dissolution of her marriage on the ground of malicious desertion. The petition was rejected on the ground that she had consented to the desertion. In April 1946 she again petitioned the Court, alleging this time that since September, 1945, her husband had failed to pay the allowance provided for in the separation agreement. The petition was un-defended. It was heard by Boland, J., who reserved his decision for a few days and then granted a *decree nisi* on the ground of malicious desertion. The reasons for his decision are not available and it is suggested by Mr. Cabral that the learned Judge must have come to the conclusion that the failure to pay the allowance was a repudiation of the agreement by the husband and that the agreement therefore no longer constituted a bar to the obtaining of a declaration of dissolution.

3. Mr. Cabral also cited the case of Stockley *v.* Stockley, 1939, 2 All E.R. 707. That was a petition by a husband for dissolution on the ground of desertion. There had been a separation agreement, one of the clauses of which gave the husband access to the child of the marriage at least once a week. The wife refused to carry out this part of the agreement and the husband withheld the payments of maintenance provided for in the agreement. The Court held that "the proper inference is that the wife repudiated the agreement and the husband accepted that repudiation as putting an end to it" and that the obligation of the wife to permit access was a fundamental undertaking going to the root of the contract from the husband's point of view.

4. Mr. Cabral did not cite the authority of Pardy *v.* Pardy, 3 All E.R. 1939, 779, in which the principles applicable to a case of this kind were laid down by the Court of Appeal in England. In the Court of first instance Langton, J., had held that the continued separation of the spouses must be referred to the separation deed, and not to desertion by the respondent, and he refused to make a decree. On this question of fact his judgment was reversed by the Court of Appeal. The judgment of Sir Wilfred Greene, M.R. was concurred in by his brethren. In the course of his judgment he said "Was the separation which *de facto* existed attributable to the agreement under which the parties separated, or was it due to a supervening *animus deserendi* on the part of the respondent?" He laid down three conditions which must exist in order that the second of these alternatives should be the one to be adopted, *viz.*, on the part of the deserting spouse repudiation of the agreement and *animus deserendi;* and on the part of the deserted spouse willingness to resume cohabitation without regard to its terms. From the facts of the case he was able to infer the existence of these three conditions, and found that the spouses regarded the separation deed as a dead letter, and that the continuance of the separation was not in any way attributable to its existence. There was evidence that the wife had regarded the separation deed as a mere temporary matter designed to bring her husband to his senses and that she had made it clear that ii he made a home for her she would join him, notwithstanding the deed.

5. The facts in the present case are that the respondent deserted the petitioner in April 1931. When he returned to the Colony in September that year he made it clear that he had deliberately formed the intention of refusing to resume marital relations with his wife. It was open to the petitioner to bring proceedings for a dissolution on the ground of malicious desertion. Instead of that, and acting on legal advice, she chose to regulate her relations with her husband by the terms of a separation deed. This action of hers may be construed in her favour as indicating a desire on her part to keep the marriage tie subsisting in the hope of a future reconciliation, but it put an end to the desertion, malicious or otherwise, of the respondent. The terms of the deed were observed by both parties until the respondent again left the Colony in November 1936. Since that date they have, as a matter of course, been observed by the petitioner, and, with the exception of the maintenance provision, by the respondent. In Pardy *v.* Pardy, *supra*, the M.R. said "Breach of a particular covenant by

itself may not amount to repudiation; on the other hand, the breach may be so fundamental, or so persistent, or may have such a significance when regarded in the light of all the circumstances of the case as to justify the inference that repudiation is intended." I cannot regard the respondent's failure to pay maintenance, by itself, as a fundamental undertaking going to the root of the contract. But it persisted for a period, amounting to nearly eleven years, preceding the presentation of the petition; and for that period the whereabouts of the respondent were unknown to the petitioner. In addition there is the passage, already quoted in this judgment, from the respondent's letter to the solicitor for the petitioner. I infer from these facts that the respondent, at some date between his leaving here and the presentation of this petition, formed the intention of repudiating the separation deed and from that time regarded it as a dead letter.

6. The petitioner has stated that she has been at all times willing and ready to resume co-habitation. Although she has not supported this statement by evidence of any attempts at reconciliation I accept it as a *bona fide* indication of her attitude in the matter. Her husband made it clear that he was inaccessible to any approach; and all that she could do was to wait for some offer on his part. If such an offer had been made I believe she would have accepted a resumption of marital relations. She too has for a considerable time regarded the separation deed as a dead letter.

7. As long as the separation deed remained in force there could be no *animus deserendi.* But when the respondent repudiated the deed and the petitioner accepted the repudiation, the *animus deserendi* revived. There can be little doubt that in this case the epithet "malicious", as it has been construed in local decisions, is appropriate. The domicile of the respondent has been shown to be British Guiana, and there is nothing to suggest any collusion. I pronounce a *decree nisi* declaring the marriage to be dissolved.

Decree nisi of dissolution of marriage.

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

J. C. NORVILLE *v.* M. I. A. NORVILLE.

JOSEPH CECIL NORVILLE, Petitioner.

v.

MURIEL IRIS AGATHA NORVILLE, Respondent,
and
GLADSTONE SELMAN, Co-Respondent.
[1947. No. 641.—DEMERARA].

BEFORE MANNING. J. (Acting): (1948. SEPTEMBER 22, 30).

Husband and wife—Dissolution of marriage—Petition for—Adultery of wife —Adultery by petitioning husband for a number of years—Desertion of wife prior to such adultery—Petitioner the first to commit adultery—Petitioner living in adultery at time of petition—Exercise of Court's discretion—Refused.

The Court, in the circumstances of the case, refused to exercise its discretion in favour of a petitioning husband who had committed adultery.

PETITION by Joseph Cecil Norville against his wife Muriel Iris Agatha Norville for dissolution of his marriage on the ground of her adultery with Gladstone Selman who was cited as corespondent. Neither the respondent nor the co-respondent entered appearance. The petitioner asked for the exercise of the Court's discretion in respect of his own adultery.

John Carter, for petitioner.

Cur. adv. vult.

MANNING, J. (Acting): The parties were married in 1927. Mrs. Norville's mother resided with them and the husband petitioner states that this led to friction between himself and his wife. He alleges that his wife worked obeah on him and that the effect was to cause him to have pains in his stomach. In 1930 he deserted her and in July that year she obtained from a Magistrate's Court an order that he should pay her S1.92 a week for her maintenance. In 1932 the petitioner started an adulterous intimacy with a woman who was his housekeeper, and at the date of the petition six children had been born to them. Evidence has been led that in June 1934 the respondent committed a single act of adultery; and more that 13 years later, i.e. in December 1947, the petitioner presented a petition for dissolution of the marriage on the ground of this single act.

The petitioner has explained his delay in bringing this petition. He stated that he had not the means to do so until the end of the year 1947. This excuse I am willing to accept. But the facts show that he wilfully separated himself from his wife before the act of adultery charged, and I am not satisfied that he had any reasonable excuse for doing so. Further, he has himself been guilty of persistent adultery, which commenced before the date of the act of adultery charged against his wife, and is still presumably living in adultery.

In deciding whether this is a case for the exercise of discretion I am bound by authority to take into consideration the facts (a) that there is now no possibility of a reconciliation between the parties (b) that there are no children of the marriage

(c) that the petitioner states he is willing to marry the woman with whom he has been living for the last 16 years.

Having weighed these facts carefully I do not think the case is one for the exercise of my discretion. The petitioner deserted his wife; as far as is known, he was the first to commit adultery; and he was living in adultery at the time when he prayed for relief. The petition is dismissed.

Petition dismissed.

Solicitor for petitioner: *W. D. Dinally.*

The 30th day of September, 1948.

RALPH LEONARD COLLETTE RIDLEY, Petitioner,

v.

DOROTHEA CLAUDIA RIDLEY, Respondent.

[1948. No.448.—DEMERARA.]

BEFORE MANNING, J. (Acting).

1948. September 24; October 4.

Husband and wife—Dissolution of marriage—Petition for—Malicious desertion—Final repudiation of marriage—Period of desertion—Matter for careful consideration.

The Court granted a decree *nisi* of dissolution of marriage on the ground of a wife's malicious desertion for 6 months prior to the petition, where the Court was satisfied that the conduct of the respondent left no hope of any repentance and no expectation of any reconciliation with the petitioner; and that the petitioner was justified in concluding that there had been a final repudiation.

PETITION by Ralph Leonard Collette Ridley for dissolution of his marriage with Dorothea Claudia Ridley on the ground of her malicious desertion. The respondent did not enter appearance.

L. M. F. Cabral, for petitioner.

Cur. adv. vult.

MANNING, J. (Acting): The parties were married in February, 1941. A child was born in 1944 or 1945 and relations between the spouses became strained in 1946. In January, 1948, the respondent left the Colony with her child against the wish of the petitioner. She returned with the child at the end of June. She made use of the petitioner's house at first, but refused to resume marital relations with him. After 14 days she left her home and took lodgings elsewhere, and shortly after that she again left the Colony with the child. She had intimated to the petitioner that she had no intention of ever living with him again. On the 19th July the petitioner petitioned the Court for dissolution of the marriage on the ground of malicious desertion.

2. In Matthews v. Matthews, B.G. Reports, 1931-37, at p. 460 Sir John Verity said "In many cases the element of time will be one for consideration in ascertaining whether or not the desertion is in fact evidence of final repudiation." I would go further than the learned Judge and would say that in all cases the element of time is one for careful consideration. It may appear from the evidence that a deserting wife has finally made up her mind to

abandon her husband and lead her own life. But a reasonable period must be left for her to reflect on the situation. If after that period has elapsed the evidence shows that the situation is irremediable it is open to the Court to find that the desertion has been malicious. As to what is a reasonable period depends on the facts of each case. Even after a short period of desertion it may be inferred that there has been a final repudiation.

3. In the present case the desertion must be taken to have commenced on January 24th, 1948. For some months before the desertion the relations between the spouses had been very bitter and the respondent had tried in vain to induce the petitioner to consent to her leaving him. Her conduct on her return in June certainly indicated a deliberate and final rejection of her husband; but I reserved my judgment to consider whether the petitioner had been too hasty and whether he ought to have displayed more patience and given his wife time to reflect and repent. The fact that she had taken with her the only child of the marriage lent some support to an inference that she might relent at some later date. However, after full consideration of the facts. I have come to the conclusion that the conduct of the respondent leaves no hope of any repentance, and no expectation of any reconciliation with her husband; and that he was justified in concluding that there had been a final repudiation. There is nothing to suggest any collusion and I grant a decree nisi declaring the marriage dissolved.

Decree nisi of dissolution of marriage.

Solicitor for petitioner: *F. I. Dias.*

KOUNCH BEHARRY.

Appellant (Defendant),

v.

WILLIAM GORDON. P.C. No. 4594.

Respondent (Complainant).

(1948. No. 364.—DEMERARA).

Before Full Court: WORLEY, C.J. and JACKSON. J. (Acting).

1948. September 1, 3; November 9.

Defence Regulations—Price control order—Control of Prices Order, 1947—*Contravention of—Complaint for—No defence—That in effecting sale Flour* (*Control of Distribution*) *Order,* 1947, *also contravened.*

Defence Regulations—Price control order—Sale, wholesale or retail—At price exceeding that prescribed—Absolute prohibition.

It is no defence to a complaint for contravention of the Control of Prices Order, 1947 that in effecting the sale the Flour (Control of Distribution) Order, 1947 has also been contravened.

Price Control Orders made under the Defence Regulations involve an absolute prohibition of the sale of price—controlled articles, retail or wholesale as the case may be, at a price exceeding that prescribed.

Buckingham v. *Duck,* 120 Law Times 84.

A dealer who sells a price-controlled article at a price in excess of the controlled price to any person whomsoever does so at his own peril, and if in the case of a wholesaler he would save himself from contravention of the order he should, before the sale, satisfy himself that the transaction does not fall within the prohibition, for if it should subsequently be

established that it does so fall then he is guilty of an offence, and a plea of ignorance of the status of the buyer or the purpose for which the article was bought is of no avail.

APPEAL by the defendant Kounch Beharry from the decision of the Magistrate of the Berbice Judicial District, convicting him of selling one half-bag of extra flour, a price controlled article, at a price exceeding the maximum wholesale price prescribed by a price control order.

C. Lloyd Luckhoo, for appellant.

A. C. Brazao. acting Solicitor-General, for respondent.

Cur. adv. vult.

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

This appeal is from a conviction for selling one half bag of extra flour (a price controlled article) at a price exceeding the maximum wholesale price prescribed in paragraph 12 (1) of the Control of Prices Order 1947 as amended by the Control of Prices (Amendment No. 14) Order, 1947, an offence contrary to clause 69 of the Defence Regulations, 1939 as extended by the Defence Regulations (Supplies and Services) (Continuance) Order, 1946.

The paragraph above cited of the Control of Prices Order enacts that "no person shall sell or offer or expose for sale any price controlled article at a price exceeding the maximum price prescribed by this Order" and the Order, as amended, prescribes in a Schedule maximum wholesale and retail prices for the sale of extra flour. The facts in this case as found by the Magistrate are that the appellant sold the half-bag of extra flour (100 lbs. in weight) to one Jurra at the maximum retail price, and the first question raised on appeal was therefore whether the sale was by wholesale or retail.

The Control of Prices Order, 1947 defines "wholesale" as the sale of any price controlled article to any person who comes within any one of the four categories (a) to (d) specified in the definition and it is not disputed that the purchaser, Jurra, came within both categories (a) and (b) thereof. He is the proprietor of a provision shop at Sheet Anchor, Canje, Berbice, duly licensed under the provisions of the Tax Ordinance, 1939 for the sale of flour to the public and he on the same premises conducts the business of a bakery using flour in the baking of bread and cakes for sale to the public. *Prima facie* therefore the sale of 100 lbs. of flour to him would be a wholesale transaction.

Counsel for the appellant however contended

1. that the terms of the order do not prohibit or exclude the possibility of the sale by retail of a price controlled article to a purchaser coming within any of the four categories of the definition above referred to for his personal use, and that the transaction in question was in truth and in fact such a sale; and
2. that the prosecution must prove that the defendant knew that the purchaser was a person, who came within one or other of the four categories specified in the definition.

The proposition of law in the first submission has the authority

of the decision of the Full Court in the case of Choo-Kam-Chung and Chin Lung *v.* Stanley Chin (Appeal No. 509 of 1945) where the Court rejected a submission that the fact that the purchaser 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. It is however not necessary to consider the proposition in the instant case since the Magistrate found as a fact that the transaction was a sale by wholesale and no good reason has been adduced for disturbing that finding. Jurra's evidence was that he first told the appellant that he wanted to buy a half bag wholesale and that defendant said he would only sell that quantity at retail price, and that it would have to be divided into two quarter-bags. This division was made the following day and the full retail price paid. Under cross-examination Jurra said that he bought the flour on behalf of his father who was giving a wedding feast but later also said that he purchased the flour for the purpose of baking cakes to sell. Further cross-examined he said "I did not tell that to the defendant, but I asked him for a half-bag of flour. I did not tell him my father was having a wedding. I said nothing." No defence was led to the charge but the appellant's statement to the police, which was put in evidence by the prosecution, contained an admission that he knew Jurra was the owner of a grocery and parlour at Sheet Anchor, Canje and a statement that he had sold Jurra only 10 or 12 lbs. of flour and a flour bag to put it in. On this evidence this Court sees no reason to disturb the Magistrate's finding of fact that this was a wholesale transaction.

Counsel for the appellant further argued that the transaction could not be a sale by wholesale as it would contravene the provisions of the Flour (Control of Distribution) Order, 1947, promulgated in the *Official Gazette* of 2nd August, 1947. This order sets up a system of control of the distribution and sale by wholesale of flour by means of the registration of purchasers and prohibition of sale by importers or wholesalers except on the production by the purchaser of a valid delivery order issued by the Controller of Supplies. It is abundantly clear that if the transaction were a sale by wholesale both appellant and respondent were guilty of breaches of this Order but that does not preclude them or either of them from being also guilty of a breach of the Control of Prices Order.

It remains to consider the further point raised by counsel for the appellant, namely, that the prosecution failed to shew that the appellant knew that Jurra was a person falling within one of the four categories in the definition of "wholesale" in the Order.

This argument was based upon a passage in the judgment in the case of Choo-Kam-Chung and Chin Lung v. Stanley Chin above referred to. The passage relied upon by the appellant reads: —

> "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."

That passage if read divorced from its context and from the background of the facts of that particular case, appears to conflict with the judgment of the Full Court in the earlier case of Resaul Maraj & Coy., Ltd., v. Slater (B.G. L.R. 1942 362 at p. 363) where it was held that

> "Orders such as these, made under the Defence Regulations, involve an absolute prohibition of the sale of price controlled articles, retail or wholesale as the case may be, at a price exceeding that prescribed, as was held in Buckingham v. Duck 120 L.T. 84. A dealer who sells such an article at a price in excess of the controlled price to any person whatsoever does so at his own peril, and if in the case of a wholesaler, such as the appellant company, he would save himself from contravention of the order he should, before the sale, satisfy himself that the transaction does not fall within the prohibition, for if it should subsequently be established that it does so fall then he is guilty of an offence and a plea of ignorance of the status of the buyer or the purpose for which the article was bought is of no avail."

It is of interest to note that this statement of the principles to be applied to the burden of proof in statutory offences is in close harmony with the decision of the Divisional Court of the King's Bench in the recent case of Harding v. Price (1948 1 All E.R. 283) where it was said that although the wording of the statute might relieve the prosecution from proving knowledge it did not follow that the defendant might not prove lack of knowledge as a defence.

On this point, there was ample evidence in the appellant's admission to justify the conclusion that he knew the purchaser to be a "retailer" within the definition, but in our view it is immaterial. We think that Resaul Maraj v. Slater correctly states the law as to the burden of proof in this case and that Choo-Kam-Chung's case can only be regarded as authority for that case and any other case in which the facts are similar.

For these reasons, the appeal must be dismissed with costs and the conviction and sentence confirmed.

Appeal dismissed

M. SAUL *v.* J. JERVIS, CPL. OF POLICE No. 4307.

MILTON SAUL,

Appellant (Defendant).

v.

JOSEPH JERVIS, Corporal of Police No. 4307,

Respondent (Complainant).

(1948. No. 245.—DEMERARA).

Before Full Court: WORLEY, C.J. and JACKSON, J. (Acting).

1948. September 14; November 9.

Criminal law and procedure—Previous conviction—Essential element of charge—How conviction to be proved—By lawful evidence—Production of certified copy of conviction—Prevention of Crimes Ordinance, cap. 19, *section* 6 (1) (c).

Criminal law and procedure—Two offences committed on same set of facts—One involving proof that defendant is of bad character, other not—Desirable that charge should be for latter offence.

Where, as in the case of a charge for an offence under section 6 (1) (c) of the Prevention of Crimes Ordinance, Chapter 19, the proof of" a previous conviction is one of the essential elements of the charge, such conviction must be proved by lawful evidence, that is to say, by the production of a certified conviction.

If the facts of a case are such that a man may equally be charged with two offences, one of which involves proof that he is a man of bad character and the other of which requires no such proof, it is always desirable that the latter should be selected as the charge to be made against such a person.

R. v. *Goodwin* (1944) 1 A.E.R. 510, and *R.* v. *Johnson* (1945) 2 A.E.R. 105, applied

APPEAL by Milton Saul from the decision of a Magistrate of the Georgetown Judicial District convicting him of an offence contrary to section 6 (1) (c) of the Prevention of Crimes Ordinance, Chapter 19.

F. R. Jacob, for appellant.

A. C. Brazao, acting Solicitor-General, for respondent.

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

In this matter the appellant was convicted and sentenced to undergo imprisonment with hard labour on a charge that he, having been convicted on indictment on the 13th day of June, 1938 of House Breaking with intent to steal and a previous conviction of the crime of being found in a dwelling house in the night with intent to steal, having been then and there proved against him, was on the 2nd day of November, 1947, (i.e. within the seven years prescribed by the section) found in a public place namely Bentinck Street waiting for an opportunity to commit or aid in the commission of larceny contrary to section (6) (1) (c) of the Prevention of Crimes Ordinance (Chapter 19).

The principal grounds of appeal were (a) that the charge as laid was not proved in that there was no legal proof of the second previous conviction and (b) that there was no proof that the appellant was waiting for an opportunity to commit larceny.

The conviction of the appellant on indictment on the 13th

day of June, 1938 and the sentence of seven years penal servitude then passed upon him were proved by the production of a copy of the conviction signed by a Sworn Clerk for the Registrar of the Supreme Court but the only evidence of the earlier conviction was that of a police officer who said

> "At the said trial (*i.e.* the trial and conviction on the 13th June, 1938) in my presence in Court the defendant admitted to the Court a previous conviction for being found in a dwelling house with intent to steal and (that he) was sentenced for the said offence to three years Penal Servitude on 9th January, 1934. I know the defendant well and was also present in Court in the year 1934 when defendant was sentenced to three years penal servitude."

The appellant having pleaded not guilty to the present charge there was no question of any admission of a previous conviction and the onus lay upon the prosecution to prove in proper form all the essential elements of the charge. The Solicitor-General has admitted that there was in this case no proper proof of the conviction in 1934 and that the conviction now appealed against cannot stand.

Where previous convictions are relied on in a criminal trial, they must either be proved by lawful evidence or expressly admitted by the accused (R. v. Turner 18 Cr. App. R. 168). The trial and conviction or acquittal of any person charged with an indictable offence must, at common law, be proved by the production of the record or an examined copy thereof and the sentence of an Assize Court was provable in the same manner and not by the oral evidence of a witness who heard it, nor by the calendar signed by the Clerk of Assize (see R. v. Smith 8 B. & C. 341, Hartley v. Hindmarsh L.R. 1 C.P. 553, R. v. Bourden 2 C. & K. 366 and Mash v. Darley 1914 3 K.B. 1226 C.A.).

Section 43 of the Evidence Ordinance (Chapter 25) and section 136 of the Summary Jurisdiction (Offences) Ordinance as amended by section 20 of the Criminal Justice Ordinance 1932 (No. 21 of 1932) provide for production and proof of the certified

The objection to the absence of proof of the conviction of 1934 is sufficient to dispose of the appeal but we consider it advisable to make some observations on the merits of the case I view of the unusual nature of the section under which the appellant was charged. The section corresponds to section 7 of the Prevention of Crimes Act, 1871 which was considered by the Court of Criminal Appeal in the case of R. v. William Goodwin (1944 1 All E.R. 506). Humphreys J. delivering the judgment of the Court said (p.509)

> "As I have already observed, this is quite an unusual section, in that it requires that the jury shall know that the man who is before them and whom they are trying is a criminal and that he is a man who is likely, from what is known of him, to commit the very crime with which he is being charged. As has already been said, it is precisely the thing which in most cases we take the greatest possible care to prevent the jury knowing anything about. That being so, it is not too much to say that, whenever such a charge is brought against a person, the presiding judge and everybody concerned in

> the case should be meticulously careful to see that the man is not convicted as the result of the appalling prejudice which must in such circumstances be brought against him, but is convicted upon clear and unmistakable evidence that he committed the particular charge named in the indictment, quite irrespective of whether he committed any other, I mention that because there is another offence with which it is possible this man might have been charged under that same sect. 7 (iii).

And further (p.510)

> "The Court would add about this section that they think the police and those who have to deal with these matters, including courts of justice, would do well to remember that, if the circumstances of a particular case are equally applicable to such an offence as the offence I have just referred to under the Vagrancy Act or any other offence, which does not involve the proof beforehand to the jury of a man's bad character, it is much more satisfactory that the person should be charged with that than that he should be charged with this offence which does put him in such an extremely difficult position, for nobody with experience of a criminal court can fail to agree that, when once a jury know that a man is a man who is given to committing a particular class of crime, it must be extremely difficult for them, doing their best though they do, to treat that man in the same fair and impartial way as they would if they knew nothing whatever about him. For that reason, if the facts of the case are such that a man may equally be charged with two offences, one of which involves the proof to the jury that he is a man of bad character and the other of which requires no such proof, it is always desirable that the latter should be selected as the charge to be made against such a person."

This warning was repeated and strongly emphasized by the same Court in R. v. Johnson 1945 (2 All E.R. 105) and we take tins opportunity to express our complete agreement with it and to state that it should be carefully noted and observed by the police and the prosecuting authorities.

In the case now before us the evidence was that the appellant's motor car was parked at the corner of Water and Bentinck Streets, Georgetown, at about 3.30 a.m. on a Sunday in November, 1947 not far from a hotel. He was seen to walk clown Bentinck Street towards the water front and back again passing a door of Thom and Cameron's Bond. A police officer who was observing him went to the door of the Bond and saw a large hole freshly cut in one of the shutters of the door and a piece of wood lying in front of the hole, covered by a bag. Lying on the pavement nearby was a man - who subsequently pleaded guilty to an offence in connection with the breaking of the Bond. The appellant was detained by another constable before he reached his car and subsequently gave an explanation of his walking towards the water front which the learned Magistrate disbelieved. A search made of his car disclosed nothing incriminating but the Police detained the vehicle and the following morning, after finding at the scene of the breaking some

flakes of red paint, small wooden chips and pieces of putty, they again searched the car and discovered under the back seat among the tools a crowbar bearing patches of red paint and putty similar to those picked up at the scene. The appellant admitted possession of the crowbar and offered an explanation of the paint and putty thereon which the Magistrate rejected.

On this evidence the Magistrate found that the appellant was waiting for an opportunity to commit a larceny, presumably adopting the view that the appellant, either alone or in conspiracy with the other man who pleaded guilty, had broken the door of the Bond with the crowbar as a preparatory step to entering and stealing therein. It would appear however that, even if it were thought that the evidence would not support a charge of attempting or abetting an attempt to break and enter, the appellant might on this evidence have been charged under section 147 (vi) or (ix) of the Summary Jurisdiction (Offences) Ordinance and the prejudice created by the recital of his previous convictions have been avoided.

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

Appeal allowed.

S. P. DA SILVA, Appellant,

v.

KATIE THERESA LAM, Respondent.

[1948. No. 360.—DEMERARA.]

BEFORE FULL COURT: WORLEY, C.J., AND JACKSON, J. (Acting).

1948. September 3; November 9.

Rent restriction—Recovery of possession—Ground of application—That dwelling house reasonably required by landlord for use as such—To be established by landlord—Paramount question for court—Garage on premises—Not to be taken into consideration—Volume of traffic passing on road outside—Whether relevant.

Where a landlord seeks to recover possession of premises to which the Rent Restriction Ordinance, 1941, applies on the ground that he requires those premises for use as a dwelling-house, the paramount question is whether the landlord reasonably requires the premises for the purposes of habitation.

In determining whether a landlord reasonably requires, within the meaning of the Rent Restriction Ordinance, 1941, premises as a dwelling house, the circumstances that it has a garage is not to be taken into consideration.

Consideration of the volume of traffic which passes on the road outside is extraneous to the question whether the building *qua* dwelling-house is reasonably required, within the meeting of the Rent Restriction Ordinance, 1941, by the landlord for the purpose of her son's habitation.

APPEAL by S. P. da Silva from the decision of a Magistrate of the Georgetown Judicial District ordering him to give up pos-

session to his landlord Katie Theresa Lam of a dwelling house to which the Rent Restriction Ordinance. 1941, applies.

L. M. F. Cabral, for appellant.

H. C. Humphrys, K.C., for respondent.

Cur. adv.vult.

The judgment of the Court was delivered by JACKSON, J. (Acting) as follows: The appellant was a tenant of respondent who successfully applied under the Rent Restriction Ordinance, 1941, to a Magistrate of the Georgetown Judicial District for an order of possession in respect of a cottage situated at 3 George and Norton Streets,Werk-en-Rust, Georgetown, on the ground that the cottage was reasonably required for occupation as a residence for her son. Respondent offered as alternative accommodation the premises No. 225 South Street, which are owned by her husband and are at present occupied by her son who lives on the ground floor and by one Sue who lives on the first floor. This house abuts South Street which has been gazetted a major road and carries considerable traffic. Respondent's case was that her son had young children whose safety was constantly in peril because of the constant flow of traffic which passes the house; further she stated that there was a garage on the premises in George Street which her son who kept a car could use and there was none in South Street. Appellant contended that he also had a young child, that the South Street house was too small for his family and that it was not available to him.

The Magistrate on the suggestion of both parties inspected the first floor of the South Street house in which Mr. Sue lived and found that (1) owing to the major road the premises were not altogether safe for young children to live in, (ii) there was no garage, (iii) the premises were quite suitable for appellant (iv) the premises were available to the appellant whenever he was ready to occupy them.

Before any other questions may be determined the Court must first be satisfied that the premises were reasonably required by the landlord. It was submitted by the appellant that the Magistrate did not fully appreciate that this should have been his first consideration; in paragraph 2 of the memorandum of his reasons for decision the Magistrate expressed himself thus "It was clear that the applicant genuinely required the cottage for her son;" and in the ultimate paragraph he said "Having therefore decided that the application was *bona fide* and that suitable alternative accommodation was provided I had next to consider whether it was reasonable to grant the application." In our view the learned Magistrate misdirected himself for the test was neither the bona fides of the applicant nor her genuine desire to have the house for her son; there may be both and yet notwithstanding the house may not be reasonably required. Lord Justice Bankes in *Epsom Grand Stand Association* (*Limited*) v. E. J. *Clarke* (1919) 35 T.L.R. *at p.* 526 stated the law in this manner "The plaintiffs must satisfy the Court that the premises were reasonably required. It was not merely a question of their acting *bona fide.* They must not only act *bona fide,* but they must act

reasonably in requiring the possession of the premises. Whether the premises were reasonably required must depend on the circumstances."

The appeal being not from the reasons but from the judgment it must be ascertained whether the evidence offered sufficiently discharged the burden that lay on the respondent (applicant). Respondent's son has a family of six including four children whose ages range from one to five years; the appellant has a family of seven including five children the youngest of whom is six years old. The evidence disclosed the real grounds of the application to be that the South Street house exposed the young children of respondent's son to danger from passing traffic and that the son required a garage for his car. The question for this Court therefore is whether these are factors which can properly be considered in deciding whether the premises were reasonably required. In England the Courts have held that when the question of alternative accommodation falls to be considered, the only relevant considerations are those which affect its suitability *qua* dwelling house (see *Wilcock* v. *Booth* 1920 122 *L.T.* 678: *Middlesex C.C.* v. *Hall* 1929 *L.R.* 2 *K.B.* 110 and *Briddon* v. *George* 1946 *I All E.R.* 609) though these considerations may include the position of the alternative dwelling house (Wilcock v. Booth at p. 680-681). In *Briddon* v. *George* Scott L.J. said in the Court of Appeal (at p. 613).

> "The judge has found as a fact that, but for the question of the garage the alternative house offered was in all those respects reasonably suitable. The only question for this Court therefore is whether the absence of a garage can properly be taken into consideration on the question of the accommodation being suitable. In my view it cannot, for this simple reason, that it is the dwelling house itself which is the unit throughout the whole of these Rent Restriction Acts and especially so under (the Section) which I am now considering."

And further

> "That being the principle of interpretation to apply, the question of the garage was out of the picture so far as the meaning of "accommodation" was concerned. It may be that on the question of reasonableness it could be considered though I have considerable doubts whether it should be."

Counsel for the landlord-respondent contended that in the circumstances of this case, the requirement of the garage is reasonable, and that the principle of interpretation applied in the English cases to the suitability of alternative premises ought not to apply to questions affecting the reasonableness of the landlord's requirement of premises. We are unable to accept this view. The principle of the local Ordinance is in our view, the same as that of the English Acts, expressed in the words of Scott L.J. quoted above "It is the dwelling house itself which is the unit throughout the whole of these Rent Restriction Acts." It follows therefore that the question of the garage is "out of the picture" so far as the reasonableness of the landlord's requirement is concerned. What is paramount is whether the landlord reasonably requires the premises for the purposes of habitation; the learned Magistrate found as a fact that the premises in South Street

were suitable for those purposes and made the following observations:—

"The upper flat consists of three bedrooms, two large and one small; there is a large drawing room and a gallery also a dining room. There is a water closet and a bath. The kitchen has no stove but there is room for one. The premises are in a fairly good condition. The water closet was somewhat small but could be enlarged if necessary…….I consider the premises quite suitable for the defendant." These findings equally fit the circumstances of respondent's son save for the considerations of danger from traffic and the absence of a garage.

We are also of opinion that the application of this same test must result in the exclusion of the question of the traffic on the road outside the house and the consequent risk of danger to the respondent's grand-children. The only evidence on this matter was given by the respondent who said "My son's children are very small and South Street is dangerous for them. One was nearly knocked down recently." There are very few streets in Georgetown of which the same could not be said and it would be unreasonable if a landlord, living in a house suitable to his wants in all other respects, could dispossess a tenant merely on the ground that he thinks his children would be safer living in another street. In so holding we must not be taken to be expressing the view that the situation of the house may not in some cases be relevant to the consideration whether it is reasonable to make the order: the question may arise in another case. All that we are saying in this case is that consideration of the volume of traffic which passes on the road outside is extraneous to the only question which is before us now, namely, whether the building *qua* dwelling house, is reasonably required by the respondent for the purpose of her son's habitation.

The respondent having failed to establish such reasonable requirement, the application must be dismissed. The appeal is allowed with costs and the order for possession set aside.

Appeal allowed.

Solicitors; *J. Gonsalves.* O.B.E.; *H. W. de Freitas.*

P. BENN *v.* S. BILLYEALD, C.S.P.

PHILIP BENN, Appellant (Defendant),

v.

S. BILLYEALD, C.S.P. Respondent (Complainant).

(1948. No. 388 — DEMERARA) .

BEFORE FULL COURT: WORLEY, C.J. AND JACKSON, J. (Acting).

1948. September 1; November 9.

Criminal law and procedure—Assault by police constable on non-commissioned officer—Not an assault by police constable on superior officer—Constabulary Ordinance, cap. 30, *section* 49 (1) (d).

Police—Superior officer under Constabulary Ordinance, cap. 30, *section* 49 (1) (d)*—Non-commissioned officer not.*

A non-commissioned officer of police is not a "superior officer" within the meaning of section 49 (1) (d) of the Constabulary Ordinance, Chapter 30.

APPEAL by the defendant Philip Benn, a police constable, from the decision of the Magistrate of the Courantyne Judicial District, convicting him of assaulting a superior officer, to wit, Lance Corporal 4452, contrary to section 49 (1) (d) of the Constabulary Ordinance, Chapter 30.

L. M. F. Cabral, for appellant.

A. C. Brazao, acting Solicitor-General, for respondent.

Cur. adv. vult.

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

The appellant, a constable in the Police Force of the Colony, was convicted on a charge of assaulting a superior officer, to wit, Lance Corporal 4452, contrary to section 49 (1) (d) of the Constabulary Ordinance (Chapter 30). For his offence he was sentenced to pay a fine of $20 and costs or in default to be imprisoned for one month with hard labour. A more serious consequence of the conviction is that by virtue of the provisions of subsection (2) of section 49 the appellant *ipso facto* ceases to be a member of the Police Force.

The relevant facts, as found by the Magistrate, are that the appellant was one of a party of police under the command of Lance Corporal 4452 keeping order at a sports meeting held at Canje, Berbice and, while engaged on that duty, the appellant, on being rebuked by the Lance Corporal for misconduct, seized him by the shirt and punched him on the chest. The appellant was under the influence of drink.

The sole ground of appeal is that the Lance Corporal in question was not a "superior officer" within the meaning of the section of the Ordinance under which the appellant was charged and convicted. The validity of this contention must depend mainly upon a consideration of the relevant provisions of the Constabulary Ordinance as now enacted though it may be relevant and helpful to consider the earlier legislation of the Colony and parallel provisions in the laws of England.

The interpretation section (section 2) of the Ordinance defines "the police force" or "the force" as the police force established by the Police Ordinance 1891 and continued by the Ordinance and the members of the force are therein classified as officers, sub-officers and constables. The section enacts separate definitions of "officer" (of which the lowest grade is sub-inspector), and "sub-officer" which term includes a warrant officer and non-commissioned officer, the lowest rank of the latter class being a Lance Corporal. A constable means a member of the force other than an officer or a sub-officer.

It is clear therefore that a Lance-Corporal is not an officer within the meaning of the definition and not a "superior officer" unless that expression is used in section 49 as a term of art or in a special sense as meaning any officer or sub-officer *(i.e.* a warrant officer or non-commissioned officer) who is superior in rank or seniority or in the way of duty to the sub-officer or constable charged with an offence under that section. After a careful consideration of the section and of the other relevant provisions of the Ordinance we are of opinion that such a construction would be strained and contrary to the intention of the Legislature.

In many sections of the Ordinance a clear distinction is made between "officers" and "sub-officers" and where it is intended to include the latter they are specially mentioned *e.g.* sections 4(1), 31, 35(2), 55, 56, 61 and 64; and in paragraphs (c) and (e) of subsection (1) of section 49 a clear distinction is drawn between the two classes. Moreover where the expression "superior officer" is used in subsection (1) of section 60 it clearly does not include a sub-officer, since an appeal from the decision of a sub-officer would normally be in the first place to the inspector or other officer in charge of the police station or district.

It is difficult therefore to find any reason for giving a wider connotation to the phrase "superior officer" in section 49 (1) (d). The section provides severe penalties and automatic dismissal from the force for any sub-officer or constable who is found guilty of any of the offences set out therein. These are described in the marginal note as "serious offences" and cover mutiny and sedition or incitement to mutiny or sedition, failing to do his utmost to suppress a riot, failing to give information of actual or intended mutiny, rebellion or insurrection and

> (d) assaulting a magistrate or any superior officer;
> (e) drawing or offering to draw or lift up any weapon, or offering any violence against any magistrate or officer.

So far as we have been able to discover this section was first enacted in the Colony as section 51 of the Police Force Ordinance 4891 (Ordinance No. 17 of 1891) and appears to have been taken, with necessary modifications for its application to a police force, from sections 7 and 8 of the Army Discipline and Regulation Act, 1879 (now sections 7 and 8 of the Army Act), although it may be noted that the phraseology of the last paragraph of the section follows more closely that of Article 16 of the Articles of War as enacted in the Naval Discipline Act.

But whatever its origin the meaning of section 51 of the Ordinance of 1891 was perfectly clear. The relevant provisions read:—

51. Every Non-Commissioned Officer or Constable who.....
(4) Assaults a Magistrate or any superior Officer under whom he is for the time being placed; or
(5) Draws or offers to draw or lift up a weapon or offers any violence against any such Magistrate or Officer,

shall be liable to be tried by a Court Martial and may be placed under arrest by any superior Officer under whose order or command he may then be etc.

It is clear from the other provisions of that Ordinance (as well as from the use of the capital letter in Officer), that the term "superior Officer" did not then include a Non-Commissioned Officer and that no distinction was intended between the meaning of "Officer" in paragraphs (4) and (5) of the section.

The Police Ordinance, 1928 (Ordinance No. 37 of 1928) introduced the class of sub-officers, as now defined, and the section was re-enacted, with modification, as section 49, the relevant provisions being as follows: —

49. (1) Any sub-officer or constable who .....
(d) assaults a magistrate or any superior officer, or
(e) draws or offers to draw or lift up any weapon or offers any violence against any such magistrate or officer shall be guilty of an offence, etc.

We observe that although the scope of these paragraphs widened by deletion of the words "under whom he is for the time being placed" yet there is still no distinction drawn between the meanings of "officer" in paragraphs (d) and (e). The definitions of "officer," and "sub-officer" in the Ordinance of 1928 are identical with those in section 2 of Chapter 30 and, if it had been intended to widen the scope of these two paragraphs to include acts directed against sub-officers, one would have expected that class to be expressly mentioned as was done in so many other sections of the Ordinance.

In the section now under consideration, that is, section 49 of |the Constabulary Ordinance, Chapter 30 of the Revised Edition of 1926, the word "such" has been omitted from paragraph (e). The effect of this omission is that the word "superior" is not to be implied before "officer" in. that paragraph and, therefore, that "officer" cannot be interpreted otherwise than as defined in section 2. In other words if we accept the interpretation which the Crown seeks to put upon the expression "superior officer" in paragraph (d), it must follow that the omission of the word "such" in paragraph (e) has effected an alteration or amendment in the substance of the paragraph in question, and this, if intentional, would be *ultra vires* the powers of the Commissioner constituted by the Statute Law Revision Ordinance as limited by section 6 of that Ordinance. No such difficulty arises if the expression "superior officer" is limited to "officers" as defined in section 2. It is of course possible that the word “such" was omitted *per*

incurian, but, however that may be, there is no legislative authority for putting different constructions upon the material words in the two paragraphs and we have therefore to read paragraph (e) as it was enacted in the Police Force Ordinance 1928.

We think it pertinent to observe that the interpretation which the Crown seeks to put upon the expression "superior officer" in section 49 is not only inconsistent with that borne by the same expression in section 60 but would also greatly enlarge the scope of the offences created by the two last paragraphs of subsection (1) as compared with their scope as originally enacted in 1891. An assault upon or the offer of violence to an officer by a sub-officer or constable is rightly regarded as a serious act of insubordination, but it may be far otherwise when the person assaulted or threatened is a sub-officer. Non-commissioned officers and constables have to share quarters in police stations and barracks and to live in close and constant proximity. It is probable therefore that they may from time to time become involved in petty disputes resulting in an assault or the violent laying of hands upon a Non-commissioned officer. Since the repeal of the Ordinance of 1891 the offence of "assaulting a superior officer" has not been limited to acts done while under the command of the superior officer and therefore any assault, however technical or trivial and whether committed while on or off duty, will render the offender liable to the severe penalties which follow from a conviction under section 49.

It is significant that section 8 of the Army Act draws a clear distinction between the punishment for striking or threatening a superior officer, being in the execution of his duty, and the same offence when the officer is not in the execution of his duty. Furthermore section 190 of that Act expressly defines "superior officer", when used in relation to a soldier as including a warrant officer and a non-commissioned officer. Similarly section 86 of the Naval Discipline Act defines "superior officer" as including all officers, warrant officers, petty and non-commissioned officers. There is no corresponding definition of this expression in the Constabulary Ordinance of this Colony and this Court cannot violate the rules of construction in order to repair the omission if such it be.

We have reached our conclusion with some regret as we are fully alive to the necessity for maintaining the discipline of the Police Force and there is nothing to be said in favour of the appellant's conduct in this matter. If, however, the decision discloses a defect in the disciplinary provisions of the Ordinance or shews that the section under consideration needs recasting as a result of the successive amendments set out above, that is a matter for the consideration of the Legislature.

In the result this appeal must be allowed with costs and the conviction and sentence must be set aside.

Appeal allowed.

I. CLARKE *v.* J. J. F. HUTT.

IRIS CLARKE, Appellant (Defendant),

v.

JOHAN JOSEF FRANCOIS HUTT, Respondent (Plaintiff),

[1948. No. 604.—DEMERARA].

BEFORE FULL COURT: WORLEY, C.J., LUCKHOO, J. AND JACKSON, J. (Acting).

1948. NOVEMBER 10, 26.

Rent restriction—Order of possession made—Subject to a condition as to coming into force—Re hearing of application—Altered circumstances—What are—Rent Restriction Ordinance. 1941 (No. 23), *section* 13 (2).

A magistrate made, under the Rent Restriction Ordinance, 1941, an order for possession subject to the condition that it should not become effective unless and until the landlord was granted a hotel licence in respect of the premises.

At the time of the making of the order for possession, there were sufficient rooms empty and available for the landlord to satisfy the requirements of the Licensing Board, and the Magistrate understood that the tenant did not intend to do anything to obstruct the landlord's application for a licence. Before a person can obtain a hotel licence, he has to furnish 10 rooms and to comply with the law in other respects to the satisfaction of the Licensing Board. The tenant, however, prevented the landlord from doing this by putting some pieces of old and dilapidated furniture in the rooms; and the rooms were in a filthy condition.

The landlord applied to the Magistrate, under section 13 (2) of the Rent Restriction Ordinance, 1941 (No. 23), to re-hear the application for possession and to revise the decision thereon, on the ground of altered circumstances. The Magistrate deleted the condition attached to the order for possession, and fixed a date for the delivery of possession.

The tenant appealed on the ground that there were no altered circumstances.

Held that the acts and conduct of the tenant effected an alteration in the circumstances as they had existed at the time of the making of the order.

APPEAL by Iris Clarke from an order made by the Magistrate of the Georgetown Judicial District under section 13 (2) of the Rent Restriction Ordinance, 1941, (No. 23) on the application of her landlord, the respondent Johan Josef Francois Hutt, cancelling the condition attached to an order for possession made in favour of the respondent.

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

John Carter, for respondent.

Cur. adv. vult.

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

In this matter the appellant appeals from an order made by the Magistrate and Rent Assessor, Georgetown, in exercise or purported exercise of his powers of revision under sub-section (2) of section 13 of the Rent Restriction Ordinance 1941 (Ordinance No. 23 of 1941). The sub-section reads as follows: —

> "A magistrate shall have full powers to rehear any application and to revise any decision in any case in which, in his opinion, altered circumstances make it just that he should exercise such powers,"

The only ground of appeal which was argued before us was that the decision was wrong in law because there was no evidence of altered circumstances to give the Magistrate jurisdiction to revise his previous order.

The facts and history of this matter so far as appear from the record of the appeal are as follows. The appellant is tenant to the respondent on a monthly tenancy of the first and second floors of a building on lots 9 and 10 Holmes Street, Georgetown, where she carried on the business of a boarding house. In 1946 respondent terminated the contractual tenancy by notice and obtained an order for possession on the ground that he wished to repair the premises. The appellant however (apparently by mutual arrangement remained in occupation while the repairs were being done but paid no rent after November 1947. There was a conflict of evidence as to when the repairs were completed and whether the appellant was or was not to pay rent while they were in hand and on these points the Magistrate has made no finding. He finds however that the appellant has not restarted her boarding house and has "only furnished two rooms properly."

In March 1948, respondent served on the appellant another notice to quit with which she did not comply and he thereupon applied for an order of possession on the ground that the premises were required by him for use by himself for business purposes, namely, as a hotel in respect of which he had applied to the Licensing Justices for a licence. On June 7th 1948 the Magistrate made an order for possession subject to the condition that it should not become effective unless and until the respondent was granted a hotel licence in respect of the premises. Neither party appealed from this order and both must therefore be taken to have accepted it.

On the top or second floor there are eight rooms and on the first floor seven. At the date of the order the appellant was occupying only two of these. Before the respondent could obtain a hotel licence he had to furnish at least ten rooms and to comply with the law in other respects to the satisfaction of the Licensing Justices. The appellant however prevented him from doing this by putting some pieces of old and dilapidated furniture in the rooms and on the 16th June the respondent applied to the Magistrate for a review of his order. At the hearing of this application an officer who inspected the premises on July 15th in connection with the respondent's application for a licence gave evidence that none of these rooms appeared to be occupied, that the pieces of furniture were not arranged for occupation and that the rooms were in a filthy condition. He informed the respondent that he could not get a hotel licence until he could comply with the law by cleaning and furnishing the requisite number of rooms. The respondent withdrew his application for a hotel licence but has since made a fresh application. On this evidence the Magistrate reviewed his previous order by deleting the condition attached to it and substituting an order for possession on 16th September 1948. His reasons for so doing are stated thus: —

> "In view of the fact that the order of 7.6.48 was absolutely ineffective and would not have been made if I had been aware

of the true position; in view of the fact that the tenant has, by throwing odd bits of furniture into unoccupied rooms since the Order, made it impossible for the landlord to obtain his hotel licence, and in view of the fact that, according to Mr. Howard, who visited the premises since the order was made, the premises do not appear to be occupied and are being allowed to be kept in a dirty condition, I considered that the order I had made should be reviewed. I therefore reviewed it by cancelling the condition attached to the order and by extending the order for possession until the 16th September.

In my view it would have been ridiculous to allow the order of 7th June to remain, as in the circumstances it would be completely ineffective."

Mr. Humphrys for the appellant has argued that there are here no "altered circumstances" which can ground the jurisdiction in revision, that the order of 7th June left the appellant in possession as statutory tenant of all the rooms comprised in her tenancy and that by virtue of section 10 (1) of the Rent Restriction Ordinance 1941 (Ordinance No. 23 of 1941) she was entitled to exclusive possession of these rooms and was not bound to permit the respondent to enter them or any of them for the purpose of cleaning and furnishing them; that the possibility of her furnishing these rooms was a circumstance which existed on the date of the original order for. possession and that neither the fact that she has done so in exercise of a legal right, even though done to prevent the respondent from obtaining a hotel licence and in order to defeat and nullify the Court's order nor any misconception by the Magistrate of the appellant's rights as tenant could constitute an "altered circumstance."

We are unable to accept this argument. In the first place, whatever may have been the arrangements for the payment of rent during the execution of the repairs, it is clear that the repairs were completed in May of this year at the latest, yet the appellant has neither resumed nor tendered payment of rent and is therefore herself in breach of observance of the terms and conditions of the original tenancy.

In the second place, the appellant's statutory tenancy depends upon the Magistrate's order of June 7th and it is, to say the least, unusual for a party whose rights flow from an order of Court to claim to be entitled so to act as to render the order ineffective.

In our view the learned Magistrate was fully justified in finding that circumstances had so changed as to give him jurisdiction to exercise his powers of revision. When he says that he would not have made the order conditional if he had been aware of the true position, we understand him to mean (not that he in any way misconceived the legal rights or position of the parties) that he knew and understood there were sufficient rooms empty and available for the respondent to satisfy the requirements of the licensing authorities and that they would remain so. In other words that the appellant did not intend to do anything to obstruct the respondent's application for a licence. On that view the appellant's action effected an alteration in the circumstances as they had clearly existed at the date of the order.

There are no grounds for holding that the discretion vested in the Magistrate by section 13 (2) was exercised unreasonably.

In this connection, we note that the appellant did not in the revision proceedings raise the question of alternative accommodation and that the respondent offered her the occupancy of four rooms although she is at present only occupying two but this offer was not accepted.

The appeal is dismissed with costs and the Magistrate's order for possession confirmed: the order to take effect from 1st day of December, 1948.

Appeal dismissed.

Solicitors: *E. D. Clarke; H. B. Fraser.*

N. A. QUAIL, Appellant,

v.

AGNES LOUISA POLLARD. Respondent.

(1948. No. 239.—DEMERARA) .

Before Full Court: WORLEY, C.J., LUCKHOO, J. and JACKSON, J. (Acting).

1948. November 11, 26.

Landlord and tenant—House raised off ground on posts—Tenant's interest therein—Chattel interest.

Licence—Prima facie revocable—When irrevocable—Where coupled with or granted in aid of a legal interest—Nature of such interest—Chattel interest or interest in realty.

Landlord and tenant—Chattel house—Tenant of—To have licence to use passage way for ingress and egress to and from house or public road—Licence not an "interest in or concerning immovable property"—Civil Law of British Guiana Ordinance, cap. 7, *section* 3 *proviso* (*d)—Licence necessary incident of contract of letting—Irrevocable—So long as tenancy subsists*

Statute of Frauds—Tenant of chattel house to have licence to use passage way for ingress and egress to and from house or public road—Licence not an "interest in or concerning immovable property"—Civil Law of British Guiana Ordinance, cap. 7, *section* 3, *proviso (d).*

The usual type of house in the Colony raised off the ground on posts is movable property, and, where such a house is let, the tenant's interest therein is a chattel interest.

A licence to enter a man's property is *prima facie* revocable, but is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser, and the interest so conferred may be purely a chattel interest or an interest in realty.

James Jones & *Sons, Ltd.,* v. *Earl of Tankerville* (1909) 2 Ch. 440, 442; and *Winter Garden Theatre (London) Ltd.* v. *Millenium Productions, Ltd.* (1949) A.C. 173, 188, 189, applied.

A grant of chattels can be made without any formality, and will nevertheless make irrevocable any licence connected with it.

Where it is one of the terms and conditions of a tenancy of a chattel house that the tenant should have a licence to use a passage way for the purpose of ingress and egress to and from the house or the public road, such licence is not an "interest in or concerning immovable property" within the meaning of proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, Chapter 7.

Further the licence as a necessary incident of the contract of letting is irrevocable, so long as the tenancy subsists.

APPEAL by N. A. Quail from the decision of the Magistrate

of the Georgetown Judicial District awarding damages to the respondent Agnes Louisa Pollard for breach of contract.

S. I. Cyrus, for appellant.

H. C. Humphrys, K.C., for respondent.

Cur. adv. vult.

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

This appeal is from a decision of a Magistrate of the Georgetown Judicial District awarding the respondent damages and costs for breach of contract.

The facts are that about ten years ago the respondent (plaintiff in the Court below) became a monthly tenant under an oral agreement of a cottage situated on the back portion of lot No. 1 Lamaha Street, Georgetown. It was a necessary incident of her tenancy and an implied term of the contract that she should have a way of ingress and egress to and from the cottage to the public road and, in fact, from the beginning of her tenancy she had access to the cottage across lot No. 1 by a path and gateway leading to Lamaha Street. The Magistrate viewed the premises at the request of both parties and has found, as a fact that the pathway in question was laid down specifically for the use of the cottage occupied by the respondent and for no other purpose. It is a broad well-made-up path leading directly to the front steps of the cottage.

In 1945 the appellant became the owner of lot No. 1 including the yard, the building in the front portion of the lot (which he occupied himself) and the respondent's cottage. The respondent attorned tenant to the appellant, remained in occupation of the cottage paying the same rental and continued, with the appellant's knowledge and consent, to use the passage way in question, which was in fact the only means of access to the cottage. It is therefore reasonable to infer that it was understood by both parties that the respondent was to continue to enjoy all the incidents of her tenancy as before. Appellant's servants also used a portion of the path to get to the back steps of his house but this is only material as shewing that the respondent had no exclusive user of the path.

In December, 1946, the appellant determined the contractual tenancy by a notice to quit and in February, 1947, sued the respondent for possession. An order for possession was made in July but was subsequently rescinded on October 14, 1947, on respondent's application. The respondent therefore remained in possession as a statutory tenant and, by virtue of section 10 of the Rent Restriction Ordinance, 1941, was entitled to the benefit of all the terms and conditions of the original contract of tenancy. On October 19, that is, five days later, the appellant blocked the passage way used by respondent by extending across it a line of palings which ran at the back of the front house, and provided an alternative means of ingress and egress to the cottage by making a gateway leading into another yard, which is also the appellant's property and which gave access to Lamaha Street. The Magistrate found that this alternative route was

through a tenement yard which was very muddy and duty with planks laid for the purpose of crossing pools of water. It also led past some very dirty latrines and, in his opinion, was entirely unsuitable for a person of the respondent's position. He found that it in no way compared with the entrance formerly provided and that the respondent had suffered considerable inconvenience. He disbelieved the evidence led on behalf of the appellant that the respondent had so used the original passage as to cause a nuisance to the appellant and found that the appellant's act in blocking that way was maliciously done because she was annoyed at the rescission of the order for possession and wished to force the respondent to leave her cottage.

The only ground of appeal which it is necessary to consider is the allegation that the claim disclosed no cause of action because the "alleged contract for user of the passage was a mere permissive right, a bare licence not capable of being assigned and the same was not evidenced in writing nor was there such acknowledgement in writing by the plaintiff (sic) to satisfy the statute of frauds." We assume that these last words are intended as a reference to paragraph (d) of the Proviso to section 3. of the Civil Law of British Guiana Ordinance (Chapter 7).

This ground of appeal assumes that the right claimed by the respondent to have access to the demised premises amounts to "an interest in or concerning immovable property" and is based on the decision in Wood v. Leadbitter (1845) 13 M. & W. 838. The authority of that case has been impugned by Viscount Simon and Lord Porter in Winter Garden Theatre (London) Ltd. v. Millenium Productions Ltd (1948) A.C. 173. It is moreover fallacious to assume that the respondent had a mere permissive right or a bare licence, or that the right of access incident to her tenancy constituted an interest in land. "A licence to enter a man's property is *prima facie* revocable but is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser and the interest so conferred may be a purely chattel interest or an interest in realty" — per Parker J. in James Jones & Sons Ltd. v. Earl of Tankerville (1909) 2 Ch. 440 at p. 442. It is an example of the principle that a man may not derogate from his own grant. See also the opinion of Viscount Simon on licences generally and on the case of Hurst v. Picture Theatres Ltd. (1915 1 K.B. 1) in the Winter Garden Theatre case at pp. 188-189.

In the instant case, it appears that the cottage in question was of the usual type of local house raised off the ground on posts and was therefore movable property and the respondent's interest therein created by the tenancy was a chattel interest. A grant of chattels can be made without formality and will nevertheless make irrevocable any licence connected with it. It follows therefore that the proviso to section 3 of the Civil Law Ordinance has no application to this case and that the licence to afford access to the cottage across the appellant's land, as a necessary incident of the contract of letting, is irrevocable so long as the tenancy subsists.

The exact extent and conditions of such a licence are a

matter of construction of the contract, if written, or, if it is unwritten, of necessary or reasonable implication. The right to pass and repass in this case is in no sense an easement as the whole property in the land remained in the appellant (Brown v. Alabaster (1888) 37 Ch.D. 490 at p. 500). The question is. therefore, whether the parties intended that the respondent should have a right (as she contends) to pass and repass by the particular path laid down to her house and used by her for ten years or whether (as the appellant contends) the contract was to give her merely a means of access by any route which the appellant chose to make available. The difficulty in accepting the former view is that it involves the assumption that the appellant was consenting to a restriction on his full use of the front portion of the lot. Suppose, for instance, that he wished to extend his house over the pathway but could provide an equally convenient route through lot 1 by the other side of his house, is it not reasonable to suppose that, if this had been in contemplation of the parties, they would have agreed to it? Or, again, suppose that the original access had been by the present inconvenient route and the appellant, for good reason, wished to close that and offered the respondent the more convenient route past his house; in such case the respondent would have suffered no damage nor had any ground for complaint. On the other hand, it seems equally unlikely that the respondent would have agreed, had the matter been in her contemplation, that her means of access should be at the whim of the appellant, or across the land of the adjoining lot. If the means of access is over the land of Lot 1, she can enforce her right against any purchaser of that lot who accepts her as a tenant: moreover, Municipal regulations will prevent any subdivision of the lot which would leave the back portion on which her cottage is situated "land locked" and without access to the street: see the Georgetown Town Council Ordinance (Chapter 86) section 126. If, however, the appellant should dispose of the adjoining lot, there would be no contractual relationship between the respondent and the purchaser from the appellant on which she could rely to enforce a right to pass and repass across that lot.

We think therefore that it is reasonable to infer that the intention of the contracting parties was that the respondent should continue to use the route which she had used for so long and that the appellant would not interfere with it except for good cause and, if such cause arose, that he would provide the tenant with an alternative and equally convenient means of access.

That is not what has happened. The Magistrate has found that the appellant's act in blocking the pathway was malicious and spiteful and that he thereby committed a breach of his contract. We think that the learned Magistrate was entirely correct in. treating the case as arising simply out of contract and agree with his conclusions.

The appeal is dismissed with costs and the judgment for the plaintiff in the sum of $50 with costs $16.40 in the Court below affirmed.

Appeal dismissed.

J. INSANALLY *v.* THE TOWN CLERK OF G'TOWN.

JANET INSANALLY, Applicant,

v.

THE TOWN CLERK OF GEORGETOWN. Respondent.

[1948. No. 533.—DEMERARA]

BEFORE WORLEY. C.J. IN CHAMBERS:

1948. September 20, 25; November 23; December 4.

Georgetown—Building By-Laws. 1945, (No. 1 of 1946)—*For what purpose designed—To control erection and siting of buildings in the common meaning of that word—Inapt to deal with the erection of fences.*

Georgetown—Sub-division of lots—Certificates of Town Clerk for a portion of a lot—Only that provisions of Georgetown Town Council Ordinance, cap. 86 *will not be contravened—Except as otherwise provided in section* 128 *of the Georgetown Town Council Ordinance, as enacted by section* 24 *of the Georgetown Town Council* (*Amendment*) *Ordinance.* 1946 (No. 29).

Georgetown—"This Ordinance"—Georgetown Town Council Ordinance, cap. 86, *section* 129 (1)—*Meaning of—Does not include by-laws made or in force under Ordinance.*

The Georgetown Building By-Laws 1945 (No. 1 of 1946) are clearly designed to control the erection and siting of buildings in the common meaning of that term and are inapt to deal with the erection of fences.

Except as otherwise provided in section 128 (4) (b) of the Georgetown Town Council Ordinance, Chapter 86, as enacted by section 25 of the Georgetown Town Council (Amendment) Ordinance, 1946 (No. 29), the Town Clerk, under section 129 (1) of the Georgetown Town Council Ordinance, is only called upon to certify that the proposed sub-division will not contravene sections 125 to 128 inclusive, restricting the sub-division of the lots.

The expression "this Ordinance" in section 129 (1) of the Georgetown Town Council Ordinance, Chapter 86, does not include by-laws made or in force under the Ordinance.

APPLICATION by Janet Insanally (also known as Zinat Tulnisha) the wife of Shekh Sher Mohamed Insanally, for an order under section 129 (5) of the Georgetown Town Council Ordinance, Chapter 86, to compel the Town Clerk of Georgetown to issue a certificate under section 129 (1) in respect of the south half of lot 192 Charlotte and Wellington Streets, Lacytown, Georgetown. The said half lot has a frontage on Wellington Street.

Applicant (by her attorney S. S. M. Insanally), in person.

H. C. Humphrys, K.C., for respondent.

Cur. adv. vult.

WORLEY, C.J.: This is an application brought under subsection (5) of section 129 of the Georgetown Town Council Ordinance (Chapter 86) for an order to compel the Town Clerk of Georgetown to issue a certificate under subsection (1) of the same section in respect of a proposed transport of the South half lot No. 192 Charlotte and Wellington Streets, Lacytown, Georgetown.

The applicant has entered into a contract to purchase the said lot and is desirous of selling the South half with the two-storeyed building on it with the object of helping her to finance the purchase of the whole lot. The North half also has on it one large

two-storeyed dwelling-house which overlaps or bestrides the East-West middle line of the lot and encroaches on the South half for about 12 feet. The proposed demarcation line between the two halves would therefore pass through this building, which is a substantial one standing on 10 foot piers and could not easily be moved. The "facade" of lot 192 is towards Charlotte Street but the building on the South half faces Wellington Street and the South half-lot, if subdivision were made, would have a frontage to that street.

Section 125 of the Georgetown Town Council Ordinance prohibits any subdivision of lots of land within the city in less portions than half lots (except as otherwise provided in section 128) and declares void any transport contrary to the section. Section 126 provides:

"From and after the commencement of this Ordinance, a lot may not be sub-divided by transport so as to create for the time being a separate ownership of the land, in less portions than half lots, or in such a way as to cut off any portion of the lot from proper drainage, or to interrupt or interfere with the proper drainage of any portion of the lot, or unless each portion of the divided lot has a frontage to a street."

Section 129 (1) provides that no transport shall be passed for any portion of a lot of land in the city less than a whole lot except upon production to the Registrar of Deeds or the Judge of a certificate signed by the Town Clerk that the "provisions of this Ordinance will not thereby be contravened." Sub-section (3) declares that anyone desiring to sell or to purchase any portion of a lot less than a whole lot may at any time obtain a similar certificate.

The applicant accordingly applied to the Town Clerk for the prescribed certificate which was refused on the ground that the proposed division would contravene the Building By-Laws made under the Ordinance. In the subsequent correspondence (copies of which were exhibited to the affidavit in support of this application) the City Engineer admitted that the division of the lot into north and south halves would not offend in any way against any of the provisions of section 126 relating to drainage or frontage to a street. During the hearing, counsel for the respondent stated that the specific by-laws which would be contravened by the proposed sub-division would be the Georgetown Building By-laws, 1945 numbers 23 and 24 (No. 1 of 1946); and the By-laws relating to the marking of boundaries, etc., made and confirmed on 26th July 1917 (No. 64 of 1917 Official Gazette of 18th August 1917). The relevant portions of these two Building By-laws read as follows: —

> "No part of a new building or alteration or addition to an existing building or any other construction, except the eaves of the main or other roof of the building, shall project beyond the boundary line of any lot on the frontage of any street or other public way." and "No new building or alteration or addition to an existing building or other construction shall be so erected or made on any lot that any portion of the new building or of the alteration or addition to any existing building or other construction shall stand or be less than six feet from either of the side lines or the back boundary

line of the lot on which the new building is erected or the existing building stands."

It may be noted here that the Building By-laws define "building" as including "any fence, rail, palings" and define "lot" as meaning "any parcel of land in any ward of the city described as a lot by a number or a letter in the valuation list for the city made under the Georgetown (Valuation and Rating) Ordinance 1942, or any lawful subdivision thereof, or any parcel of land appearing in the said list although not so described." These By-laws are to be construed with the By-laws of 1917 above mentioned (which I will refer to for convenience as the Fencing Bylaws) and these latter provide, inter alia, that boundary palings shall be erected between all lots or portions of divided lots owned by separate persons. (Fencing By-law 2).

I indicated during the argument that in my opinion Building By-law 23 could have no application as there was no evidence that any part of either building would project beyond the boundary line of the proposed half lots on their frontage to the street. I also indicated that Building By-law 24 could not apply as there was nothing in the proposed subdivision which would bring either building within the definition of a "new building" enacted in Bylaw 16 of the Building By-laws.

The respondent therefore fell back upon the question of the fencing between the proposed half lots. He argued that by virtue of the definitions of "building" and "building operations" in the Building By-laws 1945 the erection of a boundary paling between the divided lots would be a building operation for which plans would have to be submitted to the City Engineer and his approval obtained thereto and that, in fact, it would be impossible for the applicant to comply with the requirements of Fencing By-law No. 2. To this the applicant rejoined that there would be no difficulty in erecting the necessary fence between the lots as the house which straddles the boundary is raised 10 feet off the ground and the fence could be constructed to pass underneath it.

I think counsel for the respondent was conscious that his argument verged on a *reductio ad absurdum* and were it necessary to decide the application on this narrow ground I should feel compelled to reject it as manifestly unreasonable and unfair. Although the definition of "building" in the Building By-laws does include "fence, rail and palings" yet there is no further reference to these in the By-laws themselves which are clearly designed to control the erection and siting of buildings in the common meaning of that word and are inapt to deal with the erection of fences.

There is however a more satisfactory and substantial ground on which the application can be decided. The appellant contended that the words "provisions of this Ordinance" in section 129 (1) have reference only to the preceding provisions of sections 125, 126,127 and 128 restricting the sub-division of lots in the city and were not intended to refer to By-laws made under the Ordinance, and that since, in the instant case, the respondent has admitted the proposed division will not contravene section 126, the Town Clerk was wrong in refusing his certificate on the grounds of some real or supposed infringement of the By-laws.

In support of his argument he adduced several instances, some as recent as 1946 where a certificate has been given in respect of divisions of lots where the houses on one half-lot encroached on the other half-lot. In some, at least, of these cases the buildings were on ground level and there could be no compliance with the Fencing By-laws. Any difficulty arising from the separation of ownership of the land appeared to have been avoided by the device of granting a lease of the area encroached upon to the owner of the encroaching building. These instances shew that in the past the Town Clerk appears to have interpreted the relevant sections in the sense that the appellant now contends for but, of course, this consideration could not be permitted to override the correct interpretation of the Law if the Court held otherwise.

The respondent on the other hand contended that the words "this Ordinance" were intended to and do include the Building By-laws and the Fencing By-laws. His argument was that as they have been made in exercise of powers conferred by the Ordinance and subsequently approved by the Legislature (see section 215 of the Ordinance: subsections (1), (2) and (3) and section 21 of the Interpretation Ordinance Chapter 5) they had consequently become part of the statute (see Dale's Case 1881 6 Q.B.D. 376 at p. 455 per Brett L.J.). This as a general proposition is indisputable and would be of great moment if I were considering the question whether the By-laws were *ultra vires.* But the actual question I have to consider is what the Legislature intended when they used the words "this Ordinance." It is reasonable to presume that the same meaning is implied by the use of the same expression in every part of a statute. Accordingly, in ascertaining the meaning to be attached to this particular phrase in section 129 of the Ordinance though the proper course would seem to be to ascertain that meaning, if possible, from a consideration of the section itself yet, if the meaning cannot be so ascertained, other sections may be looked at to fix the sense in which the word is so used (see Spencer v. Metropolitan Board of Works (1882) 22 Ch. D. 142).

Now, if I look at the group of sections headed "Subdivision of Lots" (sections 125-129) in the Ordinance, I find that the mischief aimed at is the "fragmentation" of lots whereby lots might be subdivided into portions of unsuitable size or without proper drainage or without a frontage to a street. To prevent this mischief certain restrictions are imposed by the provisions of sections 125, 126, 127 and 128; and section 129, by requiring the production of the Town Clerk's certificate on the transport of any portion of a lot, provides machinery for enforcing those restrictions. Section 128 of the Ordinance gives power to the Town Council to consent to the transport of less than half a lot, such portions being designated as "sub-lots." In this section, as re-enacted by section 24 of the Georgetown Town Council (Amendment) Ordinance (No. 29 of 1946), it is provided in sub-section (4) thereof that the consent of the Council shall not be given

> "(b) unless the City Engineer has first certified to the Council that the requirements of the by-laws relating to buildings and drainage will not be contravened if the consent is given."

Sub-section (7) provides that where the Council gives its consent under the section to the transport of a sub-lot the Town Clerk shall issue his certificate under section 129 in relation to the sub-lot.

Now, if the respondent is correct in his contention that in every case when the Town Clerk issues his certificate he has to satisfy himself that there will be no contravention, not only of the provisions of the preceding sections, but also of the Council's By-laws and in particular those relating to buildings and fencing then the paragraph (b) referred to above would be mere surplusage. Such a construction is one which ought not to be readily applied if there is a reasonable alternative.

Turning to other sections of the Ordinance for assistance I find that section 227 refers to "proceedings taken by or in the name of the Town Clerk or any officer of the Council under any of the provisions of this Ordinance or the by-laws." This reference to the by-laws would again appear to be surplusage if the interpretation of "this Ordinance" contended for by respondent is correct.

Further, I find that a specific reference to by-laws was introduced in 1946 into section 118. That section, as enacted in 1918, provided that every town constable, "for the purpose of carrying out and enforcing the provisions of this Ordinance in relation to any offence against or breach of them" should have the powers privileges and immunities of a police constable.

This section was repealed and re-enacted by section 2 of Ordinance No. 19 of 1946 and, as re-enacted, provides that the town constable shall enjoy these powers, privileges and immunities

> "for the purpose of executing or enforcing the provisions of this Ordinance or of any by-laws in force thereunder in relation to any offence against this Ordinance or breach of any of the said by-laws."

Now I cannot think that I should be justified in treating this amendment as surplusage or as having been made per incuriam. The natural inference to be drawn is that the Legislature was advised in 1946 that the expression "this Ordinance" was not apt to include By-Laws made under the Ordinance and that, the intention being to invest town constables with the requisite power to take action for offences against the By-laws, the amendment was enacted to give effect to that intention. Similarly with the reference to By-laws in section 128 (4) (b) as re-enacted in 1946. It must follow therefore that the expression "this Ordinance" as used in section 129 (1) is not apt to include By-laws made under the Ordinance and that, except as otherwise provided in section 128, the Town Clerk is only called upon to certify that the proposed sub-division will not contravene any of the provisions of the preceding sections restricting the sub-division of lots.

It is admitted in the present case that there will not be any contravention of the relevant section 126. In my view therefore

the Town Clerk was wrong in refusing the certificate applied for and I accordingly order him to do so.

Application granted.

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

EDITOR'S NOTE.—The Town Clerk of Georgetown appealed to the West Indian Court of Appeal, and the appeal (No. 1 of 1949) was heard on the 7th and 17th March, 1949. The Court of Appeal held (1) that the expression "this Ordinance" used in section 129 of the Georgetown Town Council Ordinance, Chapter 86, must necessarily include the by-laws made under the Ordinance; (2) that the issue of the certificate would not cause a contravention of the Ordinance or of the Building By-laws or of the Fencing of Lots By-laws. The appeal was therefore dismissed with costs.

THE WEST INDIAN COURT OF APPEAL

REPORTS OF DECISIONS

OF

THE COURT

SITTING IN

TRINIDAD AND **TOBAGO**

[1948.]

AND IN

BRITISH GUIANA

[1948.]

JUDGES OF THE COURT:

C. FURNESS-SMITH, C.J., Trinidad and Tobago, President.

Sir ALLAN COLLYMORE, C.J., Barbados.

Sir CLEMENT MALONE, C.J., Windward Islands and Leeward Islands.

N. A. WORLEY, C.J., British Guiana.

D. SAMMAH & I. BRATHWAITE *v.* A. R. SAMMAH.

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of Trinidad and Tobago

Between:—

DORA SAMMAH AND IRVING BRATHWAITE, Appellants,
and
ABEL RUTHVEN SAMMAH, Respondent.
(TRINIDAD AND TOBAGO No. 1 AND No. 2 OF 1947).

BEFORE FURNESS-SMITH, PRESIDENT, (C.J. TRINIDAD AND TOBAGO),
COLLYMORE, C.J., BARBADOS, AND WORLEY, C.J., BRITISH GUIANA.
1948. MARCH 9.

Husband and wife—Dissolution of marriage—Petition for—Adultery—Proof of—Must be beyond reasonable doubt.

Adultery must be approved beyond reasonable doubt.

Churchman v. Churchman (1945) A.E.R. 195, and *Ginesi* v. *Ginesi* (1947) 2 A.E.R. 438, applied.

APPEAL by Dora Sammah and Irving Brathwaite from a judgment of the Supreme Court of Trinidad and Tobago finding on the petition of Abel Ruthven Sammah that Dora Sammah and Irving Brathwaite had committed adultery with each other, and granting Abel Ruthven Sammah a *decree nisi* of dissolution of marriage against his wife Dora Sammah.

The judgment of the President was as follows:

This is an appeal by the co-respondent Brathwaite and the respondent Dora Sammah from the decision of the learned trial judge granting to the petitioner, Abel Sammah, a decree of divorce by reason of the adultery of the respondent and co-respondent at the house of the respondent at Arima on the 21st January, 1945. The petitioner and respondent were married in April, 1925, but separated in March, 1931, and have not since lived together. A previous petition for divorce failed in 1940, and the respondent then obtained a maintenance order against the petitioner for seven dollars a week and two dollars a week in respect of each of her two children.

In the present petition two acts of adultery were charged, one on the 18th January, 1945, and the other on the 21st January, 1945, both alleged to have occurred at the respondent's home at Arima, where she was living with her two daughters, aged at that time eighteen and sixteen years respectively. The trial judge found that the evidence adduced in regard to the incidents of the 18th January was insufficient to establish adultery. The case presented in proof of adultery on the 21st January was such that, if believed, no other inference was possible. The Judge accepted that evidence, and it is in respect of this finding of fact that the present appeals are made.

The principles governing the functions of an appellate court in regard to issues of fact are well settled. In the argument before us, the judgment of Lord Sumner in s.s. Hontestroom *v.* Sagaporack (1927) A.C. 37 was, I think, principally relied upon

by both sides for the enunciation of those principles. I have carefully considered that judgment and numerous others, including those of Lord Loreburn in Kenlock *v.* Young (1911) S.C. H.L. 1 & 4, Lords Simon and Thankerton in Watt *v.* Thomas (1947) 1 A.E.R. 583 and the decision of the West Indian Court of Appeal in Roberts *v.* Battoo Bros. (1939). The view which I take in the present case is, I believe, in full accord with the principles there enunciated.

Before proceeding to examine the facts in issue in this case and the quality of the evidence adduced to establish them, it seems material to observe that at the close of the case before the trial judge, counsel on neither side thought fit to address the Court in regard to the salient features affecting its decision in the complicated circumstances presented by the conflicting testimony adduced. This, I think, imposed an unfair burden upon the trial judge, and the great advantage which we have had by reason of the close analysis of the evidence and the arguments submitted on each side outweighs, in my estimation, that which the trial judge had, and we have not, by reason of seeing and hearing the witnesses and studying their demeanour and the drift and conduct of the case. In Churchman v. Churchman (1945) 2 A.E.R., at page 195, it is stated by Lord Merriman as a rule of law that the same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called, and this rule is cited with approval in Ginesi v. Ginesi (1947) 2 A.E.R. 438. I assume, of course, that the trial judge was aware of the rule, and that he carefully analysed the oral evidence in all its implications and with full regard to its discrepancies which have been canvassed in argument in this Court before he reached the conclusion which he did. But, having regard to the fallibility of human judgment, I cannot assume that every material consideration necessary to reach the assurance that adultery took place beyond reasonable doubt was present to his mind, since no argument was addressed to him concerning them.

The fact of adultery on the 21st January, 1945, was deposed to by the petitioner and by four other witnesses, namely, Rivero, Singh, Atherley, and Flemming. Their story is that, on the night of that date, the petitioner, Rivero, Singh and Atherley met together at Rivero's house for the purpose of proceeding to the house of the respondent in the hope of discovering her in adultery with the co-respondent, whom they knew to be a frequent visitor there.

I pause here to observe that there is no evidence to show that they knew at that time that the two daughters of the respondent, who live with her in the house and share her bedroom, would not then be at home. I also observe that, according to the evidence of the petitioner, Rivero and Atherley, a man named Carlton Ali, was one of the party, but according to the evidence of Singh he was not.

The petitioner and his friends reached the respondent's house at about 9.30 p.m. and there separated, Rivero and Singh to watch the front of the house in King Street, and the petitioner and

Atherley the back in Lopez Street. The petitioner and Atherley hid themselves behind a hedge or fence, and shortly afterwards the co-respondent arrived and entered the house. The lights inside the house were on when he entered, but were soon extinguished. Atherley went off to the front of the house, where he saw and spoke to Rivero and presumably told him that their quarry was inside. Atherley returned to the back, and he and the petitioner then saw approaching them the witness Flemming who was a complete stranger to both of them. The petitioner persuaded Flemming to accompany them into the house, telling him what they expected and wished to discover there. The house was then in darkness and, for all any of them knew at that time, they might have to break open the door to get in. and might find the girls sleeping there as well as the respondent and co-respondent. In those circumstances, it was indeed a surprising and embarrassing adventure for a complete stranger to the parties, such as Flemming, to have embarked upon. At the best he would become, surely, a reluctant witness in Court proceedings, and at the worst he might find himself the object of violence at the hands of the co-respondent, and perhaps be involved in a criminal charge arising out of his unjustified intrusion at that late hour upon the privacy of a stranger's home. The petitioner's fortune in finding this amiable witness ready to hand continues, and they find the back door unfastened, and, with the aid of Flemming's torch lamp, they immediately find their way into the respondent's bedroom and the respondent and co-respondent in bed together. It is most fortunate for their purpose, too that the two girls were not at home at that time, for it would have been, surely, difficult to persuade belief that adultery occurred in that small house while they were there. That they were not there that night is deposed to by Rivero and Singh, who say that they saw them leave and walk along King Street to attend an Indian dinner being held there. The absence of these girls from the house seems to have been necessary for the successful issue of the petitioner's venture in entering the house with his party by the back door, and yet, if Rivero and Singh are to be believed, he was not aware of it before he entered. This was a curious, and I think, suspicious circumstance. On entering the bedroom, instead of switching on the electric light, which one would have thought more convenient to his purpose, the petitioner directed the light from Flemming's torch lamp upon the bed and said: "That woman is my wife, Mrs. Sammah. That man is Brathwaite". That is all that happened, and they then left. Taking a mental picture of the incident, it seems surprising that the sudden and unexpected entry by these men into the respondent's bedroom in such circumstances, and at such an hour, did not occasion any expression of alarm or protest. I find it surprising also that the electric light was not switched on so that the witness Flemming, who had not previously seen the parties, might be sure of his identification of the co-respondent, and be able to describe accurately the contents of the room and the situation of the beds in it. He and the other witnesses were, in fact, unable to say how many beds there were.

Since the defence to this petition was that no such incident on the 21st January as described by the petitioner and his witnesses occurred at all, it was. as the trial judge evidently appreciated, of the utmost importance, quite apart from any inherent improbabilities in the story, that the evidence of Flemming, who, unlike the other witnesses, was a stranger to the petitioner and his cause, and therefore presumably independent, should receive special consideration. In examining his evidence, the trial judge was impressed by the fact that it was not to his interest to come to Court and have his private affairs exposed, and it seemed unlikely that he would do so unless he was a witness of truth. This is, of course, a valid and important consideration, but against it is a remarkable discrepancy in his evidence to which the judge has not referred and which, as it seems to me, detracts materially from the reliability of his testimony. When asked in cross-examination on the 11th November to account for his movements on the material date, for the purpose, no doubt, of ascertaining how, living as he did at Sangre Grande, he came to be at Lopez Street, Arima, at that time of night, he says (page 35) that he was seeing a girl friend who lived in that street, and at the request of Counsel he wrote down her name. When cross-examination was resumed on the 12th November, he says (page 37): "I had left my friend to go and get the bus. The lady had to go back to where she lived in Sorzano Street. I had met her and been with her at a friend's house in Lopez Street. I left the house before her to get my bus". It is submitted by counsel for the petitioner that the earlier and conflicting statement might have been inadvertent or through the wish to conceal the girl's identity. It may be so, but if there was reason to doubt whether the witness was in Lopez Street at all that night, it would certainly tend to confirm that doubt if the reason which he originally gave for being there was subsequently corrected after it had been discovered that the girl whom he named did not live in Lopez Street but in Sorzano Street. This is a material discrepancy which one would have expected the Judge to deal with in the course of his comment upon the evidence of Flemming, but he makes no reference to it.

In regard to the reliability of the other witnesses of these occurrences, I have already alluded to the discrepancy between Singh and the rest as to the presence there of Carlton Ali. It may be that, speaking so long after the event, they were confusing the dates when Ali took part in watching the respondent's house. It is, however, significant that there is a similar discrepancy between the witnesses of the occurrences of the 18th January as to the presence of Ali, and that Ali, who was seen in Court during the trial, was not called as a witness.

I personally find the story told by the petitioner and his witnesses concerning the events of the 21st January exceedingly difficult to credit, and when I contrast this with the substantial account of the co-respondent's alibi on that date; I am quite unable to understand why the trial judge was convinced beyond reasonable doubt that this story was true. No less than five witnesses, in addition to the co-respondent himself, speak to this

alibi. Each of them is quite definite in fixing the date, and their certainty in regard to this cannot be attributed to confusion or mistake. The rejection of their evidence can only be accounted for by the belief that they were deliberately lying. Nevertheless, this belief is not categorically stated by the trial judge, who dismisses their evidence in the following terms: "I could not help feeling", he says, "when they were giving their evidence that they were attributing a perfectly true fact, *i.e.*, that a party had taken place, to an incorrect date, and after close examination of their evidence that feeling still exists." If their story was true in regard to the reasons they have given for fixing the date of the party as being that of the co-respondent's birthday, then the story told by the petitioner and his witnesses as to the events of that night must necessarily be false, and having regard to the onus which was upon the petitioner to prove his case beyond reasonable doubt, I am unable to understand how a mere impression that the co-respondent's presence at the party was being attributed to an incorrect date was found sufficient to resolve the doubt which such an abundance of testimony must occasion. One of the five witnesses to the alibi, namely Bodkyn, had, unlike the others, not previously met the co-respondent, and his evidence is, therefore, no less independent than that of Flemming, who was called on behalf of the petitioner.

In the result, I am satisfied that the learned trial judge ought not, on such evidence as was adduced in this case, to have been convinced beyond reasonable doubt that the events of the 21st January as described by the petitioner really occurred. In my opinion, the present appeals should be allowed and the decree of divorce rescinded.

Having read the judgment of my learned brothers, I wish to add that I am unable to subscribe to the view that the omission of the trial judge to consider the truth or falsity of the allegation relating to the 18th January for the purpose of determining the truth or falsity of that relating to the 21st January, amounted to misdirection. I agree, of course, that, if he had accepted or rejected the co-respondent's alibi of the 18th, this would necessarily have affected his conclusion in regard to that of the 21st. I agree also that a mere omission may amount to misdirection if the result of it be that the mind of the judge or jury weighing the evidence is not directed to a material part of the evidence or aspect of the case. It appears to me, however, that, unless that evidence or aspect leads to some definite and ascertained conclusion, it is not material, and it is no misdirection to omit to refer to it.

The evidence concerning the events of the 18th was conflicting and no definite and ascertained conclusion is manifested by it. If it was unnecessary to reach such a conclusion for the purpose of determining the issues of fact relative to that date, it cannot be said to have been necessary, although it might have proved helpful, to do so for some ulterior purpose. And, if it was not necessary to reach such a conclusion, the omission to do so was no misdirection.

The judgment of the Chief Justice of Barbados and of the Chief Justice of British Guiana was as follows:

The facts and circumstances leading up to these appeals have

been already stated by the learned President and we shall not repeat them save for the purpose of this judgment.

The defence of the respondent and the co-respondent complete denial of the allegations in respect of both the 18th January and the 21st January, 1945. The respondent's case was that on both those dates at the material times she was at home with her two daughters and one Martha Francis. She also said that a small boy, Mitchell Paul, used to sleep in her drawing room at that time. Her elder daughter gave evidence in support of this, but Francis and Paul were not called. The co-respondent set up an alibi for both occasions. The 18th of January was a Thursday and his case was that throughout January, he went every Thursday about 5 p.m. to the house in Port-of-Spain of a Mrs. Hunte with whose daughter he was friendly, to listen to a radio broadcast, "The Man born to be King" which was a weekly feature on those nights. Thereafter, at about 10.30 p.m. he would go to spend the night in his cousin's house in Port-of-Spain. This alibi was supported by Mrs. Hunte and by the witness Springer, his cousin.

The 21st January was a Sunday, and the co-respondent's story was that from about 5.30 p.m. until 2.30 a.m., except for a short interval, he was at a birthday party given at a house in Ana Street, Port-of-Spain, and spent the rest of the night with Springer. This alibi was supported by four witnesses, who spoke to his being at the party on the night in question, and also by Springer. One, at least, of these witnesses was not a personal friend of the co-respondent and was therefore, it would seem, as independent a witness as was the witness Flemming on the other side. Moreover, the nature of this evidence was such as to exclude the possibility of an honest mistake as to the date of the party.

The issue therefore turned upon the question which of these two conflicting and irreconcilable stories the learned trial judge decided to accept, for, it must follow if the co-respondent's alibi be accepted, the charge against the respondent equally fails since it was never suggested that any man other than the co-respondent was the adulterer. In approaching the consideration of this issue, it is important to observe that the onus lying on the person bringing a charge of a matrimonial offence is of the degree required in criminal cases properly so called. (See *Churchman vs. Churchman*, 1945, 2 A.E.R., and *Ginesi vs. Ginesi*, 1947, 2 A.E.R. 438). In reviewing the evidence relating to the 21st January, the learned Judge accepts Atherley and Flemming for the petitioner as witnesses of truth, stressing particularly the independence of the latter. He also accepts Rivero's evidence that the two daughters and a young man left the house shortly after the watchers arrived. He rejects an attempt by the co-respondent to show that in 1940 the petitioner had sought to persuade him and the witness Kippings, then a policeman, to lend themselves to a plot to trap the respondent in a compromising situation. He further rejects the respondent's story drawing an unfavourable inference from her failure to call Francis as a witness, and then turning to the co-respondent's alibi says, "It is true that he has called a number of witnesses to support his story, but I could not

help feeling when they were giving their evidence that they were attributing a perfectly true fact, that is, that a party had taken place, to an incorrect date; and after a close examination of their evidence, that feeling still exists. The co-respondent did not impress me as a witness of truth; in fact he satisfied me that he was seeking all means to extricate himself from an unenviable position, and I am unable to accept his evidence at all or that of his witnesses as to the day and date of the celebration."

The learned Judge does not indicate what in the evidence of these witnesses caused him to feel that they were attributing events which actually happened to a different date. They were not materially shaken in cross-examination and if one were predisposed to accept the evidence of the petitioner and his witnesses, the only possible explanation of the falsity of the alibi would be that adopted by the trial Judge.

The explanation of this sharp conflict of evidence could only be a conspiracy on one side or the other. Having regard to the burden which lay on the petitioner to prove his charges to the satisfaction of the Court beyond reasonable doubt, we ask ourselves whether the trial Judge could properly decide the question in favour of the petitioner without also taking into consideration the truth or falsity of the allegation relating to the 18th? It is clear from the judgment that he did not in fact further consider the part of the case relating to the 18th beyond deciding that the evidence did not, at best, amount to evidence from which he could find that adultery had been committed. Now if he had considered that evidence from the aspect of its truth or falsity, accepting or rejecting the co-respondent's alibi for that occasion or finding himself in doubt about it, that must inevitably have affected his consideration of the evidence relating to the 21st. A mere omission may amount to a misdirection if the result of it be that the mind of the Jury or the Judge weighing the evidence and determining the facts is not directed to a material part of the evidence or aspect of the case. It cannot be disputed that had this case been tried by a judge and jury it would have been the duty of the judge to instruct the jury that in assessing the value and credibility of the evidence given by the witnesses with respect to the 21st they must take into account the value and credibility of their evidence with respect to the 18th. We think that the learned trial judge did not appreciate the necessity for testing the evidence relating to the incident of the 21st by findings as to the truth or falsity of the evidence relating to the 18th and it is impossible to say that had he done so, he would have arrived at the conclusion which he did.

Much of the argument addressed to us on this appeal was concerned with alleged discrepancies, contradictions and improbabilities on one side or the other, which are indeed apparent on the record. There may be explanations or suggested reasons for these, but, bearing in mind the high degree of proof required on the part of the petitioner to which we have already made reference, a review of the evidence inevitably leads to the conclusion that the petitioner's case was not proved beyond reasonable doubt,

In stating this we are not unmindful of the series of cases cited to us, relating to the proper function of an appeal Court on an appeal against findings of fact, where there has been no misdirection.

For the reasons given, the appeals of the respondent and co-respondent are allowed, the decree nisi set aside and the petition dismissed with costs here and in the Court below.

Appeals Allowed

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of Trinidad and Tobago.

Between:—

ZARA SKINNER, Appellant,

and

ETHEL De GRASSE, Respondent.

[Trinidad and Tobago. No. 6 of 1947].

BEFORE FURNESS-SMITH, President, (C.J. Trinidad and Tobago), COLLYMORE, C.J., Barbados, and WORLEY. C.J., British Guiana.

1948. March 9.

Will—Capacity to make—Soundness of mind, not particular state of bodily health—Relevant factor.

Appeal—Execution of will—No specific finding by trial judge—New trial ordered.

In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of the bodily health that is to be attended to.

Banks v. *Goodfellow* (1870) L.R.Q.B. 549, 566. *per* Cockburn. C.J. followed.

In a claim for the propounding of a will, the trial judge made no specific finding on the question of due execution.

Held that a new trial must be had.

APPEAL by Zara Skinner from a judgment of the Supreme Court of Trinidad and Tobago pronouncing against a document propounded by her as the last will and testament of John Benjamin De Grasse deceased on the ground of the incapacity of the deceased, and granting Letters of Administration of the deceased's estate to the plaintiff Ethel De Grasse the widow of the deceased.

The judgment of the President was as follows:

The material facts of this case are stated in the majority judgment. The document propounded as a will does not bear the signature of the supposed testator, or any writing of his, although he was an educated man. It is a home-made instrument, badly written in pencil and without legal assistance, Proof that

the testator has participated in any way in its preparation and execution is wholly dependant upon the oral evidence of two witnesses. One of these witnesses is the woman Zara Skinner who has propounded it and is the sole beneficiary under it, and had therefore the strongest possible motive for establishing its authenticity, and the other witness Baptiste Campbell, is an old friend of hers. In addition to this, the testamentary disposition in favour of Zara Skinner, which is exhibited in the document, truly reflects the moral obligation which the deceased owed to her. This circumstance might be regarded as affording strong ground for belief in its authenticity. It might equally be regarded as a powerful motive to induce a close friend of Zara Skinner to assist her in her claim to the deceased's estate. False evidence is, unhappily, regarded by litigants in this Colony as of little account, as the majority of cases in these Courts testifies; and truth, I should suppose, would rank extremely low in the order of priorities when opposed to genuine belief in the justice of a claim to inheritance. In the original document (exhibit L.B.C.1) the name Zera Skinner twice occurs, first as the named beneficiary and next as a purported witness immediately beneath the signatures of F. B. Campbell and Harold Skinner. It should be mentioned that in the printed record of this exhibit, the name is incorrectly transcribed as Zara Skinner. In the original document the first name is spelt ZERA in both places where it occurs. The true name of the defendant-appellant is Zara Skinner, and she so signs herself in her affidavit propounding the will at pages 14 and 15 of the record. This is a circumstance which suggests that the supposed signature on the document is not her own, and that suggestion is supported by the marked similarity of hand-writing in the two names, and the marked dissimilarity with the signature of Zara Skinner both on the affidavit and the specimen which she gave in Court (exhibit Z.S.1).

The case for the defendant as presented at the trial was that the deceased was too ill either to write the document himself or to sign his name to it, but not too ill to dictate it and understand its contents and give his assent to it by touching the pencil when his mark was made, and this is what he did. It was the evidence of Zara Skinner and Campbell alone which was relied upon to satisfy the conscience of the Court that this was true. It is of great significance, and this is commented upon in the final paragraph of the judgment, that Harold Skinner, who is named in the document as an attesting witness and was available to give evidence, was not called. It was argued before this Court that the evidence of a single attesting witness was sufficient to prove clue execution, and that the onus then shifted to the other side to prove want of capacity if that was relied upon. Having regard to the character of the document propounded and to its dependence on oral testimony to establish its authenticity, and to the other circumstances to which I have already alluded, it is clear to me that the onus was upon the defendant throughout this case to satisfy the conscience of the Court that the document propounded was indeed the act of a competent testator. The omission to call an available attesting witness in such circumstances supplied an

additional cause for discrediting the testimony of Zara Skinner and Campbell which was itself found by the trial Judge to be unreliable in several material respects.

In his judgment, the learned trial Judge deals with the issues of fact in this way. First he considers the supposed signature of Zara Skinner on the document; and records that "he had no hesitation in finding as a fact that the defendant (Zara Skinner) signed the alleged will as a witness attesting the signature of the testator." If this finding is to- be literally interpreted, it would appear to assume that the deceased did in fact consent to the document and that Zara Skinner signed as a witness to that consent, and this, as the majority judgment observes, is incompatible with the basic finding of the judgment to the effect that the deceased was not of sound disposing mind. Reading that part of the judgment as a whole I am convinced that this finding requires a more liberal interpretation. It seems to me that the learned judge meant that he rejected Zara Skinner's explanation of the presence of her signature there, and that, even if he was disposed to admit the will as proved and the signature of Zara Skinner as authentic, he would hold that the signature was put there for the purpose of evidencing her as an attesting witness. I do not think that he intended it to be inferred from the finding that he accepted the signature of Zara Skinner as authentic, and still less, that the signature or mark of the deceased was in fact made to the document. In this passage of the judgment the judge refers to the falsity and unreliability of Zara Skinner's evidence, and this, as it seems to me, is the only relevant and material conclusion which can be derived from it.

The judgment next deals with the denial by Zara Skinner that, on the morning when the deceased died, she sent messages to the solicitor, Mr. Annisette, urging him to come to the house and prepare a will for the deceased. The Judge rejects Zara Skinner's evidence on that point. He further rejects her denial that, when Mr. Annisette arrived shortly before the deceased died, she asked him whether he had prepared a will for the deceased. On these material matters, the judge considered the evidence of Zara Skinner to be false.

After observing that the onus of proof lies on the party propounding the will, and that he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator, the judge states that he is not satisfied that the testator was capable when the alleged will was made. There then follows a number of comments upon the evidence, some of which evidently relate to the issue of capacity and others, equally clearly, do not. There is one passage relating to the evidence as to the time when the alleged will was made which I find very obscure, and I am unable to determine what conclusion of fact was intended to be derived from it. The passage which refers to Zara Skinner's omission to mention the existence of the will either to Mr. Annisette or on a subsequent occasion has certainly no relevance to the issue of the deceased's capacity and indicates that the Judge was then considering the merits of the story generally and found them highly suspicious and unreliable.

The judgement concludes as follows:

> "Finally, I asked myself how much I can rely on the credibility of the defendant and Campbell whose evidence is so vital on the all important question of the capability of the testator. Both of them, I consider, were guilty of flagrant falsehood when they swore that they did not know the testator was dying. Further in order presumably to negative the medical evidence that the deceased's general condition was very bad, and that he was suffering from general weakness, the defendant and Campbell represented that the deceased only bad severe pain but that his statement was clear and his mind firm. Yet neither Dr. Joseph nor Dr. Pulver were told, or observed that the deceased had severe pain. I therefore found that I could not rely on these witnesses' statements as to the soundness of the testator's mind, memory and understanding, when the alleged will was made".

It is inferred from this passage that the learned trial Judge rejected the alleged will solely on the ground of incapacity and that he did not direct his mind, as he should have done, to the determination whether it was duly executed in the manner alleged.

It is to be observed that, although no express mention of the suspicious circumstances to which I have alluded is made in the judgment, these must have been present to the mind of the judge, and he must be presumed to have been aware of the vital character of the evidence given by both Zara Skinner and Campbell, not only on the all important question of the capacity of the supposed testator, but also in proof of the facts attending the supposed execution of the will. The fact that he rejects as flagrantly false their evidence respecting the deceased's capacity, and also the evidence of Zara Skinner on other material issues of fact which I have mentioned, leads me irresistibly to the conclusion that he did not regard either of those two persons as witnesses of truth. I am wholly satisfied that he was right in so thinking, and applying my mind to a retrial of that important issue, I am satisfied that the due execution of the supposed will has not been proved, since those two witnesses alone gave evidence of it, and that the present appeal ought therefore to be dismissed.

In regard to the judge's finding on the question of the deceased's capacity, I am disposed to agree with the view that the medical evidence is inconclusive one way or the other on this point. The fact that a priest was called in early on the morning of the day when the will is alleged to have been made; that a doctor, other than the deceased's usual medical attendant, was urgently sent for about the time when the will is alleged to have been made; that, when this doctor arrived shortly after the time when the will is alleged to have been made, he found the deceased in a moribund condition; and that the deceased actually died about two hours after the will is alleged to have been made — all these circumstances, although not conclusive, invite the closest attention to the issue as to the supposed testator's capacity. And when, added to them, the evidence of the only witnesses called to speak to the deceased's condition at that time is found to be false in a material respect, I must say that I am unable to find the trial Judge wrong in

deciding as he did. It appears to me that on this ground also the appeal should be dismissed.

The judgment of the Chief Justice of Barbados and of the Chief Justice of British Guiana was as follows:

In this case the plaintiff-respondent claimed a grant of Letters of Administration to the estate of her late husband John Benjamin De Grasse, who died on the 4th November. 1945, alleging that he had died intestate. The defendant-appellant alleged that the deceased had on the day of his death executed a will appointing her residuary beneficiary but without naming an executor and she claimed Letters of Administration with the will annexed. The plaintiff-respondent joined issue on this and counterclaimed (a) that the alleged will was not duly executed and (b) that the deceased was, at the time the will purported to have been executed, not of sound mind, memory and understanding and did not know and approve of the contents thereof. Under (a) it was alleged, *inter alia*, that the signature or mark purporting to be that of the deceased was a forgery, and under (b), *inter alia,* that the deceased gave no instructions for the will, that it was not read over to him, nor did he read it himself. The learned trial judge having found in favour of the plaintiff-respondent on the ground of incapacity pronounced against the force and validity of the will and granted Letters of Administration of the deceased's estate to the widow. The appellant appeals against the whole of that judgment.

The deceased had been in the police force of this Colony for over thirty years and was at the time of his death a prosecuting sergeant in the Magistrates' Courts, Port-of-Spain. He had been married to the respondent for about thirty years but had been separated from her for over eighteen years prior to his death, and during the last sixteen years he had been living as man and wife with the appellant. There is no doubt that their union was a happy one, the appellant had nursed the deceased's aged mother over a long period and nursed him during his last illness. During this long association the deceased had never seen or had anything to do with his wife. In the circumstances, it would, as the learned trial judge observes be natural that the deceased should make a will in favour of his reputed wife, the appellant, and indeed this was conceded by the respondent's counsel. There is no suggestion of undue influence.

About the end of September, 1945, the deceased had to stop work owing to heart trouble and died on the 4th November. He was attended during this period by the witness Dr. Joseph who last saw him on Friday, November 2nd. The deceased was then quite conscious and his mind quite sound but the doctor saw that the end was not far off and thinks that he intimated this to the appellant who was in the house. The following day Saturday, November 3rd., at about 11 a.m., a message was sent to one Baptiste Campbell, a druggist employed in a local pharmacy and a close friend of the appellant and the deceased and one who had sometimes assisted deceased with advice and medicines. Campbell went round to see De Grasse about 5 p.m. and found him complaining of pain. He rubbed him with lini-

ment and stayed there the night. According to Campbell the deceased on that Saturday evening asked him "to take a statement" but "deceased was in too great pain to make a statement".

The following morning, Sunday, November 4th, appellant sent for a priest at about 6.30 or 7 a.m. and the deceased was given the Sacrament of Holy Communion. Again, according to Campbell, the deceased called for him at about 9.30 a.m. and asked him to take a statement. Campbell said that the deceased was then easier and, writing materials having been brought, "deceased called out what he wanted done and I wrote it down. His statement was clear and his mind firm……He asked me to read it again which I did……..Deceased made his mark with my assistance". Campbell and one Harold Skinner (a son of the appellant) then attested the will which was handed to the appellant. This evidence was supported by the appellant but Harold Skinner was not called to testify.

Campbell further stated that he waited in the deceased's bedroom for about fifteen minutes until the return from the market of a girl Una Jones, whom he had sent to buy provisions for himself, and then left for his home, saying that he would return later. It was then about 10 a.m. Just before leaving he advised the summoning of a doctor. Fruitless efforts were made to find. Dr. Joseph and in his stead the witness for the respondent Dr. Pulver was called in. The doctor's recollection is that this was about 10 a.m. He found deceased sitting in a chair in a dying condition and told the appellant that nothing could be done. He diagnosed Myocarditis and Nephritis but saw no signs of the onset of coma. He prescribed a tonic for the heart and the witness Clifford Skinner was sent to obtain the medicine. This boy, who is a younger son of the appellant, said he arrived at the house after Campbell left and before Dr. Pulver came.

The witness G. R. Annisette, a solicitor and a friend of the deceased's of long standing, arrived at the house about 1 p.m. if his recollection is correct. There is a conflict of evidence as to the circumstances in and the purpose for which this witness was requested to come, but the trial judge accepted Mr. Annisette's evidence that he went in response to two messages purporting to come from either the deceased or the appellant asking him to go for the purpose of making a will. On arrival he found De Grasse on the point of death and unconscious and death ensued shortly after in his presence. After praying over the deceased and talking with the appellant, the witness left the house. There is nothing in the evidence to suggest that Baptiste Campbell was in or anywhere near the premises about this time and, moreover, the evidence is that he had left much earlier in the morning and did not return until about 5 p.m. If it had been sought to impugn this evidence, it appears to us that recourse might well have been had to the calling of Una Jones and her mother, Albertina Cooper, who was in the house that morning, and also in lesser degree, to the questioning of the witness Martha Beckles who arrived shortly before the death.

In this Court of re-hearing we find a difficulty at the outset

inasmuch as the learned trial judge adopts the view on the evidence that the appellant, whose name is written on the document below those of Campbell and Harold Skinner "signed the alleged will as a witness attesting the signature of the testator". This finding was only necessary if the judge accepted the evidence as to the dictation and execution of the will and it would appear to be incompatible with the finding, which is the basis of his judgment, that De Grasse was not of sound disposing mind at the time the alleged will was made. In the circumstances of this case, if the capacity to dictate were there, it goes far to indicate that degree of capacity requisite to show a sound disposing mind.

The learned trial judge finds incapacity by rejecting the evidence of appellant and Campbell largely on the ground that they were "guilty of flagrant falsehood when they swore they did not know that the testator was dying and further that, in order presumably to negative the medical evidence that the deceased's general condition was very bad, these same witnesses represented that the deceased only had severe pain but that his statement was clear and his mind firm". The learned judge seems to have lost sight of the correct issue in this regard and made no distinction between physical infirmity and mental incapacity. In the case of Banks v. Goodfellow (1870 L.R. Q.B.C. 549 at page 566), Cockburn C.J. giving the judgment of the appellate Court lays down that:

> "In cases where unsoundness of mind arises from want of intelligence occasioned by defective organisation, or by supervening physical infirmity, or by the decay of advancing age, as distinguished from mental derangement, such defect of intelligence is also a cause of incapacity. In these cases, however, though the mental power may be reduced below the ordinary standard, yet if there is sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains".

He also quotes with approval a dictum from an American case to the effect that in deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of the bodily health that is to be attended to. It seems to us that far from negativing the testimony of the appellant and Campbell the medical testimony as to the mental capacity as distinct from physical weakness goes a long way to support it. On the point of incapacity of mind, therefore, we are of opinion that the approach by the learned trial judge to the questions involved was wrong and that his finding was against the weight of evidence.

A further difficulty arises from the absence of any precise finding as to the time at which the alleged will was made. The learned judge makes no reference to the allegation of forgery but expresses grave doubts as to whether the document was made at the time sworn to in the evidence. On the basis of the illegibility and signs of evident haste apparent on the document he conjectures that it may have been written shortly before the arrival of Annisette and the death of the deceased but this conjecture is inconsistent with the evidence, which if untrue might

have been refuted, that Campbell left the house at 10 o'clock and did not return until 5 in the evening. The learned trial judge also finds cause for doubt in his conclusion that, if the will were made at the time sworn to, the witness Clifford Skinner must have been present. This is however only a deduction resulting from a comparison of the times given by various witnesses to the best of their recollection speaking long after the event. It is difficult to see why a calculation based on approximate times was preferred to the direct testimony of the witness which, if untrue, might have been negatived by other evidence.

In our view the learned judge's pronouncement against the will based as it is on the ground of incapacity cannot be sustained. The judgment contains no specific finding on the question of due execution. Counsel for the respondent urged that the rejection by the judge of the evidence of the appellant and Campbell should lead this Court to the conclusion that, inferentially, he found against due execution but, for the reasons already stated, we consider that such a conclusion would be unsafe and unwarranted on such evidence as the judge dealt with. There are a number of circumstances which suggest ground for suspicion or at least call for explanation, as it was put by counsel for the appellant. There is, for example, an apparent similarity in the handwriting of the appellant's name in the body of the will and her signature at the end; also the unusual spelling of the name as "Zera" in both places; there is, too, her failure to mention or to produce the alleged will. These and other like circumstances were not dealt with by the judge specifically and cannot be explained away by reasoning however plausible or conjecture not based on evidence.

We have come to the conclusion that the learned trial judge failed to direct his mind to these circumstances and, as already pointed out, did not determine the primary question of execution. For these reasons, a substantial wrong may have been committed and this Court with regret must order a new trial.

The appeal is allowed. The judgment of the trial judge set aside and a new trial is ordered. The costs of both parties in this appeal will be paid out of the estate of the deceased. The costs in the Court below and of the new trial will be dealt with by the judge at the new trial.

Appeal allowed; new trial ordered.

B. TROTMAN *v.* L. McLEAN

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of Trinidad and Tobago
Between:—

BENJAMIN TROTMAN, Appellant,

and

LEOPOLD McCLEAN, Respondent.

[TRINIDAD AND TOBAGO. NO. 8 OF 1947.]

BEFORE FURNESS-SMITH, PRESIDENT (C.J. Trinidad and Tobago), COLLYMORE, C.J. Barbados, and WORLEY, C.J. British Guiana.

1948. MARCH 9.

Appeal—Question of fact—Findings of trial judge—Against weight of evidence—Reversed.

Findings of trial judge on questions of fact reversed on the ground that they were against the weight of evidence and the probabilities of the case.

APPEAL by the defendant Benjamin Trotman from a judgment of the Supreme Court of Trinidad and Tobago awarding damages to the plaintiff Leopold McClean in an action for deceit and for return of money on a consideration which had failed.

The judgment of the President was as follows:

In this case the plaintiff-respondent complained that by reason of certain false representations made to him by the defendant-appellant he was induced to sign articles of partnership (exhibit B) in the defendant's business and thereby suffered damage. He claimed damages for the deceit and, in addition, the recovery of the sum of $339.05 paid by him to the defendant as his share in the partnership undertaking. In the Court below he was successful in respect of each of these claims and was awarded the sum of $1,000 by way of damages for the deceit.

The proposed partnership consisted of the plaintiff, the defendant and one Hyndman, who was originally joined as a co-defendant, but at the close of the plaintiff's case it was submitted that there was no case for him to answer, and the judge gave effect to that submission and dismissed him from the suit.

So far as is material to the claim for deceit, the case as presented by the plaintiff was as follows: After negotiations with the defendant McClean, in the course of which the plaintiff paid to McClean the sum of $339.05 for half of McClean's share in the business then being carried on by McClean and Hyndman. the three men met at the office of their solicitor Mr. E. B. Annisette on the morning of Saturday the 25th March 1944. There was some conflict of evidence as to this date, the plaintiff saying that it was the 23rd of March, but it is manifest from the record that it was in fact the 25th, and before this Court it was not contended that it was otherwise. The date is of little importance, especially having regard to the fact that the evidence was given some three years after the event, except in so far as it reflects on credibility of the witnesses. As will be seen, the fact that the 25th March was a Saturday has some bearing on that important issue.

After discussion with the parties the solicitor drafted instructions (exhibit B.T.I) for a partnership deed which the parties thereupon executed. In those instructions no express mention is made of existing book-debts due to the business or of existing liabilities due by the business. It is stated merely that the business and goodwill of the undertaking is being purchased by the three partners and, since the detailed accounts of the undertaking as exhibited at pages 117 to 121 of the record (exhibit B.2) were then in possession of the parties, the instructions must be taken to mean that the parties were taking over the undertaking as it then stood. The substantial issue of fact in this case is whether, after the signing of the instructions, a dispute occurred between the plaintiff and McClean and Hyndman on the subject of the existing book-debts and liabilities which occasioned a variation of the instructions. The evidence in regard to this issue will be discussed presently. The partners left the solicitor's office on the understanding that the solicitor would prepare a draft partner- ship agreement embodying the terms agreed upon. Some days later (the exact date is disputed) the draft agreement was presented to the plaintiff by McClean and the plaintiff signed it. The circumstances in which he says he signed it are wholly disputed by McClean, and there were no witnesses of the transaction other than the two parties concerned. The plaintiff says that, on leaving the solicitor's office on the day when the instructions were signed, McClean asked him to put an additional hundred dollars into the business, and he McClean would do the same. That on the following Saturday he went to McClean and told him that he would not put any more money into the business until the partnership agreement was signed. That McClean then produced the draft agreement which he had received from the solicitor and said "Don't be timid, this is a sketch I have taken on the wording of the agreement. Man, look at it here. Go and get the amount." The plaintiff agreed, and was going off to his bank to get the money, when McClean called him back and handed him a pen on the stair-case saying, "Put your name here to safeguard your position." That he then took the pen and signed his name to the draft without reading it, believing on the representation of Mc Clean that it was only a draft of the partnership agreement and that it contained only the terms already agreed upon by the parties in the solicitor's office. That at that time the signatures of the other two partners had not been put on the draft, as they now appear over the signature of the plaintiff. That he, the plaintiff, then went off to the bank for the money but it was closed, and on returning to his workshop which was on the same premises as McClean's business he saw McClean holding a paper and laughing. That he asked what the paper was and McClean said, "It is our agreement." That he, the plaintiff, then said, "How can that be our agreement when an hour and a half ago you made me sign a paper until the agreement came out?" That he then read the paper and said, "This paper say I don't share in the debts because it is the paper I signed as a sketch." That McClean then told him that as his name was on it he would be held to it. That he saw McClean on the following Monday, and they then agreed

to call the deal off, and McClean offered to give him a promissory note for the $339.05 which he had paid. That, realising that he was not going to get his money back, he initiated the present action.

I pause here to observe that the paper which the plaintiff says that he was induced by McClean's false representations to sign is in evidence (exhibit B) and, as it appears to me, is in fact a draft partnership agreement, or, as the plaintiff describes it, a 'sketch'. If that be so, it is what the plaintiff says McClean represented it to be. The plaintiff complains that paragraphs 5 and 6, which exclude him from participation in the book-debts due to the business, are contrary to what was agreed upon in the solicitor's office. This is the substantial issue of fact to which I have already alluded.

McClean's version of the circumstances attending the signing of the draft agreement is as follows: He denies that any proposal was ever made by him that the plaintiff should put an additional hundred dollars into the business. He says that he received the draft agreement from the solicitor on the 28th March and handed it to the plaintiff the same day. That the plaintiff returned it to him signed on the 31st March without a word of complaint, and no such conversation as the plaintiff has described ever occurred between them. In regard to his denial that any proposal was made that the plaintiff should contribute an additional one hundred dollars to the business, it is to be observed that, if the plaintiff's story is true, it is difficult to believe that McClean would have disclosed his intention to hold the plaintiff to his signature on the draft agreement before that money was obtained.

In considering the probabilities respecting these two divergent accounts, it is important to understand what was the financial position of the business at that time as exhibited in the statement of accounts at pages 117 to 121 of the record (exhibit B 2). This account shows that the assets exceeded the liabilities by the sum of $39.99 only; that the book-debts due to the business amounted to $401.10; and that the loans due by the business (including an item of $200 due to the partner Hyndman) amounted to $349. It is to be noted, therefore, that, when the plaintiff complained to McClean that the draft which he had been induced to sign excluded him from participating in the book-debts, he was referring to the sum of $401.10, and that he omitted to remark that the draft excluded him also from liability for the loans amounting to $349 incurred under the written instructions which he signed in the solicitor's office. The effect, therefore, of clauses 5 and 6 of the draft agreement to which he takes exception is to exclude the plaintiff from any participation in the one-third interest which he would otherwise have had in the difference between these two amounts, that is to say, if all the book-debts were collected, one-third of $52.10. This seems a paltry sum to have made so much fuss about, especially when it is remembered that the plaintiff had already paid $339.05 for a third share in a business in which the assets exceeded the liabilities by $39.99 only. In this connection it is to be observed that, in the argument addressed to us by counsel for the respondents, it was represented that the excess of assets over

liabilities was not $39.99 but $252. This error arose from a misunderstanding in treating the loan of $200 due to Hyndman as an asset, whereas in fact it was a liability, and is so represented in the statement of accounts (exhibit B 2) at page 118 of the record. The learned trial judge has fallen into the same error in his findings of fact at paragraph (c) on page 84 of the record.

I now come to consider the evidence as to what took place at the solicitor's office on the 25th March in regard to the terms of the agreement reached between the parties which the plaintiff asserts were incorrectly stated in the draft agreement which he was subsequently induced to sign by the false representations of McClean. The solicitor Mr. E. B. Annisette gave evidence to the effect that, after the instructions were signed, the three partners started a discussion amongst themselves in connection with the statement of accounts (exhibit B 2) and the plaintiff then said that he was not going to pay any debts which that firm owed. One of the others replied that in that case he was not going to share in any debts owing to the firm. It was then about 12 or 12.15 o'clock and, as it was a Saturday, he wanted to get away, and told them that they ought to have decided their business before coming to him. The plaintiff then said that he would not share in the debts due to or owing by the firm, and they then went off. He took no note of that agreement, but included it in the draft which was subsequently prepared and signed by the parties. The plaintiff denies that any such discussion took place at all after the written instructions were signed, but says that, while the instructions were being taken down by the solicitor, he, the plaintiff, said. "In order to finish the business this evening — alright. Stock-in-trade, outstanding debts, and goodwill." It is to be remembered that the witnesses were speaking in June, 1947, to events which occurred in March, 1944. So that an exact recollection of the order in which the various aspects of the transaction were discussed is hardly to be expected. If what the plaintiff recalls having said is true, it would appear that he was becoming impatient of the discussion, and, since there was never any dispute between the parties concerning the stock-in-trade and goodwill, and there has been much about the outstanding debts, it seems proper to infer that at some time during the meeting in the solicitor's office a controversy did occur on that subject. If it did occur, it seems more probable that it occurred as Mr. Annisette says, after the instructions had been completed and signed, because in cross-examination the plaintiff says, (at page 46) that before the meeting at the solicitor's office there was an agreement between himself and McClean about the debts owing by the firm and he did not agree to share in those debts other than the debts due to Hyndman. If that be true, it is strange that he should have signed instructions which omitted that important proviso. He further says in cross-examination that when Hyndman put the $200 in the business, it was no longer a debt owing by the firm. This is not only absurd in itself, but it is contrary to the position shown in the statement of accounts (exhibit B 2) at page 118 of the record. Nevertheless the trial judge finds that the evidence given by the solicitor and the defendant (Mc Clean) of the alleged

controversies between the partners is false evidence, introduced for the purpose of accounting for the inclusion in the draft agreement of Clauses 5 and 6 which had never been agreed upon by the partners. It is clear from the judgment that the reasons for this finding are not influenced so much by the demeanour of the witness Annisette as by the following considerations — (a) That, if any such discussion concerning the book-debts occurred as he says, it was his duty to include in the written instructions the decision concerning it. (b) That the variation from the written instructions exhibited in paragraphs 5 and 6 of the draft agreement was an important one from the financial point of view, amounting to 25% of the assets. Actually, as has been indicated above, this is quite incorrect. The variation affected the plaintiff to the extent, at the most, of one-third interest in $52.10.

It may be that, on a counsel of perfection, the solicitor ought to have recorded the variation of the written instructions, and obtained the signature of the parties to it. He explains that the decision was reached at a late hour on a Saturday morning, and that, as he would be sending a draft of the agreement to the parties for their consideration, he thought that an amendment of the written instructions was unnecessary. That explanation seems very reasonable to me, and in any case the variation was, as has already been observed, of very little importance as against the plaintiff's interest. On these considerations there seems to have been no ground for disbelieving Mr. Annisette, and, indeed, his story seems much more credible than that of the plaintiff.

In the result I am satisfied that the evidence adduced by the plaintiff in this case was not such as should have convinced the judge that paragraphs 5 and 6 of the draft agreement did not reflect the terms agreed upon in the solicitor's office. The finding of false representation was, in my opinion, contrary to the weight of evidence and must be annulled.

The question therefore of damages for the alleged deceit does not arise. In regard to the decision that there was a failure of consideration for the payment by the plaintiff of $339.05, it is to be observed that that sum was paid in consideration of a partnership agreement to the terms of which the parties have set their signatures. The plaintiff, therefore, has received the value for his money which he expected, and there is no failure of consideration. The appeal should be allowed with costs here and in the Court below to be taxed.

The judgment of the Chief Justice of British Guiana, in which the Chief Justice of Barbados concurred, was as follows:

In the action out of which this appeal arises, the respondent (plaintiff in the Court below) claimed from the appellant and one Hyndman the return of the sum of $339.05 being money paid for a consideration which had failed; alternatively, a like sum for damages for breach of contract, and, further, damages for misrepresentation or deceit. The learned trial judge dismissed the co-defendant Hyndman from the suit at the close of the respondent's case and after hearing the defence of the appellant found in favour of the respondent on the issues of failure of consideration and misrepresentation. He assessed the damages at $1,000 and

gave judgment for $1,339.05 and costs. The appeal is against the whole of this judgment.

In order to appreciate the issues which were before the trial judge and the evidence relating to them it will be necessary to set out the facts at some length. In March 1944, the appellant and Hyndman were carrying on in partnership a furniture business in Port-of-Spain under the style of The Trinidad Commercial House. The capital of the firm was held as to nine-tenths by the appellant and as to one-tenth by Hyndman. The respondent at that time had a small watch repairing business in a corner of the furniture shop for which he paid a rent of $5.00 per month.

On March 22, 1944, the respondent agreed to buy for $339.05 one-half of appellant's share in the business. This sum was paid by the appellant to the respondent on the same day and a receipt given. Before parting with his money, however, the respondent, showing himself to be a man of common sense and ordinary prudence, made enquiries into the financial position of the business. He was supplied by the appellant with statements showing the valuation of the stock as on 22nd March, a detailed statement of the capital accounts of appellant and Hyndman, a statement headed "Liabilities of Firm and Accounts Outstanding For Firm" and a Balance Sheet. These accounts are quite simple but it is advisable to consider them before going further into this matter, since a great deal of confusion has been caused by a failure to understand them. The balance sheet showed the firm's liabilities as $1,091.11 and assets as $1,128.10, the balance of assets over liabilities being $36.99. The liabilities were made up of capital $742.11, (of which $678.11 was contributed by the appellant and $64 by Hyndman) and "Loans and Others $349". The principal items of assets were shown as stock $547.00 and "Outs" $401.10. The loans and "Outs" were shown in detail in the statement headed "Liabilities of Firm and Accounts Outstanding for Firm", the important item for the purpose of this appeal being a loan from Hyndman of $200.00. This account showed a balance of $52.10 in favour of the firm. It is important to notice that the heading "Liabilities of Firm" is inaccurate since the statement shows only the loan liabilities and this inaccuracy appears to have misled the respondent, his counsel and the learned trial judge himself as will appear later.

Appellant and respondent agreed to instruct Mr. E. B. Annisette a solicitor to draw up a partnership agreement but before going to the solicitor they appear to have had some discussion about the debt due to Hyndman and it was finally agreed between them and Hyndman that the latter should put into the partnership the two hundred dollars owed to him in return for an equal one-third share in the profits of the firm. Mr. Annisette recorded these instructions in writing, which the three new partners signed and acknowledged as binding. The material part of the instructions for my present purpose is that the three partners acknowledge that they "have purchased the business and goodwill of the former Trinidad Commercial House."

There is no specific reference to the book debts or loan liabilities of the old firm.

It is convenient here to refer to the evidence as to the date

on which these instructions were given to the Solicitor. The signed instructions bear the date 25th March 1944, and both the appellant and the solicitor, who gave evidence for him, swore that the partners attended at the latter's office late on Saturday morning the 25th March. In his Statement of Claim the respondent pleaded that the instructions were given on or about 25th March, 1944, but in his oral evidence he swore that the meeting in the solicitor's office took place at about 5.30 p.m. on the 23rd. The learned judge makes no finding on this point apparently considering it as a mere discrepancy such as might be expected in evidence given so long after the event. In my view, however, this date is most material since, as will be seen, it was an essential part of the appellant's case that the instructions were given around midday on a Saturday. Further, if this be true, it directly contradicts the respondent's evidence as to the alleged false misrepresentation which is said to have been made to him at about 11 a.m. on the 25th at the office where the appellant was employed.

I now come to that part of the evidence on which the issue in this case mainly depends. The appellant's story was that after the instructions had been signed the respondent said, firstly, that as a partner he could not be expected to continue to pay rent for the portion of the shop he occupied for his watch-making business but that he abandoned this point when appellant and Hyndman said that could only happen if he brought in the watch repairing business. The respondent then said that he would not hold himself responsible for the debts of the old firm and appellant replied that he would not then be entitled to share in the debts due to the firm. The matter was referred to Mr. Annisette and it was finally agreed that the respondent should have no interest in debts due to or by the old firm. Mr. Annisette corroborated this story of the dispute over the debts subsequent to the signing of the instructions and said that it was then after 12 noon, and that he told the parties they should have settled it before they came to him as he was getting hungry. He further said that he did not make a note of this arrangement on the instructions as he intended to prepare a draft agreement embodying all the terms for their approval.

The respondent denied that there was any discussion about debts or anything else after the instructions had been signed. He said that before going to the solicitor's office he had told appellant he would not accept responsibility for any debts owing by the firm except Hyndman's $200.00 and that was the only debt discussed there. He further said that finally and (apparently as a quid pro quo for Hyndman's getting an equal share of the profits although his capital was less than the others) it was agreed that the respondent was to "share in the debts owing to the firm but not in the debts owing by the firm." Although this somewhat unusual agreement is said to have been concluded before the instructions were signed they make no mention of it. The phrase used in the instructions "business and goodwill" implies the taking over by the new partnership of all the assets and liabilities of the former business and that, in fact, was the case made for the respondent by his counsel both at the trial and in the appeal.

To return to the appellant's case, Mr. Annisette said that about

two days later, on or about the 27th or 28th March, he sent the draft agreement to the parties for approval and received it back about two weeks later signed by the three partners. He then prepared and engrossed the formal agreement ready for their signatures. Both these documents were put in evidence: the former has the word 'Draft' written in ink in Mr. Annisette's writing and some interlineations in ink. Mr. Annisette swore that he wrote the word 'Draft' before the document left his office. About a week after the signed draft had been returned Mr. Annisette handed it over to the respondent who wished to show it to another solicitor. According to the respondent it was at this time that Annisette wrote the word 'Draft'. The appellant says that having got the draft agreement from Annisette on the 28th he read and signed it, got Hyndman's signature and then handed the draft to the respondent on the same day. He further says that respondent returned it on the 31st with his signature thereon, made no complaint or objection and the draft was returned to Annisette that day. Against the respondent's signature, which is written below those of the other two partners, appears the date 31|3|44 written in ink.

The respondent told a very different story. He said that on leaving Annisette's office on Thursday evening, 23 rd., the appellant proposed and he agreed that they should each advance another $100.00 to the business, the money to be put up by the following Saturday at the latest. However, on the Saturday (25th) at about 11 a.m. he went to the appellant's office and said he would not put up any more money until the agreement was completed. McClean urged him to get the money and pulling out a paper said "Don't be timid; this is a sketch I have taken on the wording of the agreement. Man, look at it here. Go and get the amount." These words are important as they contain the alleged false misrepresentation upon which the respondent relies. The respondent was reassured and started off to get the money but was called back by appellant who handed him a pen saying "Put your name here to safeguard your position. Look the three names, those for three equal shares". The respondent then signed without reading the document or having it read to him. He says that at that time the other partners had not signed. This incident took place on the office staircase with no witnesses present. The respondent returned the document to appellant and went to the bank but found the doors already closed, it being a Saturday. He then returned to the furniture shop whither the appellant had also gone. He told the appellant he had been too late to get the money and appellant told him to get it on Monday.

Now comes the discovery of the alleged misrepresentation and fraud. The respondent resumed work at his bench but was attracted by the appellant coming to him "with a paper looking at me and laughing". On respondent enquiring about the paper, appellant replied "That is our agreement". Respondent retorted, "How can that be our agreement when an hour and a half ago you made me sign a paper till the agreements come out" and taking it from the appellant he saw it was the very paper he had signed "as a sketch". He then read it and said "This paper say I don't share

in the debts because it is the said paper I signed as a sketch". The appellant replied "Your name is to it and you've got to stay to it". The provisions of the agreement to which the respondent says he objected when he read it are articles 5 and 6 which except the book debts and liabilities of the old business and provide that the respondent should have no share in or liability for these assets and liabilities.

The respondent's case was that these clauses formed no part of the agreement made in Annisette's office, as the appellant well knew and that, by falsely representing the draft as containing only the terms actually agreed upon, he deceived the respondent who, acting upon the faith of that assurance, was induced to sign the draft. Further that having so induced him to sign it as a draft, the appellant sought to make out that it was the final completed contract.

The respondent refused to complete the transaction, and, efforts at settlement having proved abortive, commenced his action.

The issues before the learned trial judge were: —

(a) did the appellant make the alleged representation to the respondent and thereby induce him to sign the draft agreement?
(b) if so, was the representation false and known to be so to the appellant?
(c) if so, has the respondent suffered any and what damage? and
(d) has there been a failure of consideration so as to entitle the respondent to the return of his money?

The learned trial judge has answered all these questions in favour of the respondent, for he has found

(a) that the appellant handed to the respondent for his signature a document which did not contain the terms agreed upon in the instructions given to the solicitor
(b) that the appellant knew at the time he handed this document to the respondent that the instructions had been varied by the clauses numbered 5 and 6.
(c) that the variation was to the detriment of the respondent in that it resulted in pecuniary loss to him of 25% of $252 which represented the excess of assets over liabilities in the partnership business.

He further found that there was a failure of the consideration for which the respondent entered into the contract whereby the contract was rescinded.

It will be convenient to examine first the third of these findings since, when fraud and deceit are alleged, it is natural to look for the benefit which would accrue to the swindler. The respondent said in his evidence "When we had agreed to form a new firm, Hyndman put that sum of $200 into the business and it was no longer a debt owing by the firm." This, if true at all, is only a half truth, but the learned trial judge has accepted it as correct and based his calculation on the assumption that the conversion of Hyndman's loan into capital would increase the assets by $200. (It should be noted in passing that the correct figure of the

balance of assets over liabilities is $36.99 as shown on the balance sheet and not $52.00). He has overlooked the point that before Hyndman's debt could be cancelled there must be a payment of $200 which could only be made from assets and that the assets would thereby be correspondingly reduced. Conversely if it is suggested that by the terms of the draft agreement appellant and Hyndman gained the sole right to share in the book debts valued at $401, it must be remembered that, on the other hand, the respondent was discharged from liability in respect of $349 loans and that Hyndman was under a liability to contribute $200 capital which would appear again in the assets. It is of course clear that by the terms of the draft the respondent would lose a one-third interest in $52 or so much of it as remained available for distribution as profit at the close of the trading year. In my view, it seems more reasonable to infer that a man might agree to such a small loss to avoid the risk and worry of collecting and paying debts than to infer evidence of a conspiracy to defraud from the possibility of such a small benefit to the swindler.

The explanation of respondent's desire to dispute clauses 5 and 6 may be that he realised that having let the book debts go, he had no assurance that Hyndman's capital contribution would ever be paid up.

I now turn to examine the learned judge's first and second findings. These are findings of fact which an appeal court will not lightly disturb though it is our duty to consider and weigh them in the light of all the evidence always remembering that the learned trial judge had the advantage of seeing and hearing the witnesses and observing the drift and conduct of the case.

These two findings involve and are chiefly based on the rejection of the evidence of the appellant and Annisette as to the events of the 25th, March. This is a question of credibility dependent upon not only manner and demeanour but also consistency and probability. The learned trial judge finds it reasonable to believe that respondent is telling the truth when he says he believed the paper to be a 'sketch' and he signed it without reading it. To my mind, however, such conduct is unlikely in view of the shrewd business sense the respondent had previously shown. The learned judge moreover, makes no reference to what appears to me a glaring improbability in the respondent's story of how he discovered the fraud. Why should the appellant, whose fraud and decent had been completely successful and who had only to keep quiet to get another $100 from the respondent on the following Monday, gratuitously and heedlessly disclose to the respondent on the Saturday morning the trick which had been played on him? If appellant is the cunning cheat respondent would have us believe, would he not have kept quiet until he had secured the $100 on Monday?

I have already referred to the materiality of the date of the meeting in Annisette's office on which the judge makes no specific finding. The preponderance of evidence is that it took place on the 25th and, if that is so, the respondent's story must be false.

The learned judge finds that the evidence given by the solicitor and appellant of the alleged conversation between the parties is "false evidence introduced for the purpose of accounting for the inclusion in the draft agreement of clauses 5 and 6 which had never been agreed on by the partners." He further finds that there was no talk about the book debts payable to or by the business or about the business of the partnership "after the partners had signed the instructions dated the 25th. March 1944". It is clear from the judgment that the finding is based not on the demeanour of the witnesses but on inferences drawn mainly from Annisette's evidence. The learned trial judge rejects as unreasonable Annisette's explanation as to why he made no note of the decision regarding the book debts, firstly because it was his duty to do so and secondly because it was important from the financial point of view "involving 25 per cent of the firm's assets". Actually, as I have indicated, the calculation is incorrect. No doubt it was Annisette's duty to make a note of the further decision and he ought to have done so but, before his explanation for not doing so is rejected and his evidence as to the discussion therefore disbelieved, it seems necessary to consider the implications of such a view of the evidence. It must follow, not that Annisette has been mistaken in his evidence, as Counsel for the respondent attempted to suggest, but that he did in 1944 deliberately conspire with the appellant to defraud the respondent and has perjured himself in the witness box. Annisette was acting as solicitor for all the parties and I ask myself what interest had he in assisting the appellant to defraud the plaintiff of the paltry sum of one-third of $52 or $36.99? In my opinion the learned trial judge's finding that there was no discussion and no agreement about book debts in Annisette's office was against the weight of the evidence and the probabilities of the case and cannot be sustained. In my view also the finding that the appellant made the representations complained of and thereby induced the respondent to sign the draft articles of agreement without reading them is also unsustainable for the same reasons. This, however, is immaterial since, even if the representations had been made as alleged, they were not false for the draft did not contain anything that had not been agreed to. The articles which the respondent was asked to sign contained the terms of the contract to which he had agreed and respondent was not justified in rescinding the contract. It follows that there was no failure of consideration.

In these proceedings questions of mistake and rectification or the taking of accounts can find no place.

This appeal therefore must be allowed, the judgment appealed from set aside and judgment entered for the appellant with costs here and in the Court below.

Appeal allowed.

A. DUKE *v.* J. A. WILKEY & ANR.

IN THE WEST INDIAN COURT OF APPEAL.

ON appeal from the Supreme Court of Trinidad and Tobago.

Between: —

ALEXANDER DUKE, Appellant,

and

JAMES ALEXANDER WILKEY and P.C. VINCENT DASENT,
Respondents.

[TRINIDAD AND TOBAGO.No. 10 OF 1947.]

BEFORE FURNESS-SMITH, President (C.J. Trinidad and Tobago),
COLLYMORE , C.J. Barbados, and WORLEY, C.J. British Guiana.

1948. MARCH 9.

False imprisonment—Passenger travelling in ship with intent to avoid payment of fare—Power under law to arrest—No such intent in passenger—Passenger arrested—Damages awarded for illegal arrest.

The captain of a ship, believing that a passenger was travelling in the ship with intent to avoid payment of his fare and that he had thereby committed a summary conviction offence, ordered the arrest of the passenger. The passenger had no intent to avoid payment of his fare, and there was no reasonable cause to believe that he had committed any offence.

The passenger sued the persons who affected the arrest, for damages for false imprisonment.

Held that he was entitled to damages.

APPEAL by Alexander Duke from the judgment of the Supreme Court of Trinidad and Tobago dismissing an action brought by him against James Alexander Wilkey and Police Constable Vincent Dasent for damages for false imprisonment.

The judgment of the Court was as follows:

The case out of which this appeal arose was a claim for damages in respect of false imprisonment suffered by the plaintiff-appellant when he was arrested by the two respondents acting under the orders of the Captain of the s.s. *Trinidad* while travelling in that ship on the 17th April, 1945, from Port-of-Spain to Tobago. The appellant was locked up in a bath room cabin from 9 a.m. until 4.30 p.m. and, on arrival of the ship at Scarborough, Tobago, was taken to the police station where he was charged and then released on bail. The facts, which are not disputed in any material respect, are as follows: On the 12th April, the appellant purchased at Tobago a cheap week-end ticket which entitled him to travel to Port-of-Spain on a Government ship on that date and to return on the 16th. He decided, however, to travel on the 13th April and was permitted by the purser to do so, notwithstanding that his ticket was available only for the 12th. He apparently assumed that he would be granted the same indulgence when he returned by the same ship on the 17th,

although his return ticket was dated and available only for the 16th April. Unfortunately for him, there was a different purser on the ship for the return journey who refused to accept appellant's expired ticket as valid, and demanded from appellant one dollar ($1.00) being the difference between the price of an ordinary return ticket and a week-end ticket. This the appellant refused to pay and an altercation ensued during which the appellant made use of extravagant and abusive language, and stated that he would make a test case of it. He consented to see the Captain who, on his persisting in his refusal to pay the extra fare, ordered his arrest, and the first respondent, being the master-at-arms on the ship and a rural constable, took the appellant into custody. When the appellant offered resistance, the second respondent, who is a police constable, was called to assist. The appellant then tendered a twenty-dollar note in payment of the one dollar due, but this offer was refused on the ground that he was already under arrest for an offence under Section 17 (d) of the Merchant Shipping Ordinance, and the appellant was then dealt with as previously stated. The relevant part of Section 17 (d) reads as follows: —

"the following offenders, that is to say: —
" (d) any person who travels or attempts to travel in any
" such ship with intent to avoid payment of his fare,
"shall for every such offence, on summary conviction, be
"liable to a fine of forty-eight dollars, or to imprisonment for
"three months."

It is clear, and was not disputed by Counsel for the respondents, that intention is a necessary element to constitute the offence of attempting to evade payment. When the plaintiff was subsequently tried, the charge was dismissed by the Police Magistrate.

The trial judge found that the Captain of the ship had good reason for believing that the appellant was travelling with intent to avoid payment of his fare and was justified, therefore, in ordering his arrest, and that the respondents, in acting as they did, were merely carrying out the lawful orders of the Captain. Judgment was accordingly entered for the respondents with costs.

It appears to us that, having regard to the appellant's explanation as to the permission given him by the purser to travel on the 13th April with a ticket available only for the 12th, it was reasonable for him to expect a corresponding day's grace on the return journey. This explanation was not challenged at the trial, but there is nothing on the record to show that it was given by the appellant before his arrest. The whole course of his behaviour, and particularly his reaction to the demand for the additional fare, manifested a belief in the validity of his return ticket, however mistaken that belief may have been, and negatives any criminal attempt at evasion or fraud. We are satisfied that the charge against him was ill-founded, and that there was no reasonable cause to believe that he had committed an offence.

This conclusion is sufficient to determine the present appeal. There is, however, another aspect of the case which should be mentioned. The arrest was presumably made by virtue of powers

conferred on police officers by Section 21, subsection (1) (a) of the Police Ordinance, Chapter 11 No. 1. There seems to be a serious conflict between that provision and the provisions of subsection (2) of the same section, which Counsel for the respondents was wholly unable to explain. The former provision empowers the police to arrest without warrant any person committing *inter alia* a summary offence. The latter provision empowers such arrest only where the name and residence of the offender is unknown, or cannot be ascertained. Whatever may be the correct interpretation of the effect of these provisions, since no offence had been committed and there was no reasonable ground for supposing that it had, there was no right of arrest, and even if there had been such right, there was no necessity to exercise it as the appellant was well-known to respondents and others on the ship. It was suggested by Counsel for the respondents that the appellant's behaviour was so violent and truculent that, in the interests of discipline on the ship, the Captain was obliged to put him under restraint. It is, however, clear that the sole reason for the Captain's orders was the alleged offence.

It follows that this appeal must be allowed, the judgment set aside and judgment entered for the appellant with costs here and below. Counsel has agreed that this Court should assess damages. In our view, the appellant was not free from blame in this matter in view of his conduct when the indulgence he had hoped for was refused, and this may well have contributed to the treatment to which he was subjected. On the other hand, in addition to the illegal original arrest, there was no justification for his confinement after his offer to pay the requisite fare. Taking everything into account we assess the damages at two hundred and forty dollars ($240.00).

Appeal allowed.

SOONDER *v.* C. F. F. JEFFREY

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL from the Supreme Court of British Guiana.
(1945. No. 3. DEMERARA).

Between: —

SOONDER,

Appellant (Defendant),

and

CHANCE FRANCIS FRANKLIN JEFFREY,

Respondent (Plaintiff).

(W.I.C.A. No. 3 of 1947.—BRITISH GUIANA).

Before FURNESS-SMITH, President (C.J. Trinidad and Tobago).
COLLYMORE, C.J., Barbados, and MALONE. C.J., Windward Islands and Leeward Islands.

1948. March 15, 16, 17.

Will—In custody of testator during lifetime—Found in his repository after death—So torn and mutilated as to destroy evidence of its due execution—Prima facie presumption—That document so torn and mutilated by testator—That testator intended by his act to revoke will.

Will—Lost will—Re-constructed contents of—English practice as to—Should be adopted.

Practice and procedure—Time for delivery of statement of claim—Specially fixed by Rules of Court, 1900, *Order* 18. *rule* 1 (b)*—Power by consent in writing to extend time for delivery of pleadings or other documents—Rules of Court,* 1900, *Order* 45, *rule* 5*—Whether special provisions of Order* 18, *rule* 1 (b) *override general authority conferred upon parties by Order* 45, *rule* 5.

Practice and procedure—Pleadings—Delivery of—Delays in—Observations on.

If a will which has been in the custody of the testator during his lifetime is found in his repository after his death so torn or mutilated as to destroy the evidence of due execution, the prima facie presumption is that the document was so torn or mutilated by the testator, and that he intended by his act to revoke the will.

Per Worley, C.J. The English practice as to probate of the re-constructed contents of a lost will should in future be adopted in British Guiana.

Semble that the special provisions of Order 18, rule 1 (b) override the general authority conferred upon the parties by Order 45. rule 5. of the Rules of Court, 1900. (Worley, C.J.).

Observations by Worley, C.J. on the delays in the delivery of pleadings.

ACTION by Chance Francis Franklin Jeffrey against Soonder, singlewoman, No. 190 ex Ellora 1881 claiming as the lawful husband, and one of the persons entitled in the event of intestacy to share in the estate, of Christina Jeffrey (otherwise known as and called Sanichari, B.R. No. 447 of 1891), deceased, for the revocation of probate of a pretended will of the deceased and for

the grant of Letters of Administration of her estate to him. The defendant, who was the mother of the deceased, counter-claimed for probate in solemn form of a will of the deceased made on the 8th December, 1943. The pretended will was not the original will of the deceased but a reconstruction of a will or pretended will of which probate in common form had been granted on the 25th November, 1944.

During the hearing of the action, the defendant produced a document which she contended was the original will of the deceased executed on the 8th December, 1943, and the action proceeded, without amendment of the pleadings, as a contest for the probate or revocation of probate of this document in lieu of the reconstructed document.

The hearing of the action took place on the 13th, 14th, 22nd and 28th days of May. 1947, and the 4th and 23rd days of June, 1947 before Worley, C.J.

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

J. A. Luckhoo, junior, for defendant.

Cur. adv. vult.

Judgment in the action was delivered on the 23rd June, 1947 as follows:

WORLEY, C.J.: This is an action by the plaintiff, claiming as the lawful husband and one of the persons entitled, in the event of an intestacy, to share in the estate of Christina Jeffrey, alias Sanichari B.R. 447 of 1891, for the revocation of a pretended will of the deceased and for the grant of Letters of Administration of her estate to him. The plaintiff also claimed an injunction restraining the defendant from passing a transport of certain lands situate at Triumph in the County of Demerara between herself as executrix of the will and herself personally and a declaration that plaintiff's opposition to the said transport was just, legal and well founded.

The defendant contended that the plaintiff was not entitled to any of the orders sought and counter claimed for probate in solemn form of a will of the deceased made on 8th December, 1943.

In fact the will or pretended will which was then the bone of contention was not the original will but a reconstruction of a will or pretended will of which probate in common form had been granted by this Court on 25th November, 1944, in Application No. 470/44.

During the hearing, the defendant produced a document which she contended was the original will of the deceased executed on 8th December, 1943 and the action proceeded, without amendment of the pleadings, as a contest for the probate or revocation of probate of this document in lieu of the reconstructed document.

It will be convenient at this stage to set out as briefly as possible the history of this matter and the agreed facts. The deceased, a daughter of the defendant was born in the Colony on 21st February 1891 of East Indian parentage and registered in the Birth Register as Sanichari, number 447 B.R. 1891. She went to

school and learnt to read and write English and at some time in her life either married or lived with a man called Russell who was killed in the 1914-1918 War. On May 21st 1919 she was married at Georgetown by a Christian minister to one King and is described in the marriage register as Christina Elizabeth Russell, widow. King died in 1928 and deceased subsequently was married again in a Christian Church to the defendant, being described in the register as Christina Elizabeth King, spinster. She was also known familiarly as Bibi. The defendant, who is a Hindu, while admitting that the deceased was known as Christina, denied any knowledge of her having been converted to Christianity and there is no direct evidence of such conversion but I think her successive marriages in Christian churches establish a strong probability that she was so converted. She appears to have been a thrifty capable and business-like woman and died possessed of certain lands at Triumph Village which are the subject of the transport referred to in the pleadings, and on which stood the house where she and the plaintiff lived, also five cultivation beds and a quantity of jewellery. The defendant at first alleged that all this property had been acquired before marriage to the plaintiff but eventually admitted that two beds were bought subsequently, that plaintiff and deceased worked together planting and selling and that the plaintiff did business buying and selling cattle. A large number of documents were exhibited showing that the deceased conducted her business in the name of Christina King, or Christina Elizabeth King, even after her marriage to the plaintiff. She sometimes used the surname Jeffrey, but, except for the alleged will, there is no documentary or oral evidence that she used the name Sanichari. She had no children living at her death. In her latter years she suffered from heart trouble and died in her home at Triumph on 29th September, 1944. In the death certificate she was described as Christina Elizabeth Jeffrey; the particulars for this being supplied by a friend of the plaintiff. After her death, the plaintiff let the house and moved to his own home at Village 51, Corentyne, Berbice.

On the 11th September, 1939, deceased executed a promissory note in favour of the defendant for $105 repayable in fifteen months from date signing her name as "Christina King". As collateral security, she lodged with the defendant her transport for the land at Triumph and also (according to the plaintiff) a considerable quantity of gold and silver jewellery. The promissory note mentions the transport but not the jewellery. Although the plaintiff alleges that the promissory note was in part satisfied, there are no endorsements on the note or other receipts to support this. At the deceased's death, the note and transport were still in the defendant's possession.

On 7th October, 1944, the defendant applied to this Court for probate of the will of the deceased and lodged with the application a certified copy of an extract from the Register of Wills kept at the Immigration Department, Georgetown, and also what was described as a copy of the will. These two documents read as follows:

SOONDER *v.* C. F. F. JEFFREY

"A"

This is the document marked "A" referred to in the foregoing affidavit by Soonder.

Sworn before me this 7th October 1914,

J. B. SHARPLES,
Commissioner of Oaths to Affidavits.

Extract from REGISTER OF WILLS

No.	Testator.	Sex.	No.	Ship.	Year.	Residence.	Date.	Executor.	Relation ship.	Sex.	No.	Ship.	Year.	Legatees.	Wit nesses.
327	Sanichari	F.	447	B.R.	1891	Triumph	8.12.43	Soonder	Mother	F.	190	Ellora	1881	Also sole Legatee	T. J. H. S. R.

Certified Correct,

D. NAUTH,
for Immigration Agent General.

Local Government Department,
Georgetown,
3rd October, 1914.

IMMIGRANT'S WILL

I, Sanichari, female, No. 447 B.R. 1891. hereby revoke all former wills and codocils made by me and declare that this is my Last will.

1. All of my property real and personal, movable and immovable, whatsoever and wheresoever, I devise and bequeath to my mother Soonder, female, No. 190 ex *Ellora.* 1881.

2. I appoint my said mother Soonder, female, No. 190 ex *Ellora,* 1881, as executrix of this my will and guardian of my minor children and as such executrix I give her the power of assumption.

IN WITNESS WHEREOF I have hereunto set my hand this 8th day of December, 1943.

Sanichari,
Testatrix.

SIGNED by the above-named Sanichari, as her last will and testament in the joint presence of herself and us who at her request and in such joint presence have hereunto subscribed our names as witnesses.

1.	Name	..	Thomas Janki
	Address	..	Department of Local Government.
	Description	..	Senior Immigration Agent.
2.	Name	..	H. S. Ramsaroop
	Address	..	Department of Local Government.
	Description	..	Interpreter-Clerk.

This is the "Copy of Will"referred to in the affidavit of Harry Sarran Ramsaroop Sworn before me this 7th October, 1944.

J. B. SHARPLES,
Commissioner of Oaths.

The application was supported by affidavits of the defendant and of Mr. Harry Sarran Ramsaroop, Interpreter clerk of the Immigration Department. The application and affidavits were intituled "In the matter of the estate of the late Sanichari, female East Indian B.R. No. 447 of 1891, deceased." The defendant's affidavit, after deposing to the death and the execution of the will, then stated

> "The said deceased was *twice* legally married. *Firstly* to Cyril King, subsequently to the 20th day of August, 1904, and he died in the year 1928. *Secondly,* to Chance Jeffrey, subsequently to the 20th day of August, 1904, and he is alive.
>
> "That at the time of the death of the said deceased on the said 29th day of September, 1944, the said will was whole and unrevoked, and in the same state as when executed but that the said will has been lost and cannot now be found, although diligent search has been made."

She then went on to swear to the certified extract and to search for any subsequent will and then said:

> "That I believe the copy of the will dated the 8th December, 1943, deposited by me in the Registry of Court to contain in substance the contents of the said true and original last will and testament of the said deceased."

Mr. Ramsaroop swore, as one of the subscribing witnesses, to the execution of the will and to the certified extract and then deposed

> "That I have also seen and inspected the "Copy of Will" laid over herewith purporting to be a true copy of the said last will and testament of the said deceased, and I say that the same represents truly and accurately all the gifts and appointments made by the said deceased in her last will and testament which was executed on the said 8th day of December, 1943."

Probate was granted on the 25th November, 1944, and the grant extracted by the defendant. This grant has been brought in obedience to a citation issued in this action on January 3rd, 1945.

Meanwhile on November 3rd, 1944, the plaintiff had applied for letters of Administration of the estate of Christina Elizabeth Jeffrey, deceased and in his affidavit in support recited the marriages to King and himself and deposed that deceased died intestate. On this Letters of Administration were granted on 25th November, 1944, and extracted by the plaintiff.

It is admitted that these two grants related to the same estate and it may be worth noting, in passing, that the defendant's inventory valued the estate at $625: and the plaintiff's valued it at $295, excluding the value of jewellery "to be ascertained." I may also note two other points in passing. The plaintiff did not, though he later said in Court that he did, disclose the $100: debt due to the defendant. The grant of probate to the defendant recites that the original will "was lost or misplaced in the residence of the said Sanichari:" there is no explanation of how this recital came to be included, and it is not consistent with the defendant's evidence.

In December 1944, the plaintiff in consequence of information received from the Immigration Office instructed his Solicitor to make search for a grant of probate of a will made by his wife but the search proved fruitless. About two weeks later it came to his knowledge that the defendant was advertising transport of the land at Triumph Village by herself as sole executrix to herself as sole beneficiary; deceased's transport being in favour of Christina King that name necessarily appeared in the advertisement. He entered opposition to the transport and started this action. He does not appear to have been in any hurry to proceed with it for he took twelve months to file his statement of claim and eleven months to file his four-line reply to the defence and defence to the counter-claim. This largely explains why this action did not come on for hearing until May of this year.

At the first hearing, counsel for the defendant made the preliminary objection that this action arose from an opposition to a transport, that the opposition did not show that the plaintiff was asserting a right in the property of a class which would ground

an opposition and that, the opposition being without foundation, any further proceedings arising from it must necessarily be bad. For the plaintiff, it was answered that he, as the husband of deceased was entitled to a share of her estate on an intestacy and therefore had a *dominium in res* which would entitle him to oppose, but that, in the event, he had abandoned the opposition proceedings and was proceeding on the Probate side of the Court. He was prepared if necessary to abandon the second and third prayers of the Statement of claim which were merely ancillary and would become unnecessary if the grant of probate were revoked. I overruled the preliminary objection and called on the defendant to prove the will.

Her story was that on 8th December, 1943, she and the deceased had gone to the Immigration Office where deceased executed a will appointing the defendant as sole executrix and sole beneficiary of her estate in the presence of officers of the Department, that on leaving the office, deceased had handed over the will to her telling her to keep it. Defendant had put the will immediately in an unlocked drawer of a chest in her house in Triumph Village, and did not look at it again for nine months but that when she went to get it from the drawer on the afternoon of her daughter's burial it was missing. She could not explain its disappearance but denied that her daughter had had any opportunity of removing it. In cross-examination she admitted that she kept her own securities (including the promissory note and deceased's transport) in a brass pot hidden in the house and, pressed as to why she put the will in the drawer instead of in the brass pot, said that she "forgot about the will." By way of accounting for the deceased cutting plaintiff out of the will she alleged that husband and wife were on bad terms because of the plaintiff's ill treatment, idleness and desertion. She subsequently had to retract this in some measure.

Two officers of the Immigration Department, Mr. Thomas Janki, who was in 1943 a Senior Immigration Agent, and Mr. Ramsaroop were called and their evidence supported by the certified extract from the Registrar of Wills, satisfied me that on the 8th December, 1943, a female East Indian immigrant, who gave her name as Sanichari did appear before them and make a will which was duly executed and attested by them according to law, and that the substance of the will was then and there recorded in the Register. But the further question still remained whether the woman was, in fact and in truth, Sanichari the daughter of defendant and wife of the plaintiff or whether, as plaintiff contended, she was an impostor. Later developments in the case make it unnecessary to go in detail into the evidence on this point and I need only say that the oral evidence adduced on behalf of the defendant would not have completely satisfied me on this point. The defendant herself was utterly unconvincing and untrustworthy. In the course of a fairly long experience of Indian witnesses, I have rarely, if ever observed one who created so unfavourable an impression on my mind and I am convinced it would be unsafe to accept any statement of hers which was unsupported by documentary or other independent evidence. Neither

Mr. Janki nor Mr. Ramsaroop had any recollection of the incident of December 8, which is not surprising, and they were really reconstructing what took place from the evidence of the extract.

When defendant's counsel was about to close his case I asked for evidence that the copy of the will laid over with the application was in fact a true copy of the original and was surprised to learn that it was no copy at all but a reconstruction concocted from the details recorded in the Register of Wills kept in the Immigration Department. I shall refer again to this matter later in this judgment.

The substance of the plaintiff's case was a denial of the allegation that he and deceased lived unhappily, though he admitted a few bickerings and one quarrel leading to blows about January or February 1944 occasioned by deceased's jealousy. He denied that deceased had made the will of 8th December 1943 or that there was any will extant at the time of her death, and alleged that in July 1944, the deceased had told the defendant that "if anything happened to her" (i.e. deceased) the plaintiff would pay off what was owed. He also alleged that the deceased was ill and unable to leave the house from the middle of November till the middle of December, 1943. Although this witness created a fairly favourable impression on my mind I am convinced he was not truthful when he spoke of this illness and that would make me cautious in accepting his other uncorroborated evidence.

On 14th May, before the cross-examination of the plaintiff was completed I adjourned the case to 22nd May and at the resumed hearing on that day counsel for the defendant informed me that his client had found the original will and was given leave to reopen his case. The defendant, recalled, then related how, after the previous hearing, she had on counsel's advice, made another search for the lost will and how it had fallen out of the chest when she pulled out the drawer. It was a remarkable story and I entirely disbelieve it. To my mind her whole story of having put the will in the drawer and forgotten it, instead of putting it safely away with the rest of her valuable documents reeks of falsehood. Mr. Luckhoo argued that the condition of the will was compatible with its having been caught and creased between the drawer and the top or side of the chest. I cannot agree: the will shows creases where it has been folded and is covered with tiny crumplings or creases, not such as I would expect to see in a document squeezed between two flat surfaces, but far more consistent with it’s having been crumpled into a ball as Mr. Stafford suggested. Taking into consideration all the circumstances and the course this action has taken, I think the most probable explanation is that the defendant having somehow or other got possession of the will, had it in her possession at the time she applied for probate, but because of its condition which I shall describe fully later, thought or was advised that it would be safer to rely upon a "copy" reconstructed from the Register of Wills and only decided to produce it when counsel impressed her with the advisability of making further search.

Mr. Janki and Mr. Ramsaroop recalled, identified their signatures and initials on the document now produced and also the

signature of the testatrix thereon made in their presence and satisfied me that the document is in fact the will made and executed by and before them on December 8th, 1943.

I now have therefore the original signature of the testatrix to assist me in determining her identity, and. by a curious accident; it furnishes evidence which to my mind is conclusive of the signature having been made by the woman Sanichari, who was Christina King or Jeffrey and the person whose estate issue. It begins with the letters "Ch" (which have been crossed out and initialled) followed by the name Sanichari. This is consistent with Mr. Janki's evidence that it is the practice in the Department to insist on the use of the name shewn in the Department's Register of Births, though it is hardly consistent with his further evidence that if the testatrix had another name it would be shewn in the will as an alias. However, I think the only possible conclusion from an examination of the signature is that the testatrix started to write the name Christina or at any rate a name beginning with "Ch", was stopped and told she must use the name Sanichari and complied. Expert evidence was called to shew the identity of the handwriting of this signature with that of authentic signatures of Christina King, the deceased, which appear on some of the documents exhibited. However I rely mainly on my own conclusions from a comparison of the "Ch" on the will with the letters "Ch" in those signatures. There are noticeable peculiarities in the formation of these letters and those peculiarities appear in all the signatures. I cannot accept Mr. Stafford's hypothesis that someone who had learnt to imitate deceased's handwriting by copying the signature Christina King forged the signature to the will but inadvertently started to write the name Christina. It appears to me far more probable that the deceased naturally and from force of habit started to write the name she habitually used. I am satisfied therefore that the document produced is a will made by the deceased on December 8th, 1943. There was no suggestion that she was not sane and of sound mind, capable of understanding what she was doing at that date, but two further questions remain to be answered.

The first is whether the document expressed her wishes and the second whether the will was revoked before death.

The will is drawn on a simple printed form made and used for this purpose in the Immigration Department and is substantially the same as the alleged copy which was laid over with the defendant's application for probate. I am satisfied that so far as concerns the bequest to defendant as sole beneficiary and the appointment of defendant as sole executrix the will expressed the wishes of the deceased at the time it was made and that it was so explained to and understood by her. The two witnesses however admit that the words "and guardian of my minor children and as such executrix I give her the power of assumption" were not explained to her and do not represent her wishes. They regard these as merely stereotyped printed phrases and do not bother to explain them or to delete them where they are not needed. The appointment of a guardian to minor children was at the time meaningless and, as the deceased was then aged 52,

was not likely to be required. I think neither witness could have explained the power of assumption if called on to do so. In the circumstances I think the right course is to hold that the will as a whole did express the wishes of the testatrix but that these two clauses were included by mistake and were not brought to the mind of the testatrix, and, if the will is admitted to probate, to order that they be omitted (see Brisco v. Baillie Hamilton 1902 P. 234).

It remains to consider the question of revocation. Section 7 of the Civil Law Ordinance, read in conjunction with the Wills Ordinance makes the provisions of the Wills Act 1837 dealing with revocation or alteration of a will part of the law of the Colony. For the purposes of this case the material words of Section 20 of the Act are that no will or any part thereof shall be revoked otherwise than…….by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of destroying the same. I may also refer to the relevant provisions of section 21 of the Act which enact that no obliteration or other alteration made in any will after the execution thereof shall be valid or have any effect……unless such alteration is executed in the manner prescribed for the execution of the will.

In this case there is no direct evidence of any destruction or intention to destroy by or on the part of the deceased, but it is contended by the plaintiff that revocation can be inferred from the condition of the document and relevant statements by the deceased. I cannot however place much reliance on plaintiff's evidence as to these statements and prefer to rely on the condition of the paper and the circumstances of the case.

The will is certainly in a very dilapidated condition. A large portion is missing altogether from the top right hand corner and from there a jagged tear goes right across to within a quarter of an inch of the left-hand edge of the paper. The name of the testatrix, Sanichari F., remains and, according to Mr. Ramsaroop's evidence, the missing piece contained the further description i.e., the number in the birth register and year of birth. Further portions are missing from the top left hand corner and down the left edge, though some of these may be attributable to the depredations of insects. Across the middle of the paper, where the devise is written is a tear running from the left hand edge to within two inches of the right hand edge. There are several other small tears and at the bottom a fairly large piece has been torn out. Across the bottom half of the paper and running through the clause appointing defendant as executrix, the signature of the testatrix, and the attestation clause and signatures of the witnesses are two diagonal parallel pencil marks, deliberately drawn and such as are commonly made by persons wishing to cross out a writing or cancel a document. On the back of the paper are some Hindi characters written in pencil, meaning "Sanichari's will". When the will was made a clean unspoilt form was used and it therefore follows that these pencil marks and tears were made subsequently to the execution. The defendant, after first denying knowledge of the Hindi characters, then

admitted that they had been written by an old man who lived with her on the day she took the will home and before she put it away in the drawer lest "he should forget what the document was and not be able to find it for us." She denied that the old man had made the two pencil marks on the face of the will and insisted that from the time she put the will away until the day she found it, she had never given it to anyone. Her story therefore, gives no explanation of these marks and I have already said that I reject her story of the putting away and finding of the will.

In my view, the probable and reasonable explanation of the condition of the will is that the deceased intended to revoke and destroy it, that with this intention, she either cancelled it herself or had it cancelled by the pencil marks, that she also rent and tore it, crumpled it up and threw it away, and that somehow or other defendant gained possession of it and kept it secretly. The evidence discloses sufficient opportunity and that deceased and plaintiff were not always on good terms; probably they differed more frequently than the plaintiff would admit, and it may be that it was at such a time deceased made this will in favour of her mother and subsequently changed her mind when her resentment against the plaintiff had passed away. I am satisfied on the evidence that deceased and plaintiff were on good terms during the last months of her life. There is also evidence that defendant resented the marriage to the plaintiff, who is of negro or partly negro blood and the conduct which I impute to her is all of a piece with the impression of cunning and deceit left on my mind by her conduct in this case and her demeanour in the witness box.

Such being the view I take of the deceased's intention, the question is whether there has been a sufficient destruction to satisfy the statute. It is clear from the authorities that a mere cancellation will be ineffective and that the two lines drawn across the paper, not having been duly executed, are ineffective for the purposes of either section 21 or section 20 of the Act, but nevertheless, in my opinion, they can be taken into account as indicating an intention to revoke. The authorities also shew that the tearing to be effectual need not be of the whole will: tearing that part of the will which may be said to be the principal part, and I think the devise is the principal operative part of this will, will cause a revocation of the whole will, though the presumption of revocation thus arising may be rebutted (see Jarman on Wills 7th Ed. Vol. I p. 131).

I do not think it necessary to refer at length to the authorities cited to me on the question of revocation. From a study of these and of the further cases on incomplete destruction referred to on page 136 of the same volume of Jarman on Wills I conclude that the question whether or not partial destruction is effectual revocation is largely a question of fact and inference and at p. 133 I find the following passage:

> "Where a will is found torn after the death of the testator and there is no direct evidence of intention, the question whether it was torn by him **animo revocandi** often depends

> on the appearance of the paper and other circumstances: the presumption seems to be that the tearing was done by him **animo revocandi** but evidence is admissible to show that it is merely the effect of wear."

That passage is to my mind a correct resume of the decisions cited as authority for it. In the present case, a will, which has been cancelled and partially destroyed, is produced, at a late stage in the case with an unconvincing explanation, from the possession of the sole beneficiary who is unable to give any satisfactory explanation of the presence of the cancellation marks or of the mutilated condition of the will. If the defendant's story were true the only wear and tear to which this paper has been subjected is such as it would suffer lying in the drawer where she placed it or being rubbed between the sides or back of the drawer and the wood work of the chest. I think that story is quite incompatible with the general condition of the paper, the tears and the missing corner and taking into consideration the appearance of the paper and all the circumstances of this case I hold that the will was torn by the deceased animo revocandi and that there was an effectual revocation by partial destruction.

I therefore pronounce against the will, revoke the grant of probate to the defendant and confirm the Letters of Administration of the estate of the deceased granted on the 25th November, 1944, in favour of the plaintiff. I make no order on the ancillary prayers indorsed on the writ which are now unnecessary. The defendant must pay the plaintiff's costs of this action.

It remains to refer to three matters arising out of this case. The first is a point of practice where it is sought to prove the contents of a lost will.

Tristram and Coote's Probate Practice 19th Edition p. 229 states that probate may be granted of the reconstructed contents of a lost will and it appears from the evidence of the Solicitor who prepared the application for probate in this case and from other applications which have come to my notice that it is the practice here, in such cases as this, to rewrite the will on a printed form and describe it as a copy. This is in my opinion a wrong and misleading description: the English practice would appeared to be to embody the substance of the lost will in an affidavit and to lay over the consent of all parties who may be prejudiced by the admission to probate, (see the same volume of Tristram and Coote's Probate Practice at p. 43 and p. 416). In the absence of any local Probate Rules the English practice should in future be adopted in these cases.

Next I think I should refer to the practice of officials in the Immigration Department who undertake to write and witness Immigrants' wills. In so doing they are not discharging any statutory duty but do perform, I have no doubt, a very useful service to poor and illiterate persons. This case however has shewn that they do not always fully realise the responsibilities they assume, and they should be advised of the importance of ascertaining fully, as a solicitor would do, the status of the person desiring to make a will, whether there is a husband or wife or children whom the would-be testator or testatrix might be

supposed to wish to benefit, of fully explaining the effect of the proposed disposition and of ensuring that anything contained in the printed form which is unnecessary and does not express the wishes of the testator is deleted.

Lastly I wish to refer to the inordinate delay in filing the Statement of Claim and the Reply in this case. I have not inquired into the reasons for this delay and am not imputing or apportioning blame. Here again this case is not unique in my short experience in this Colony: I have before me another case where plaintiff sues on a specially indorsed writ, issued in March, 1946, leave to defend given in April, 1946, and a defence and counterclaim filed in June, 1947, nearly fourteen months later and after the case had been set down for hearing. Of course in all these cases with the pleading filed out of time is laid over the written consent of the opposing party given in pursuance of O. XLV r 5 of the Rules of Court. The Rules of Court prescribe the time within which pleadings are to be delivered and also provide in O. XLV r. 4 for the enlargement or abridgement of time by the Court or a Judge, but from the manner in which and the extent to which O. XLV r. 5. is used, all other rules as to time are rendered nugatory and might as well be abolished, In my opinion the privilege conferred upon parties by 0. XLV. r 5, no doubt intended originally to save costs, is being abused and, if that abuse continues, will have to be restricted. The purpose of the Rules in limiting time for delivering pleadings is to prevent dilatory proceedings by one party or the other and that purpose is being brought to nought. It is small wonder that people complain of the law's delays when solicitors take fifteen months to close the pleadings in a simple action for money due.

In the instant case, the plaintiff's Statement of Claim was filed months after defendant had entered appearance and was of course laid over with a written consent under O. XLV r. 5. I think it very probable that the special provisions of O. XVIII r. 1 (b), which provides that in no case where a defendant has appeared shall a Statement of Claim be delivered more than ten days after the appearance unless otherwise ordered by the Court or a Judge, override the general authority conferred upon the parties by O. XLV r. 5, but the point was not taken in this case. During the argument Mr. Luckhoo invited me to infer from the delay in delivering pleadings an absence of bona fides in the plaintiff's claim. To my mind it does not lie in the mouth of a party who has without protest consented to such unconscionable delays, to urge that they show mala fides. There is always the alternative of refusing consent and leaving the party in default to apply to a Judge when such allegations can be inquired into.

The defendant appealed from this judgment to the West Indian Court of Appeal.

H.C. Humphrys, K.C. and *J.A. Luckhoo,* junior, for appellant (defendant).

S.L. van B. Stafford, K.C. and *P.A. Cummings,* for respondent (plaintiff).

Cur. adv. vult.

The judgment of the President was as follows:

FURNESS-SMITH, P.: In this case a will propounded by the defendant—appellant has been adjudged to have been duly executed, but subsequently revoked by the testatrix. It is from the decision in regard to revocation that the appeal is now made. The will was propounded by the mother of the deceased as executrix thereunder. Its condition is such that, if it were established that it was caused by the act of the testatrix, it would leave me in no doubt that it was done with intent to revoke. Its crumpled condition appears to me to be unequivocal in this respect. When the trial commenced, the original will was not produced, and it was sought to prove a reconstruction, since the original was alleged to have been lost. During the trial, the defendant produced the original which she professed to have found at the back of the drawer in which she had placed it, and accounted for its torn and crumpled condition by the explanation that this was caused by the action of the drawer in opening and shutting.

This explanation was not acceptable to the learned trial judge, and is, in my opinion, wholly incompatible with the appearance of the document. The judge attributed the condition of the will to the act of the testatrix, not from any direct evidence of her intention to revoke or of actual destruction by her, but by reason of the inference which he drew from the condition of the document which he evidently considered was caused by some deliberate act, and, presumably, by reason of the belief that such an act was unlikely to have been committed by any other person. Such inferences and conjectures are not, as it seems to me, sufficient to discharge the onus of proof which the law places on those who assert revocation of a will.

Before this Court it was argued on behalf of the respondent that the circumstances of the present case fell within one of the exceptions to the rule governing such onus of proof to which reference is made in Mortimer on Probate Law and Practice (2nd Edition) at page 157. It is there stated that if a will which has been in the custody of the testator during his lifetime is found in his repository after his death so torn or mutilated as to destroy the evidence of the execution, the *prima facie* presumption is that the document was so torn or mutilated by the testator, and that he intended by his act to revoke the will.

In the present case it was proved that, after execution in the Immigration Office, the testatrix took delivery of the will, and there is no evidence, other than that of the appellant (which the trial judge rejected as utterly unconvincing and untrustworthy), as to what became of it thereafter. It was argued that the will must be presumed to have remained in the possession of the testatrix until her death. I do not myself think that such a presumption is valid, and it is to be noted that it is in conflict with the inferences of fact which are made by the trial judge himself at page 97 of the record, where he expresses the opinion that, after the testatrix had destroyed the will with the intention of revoking it the appellant somehow or other obtained possession of it and kept it secretly. If this be so, it is very like the case of Cheese *v.* Lovejoy (1877) 2 P.D. 251; but, whatever the truth may have been

as to the means by which the appellant obtained possession of the will, there seems to be no sure ground for assuming, but rather the reverse, that the will in its present condition remained in the possession of the testatrix throughout the period from the time of its execution until her death. That disposes of the ground for the exception to the rule governing onus of proof of revocation. The will in the present case was not produced from the custody of the testatrix, nor was it found in any repository of hers after her death.

It was further argued that, since the will was propounded by the appellant as executrix in its present mutilated condition, the onus is upon her, and not upon the respondent, to prove that this condition was caused otherwise than by the act of the testatrix. I know of no authority for such a proposition and it is contrary to the fundamental rule governing proof of revocation.

In my opinion it has not been proved that the mutilated condition of this will was caused by the act of the testatrix, and I think that the present appeal should be allowed.

Having regard to the conduct of the appellant prior to and during the trial, I am satisfied that the costs of each party both in the Court below and in this Court should be born by the estate.

The judgment of the Chief Justice of Barbados was as follows:

COLLYMORE, C.J.: The facts and circumstances in the somewhat extraordinary case out of which this appeal arises are fully set out and dealt with in the judgment of the learned trial judge. I do not restate any of them save for the purpose of this decision.

The sole question for this Court is whether the duly executed last will and testament of CHRISTINA JEFFREY, also known as Sanichari, B.R. No. 447 of 1891, deceased, who died on the 29th of September, 1944, was revoked by her or not. The Respondent claims that it was so revoked and the learned judge, disbelieving the evidence of the Appellant, whom he characterised as "a very unconvincing and shifty witness" never failing to understand her counsel's questions though she always seems unable to understand questions in cross-examination or questions put by me," accepted the Respondent's contention holding that revocation had been established. It cannot be disputed that at the trial and before us the will had and bears marks of partial destruction or mutilation, — *albeit* the material parts remain. There are pencil marks through a portion of it, bits of it are torn away and it appears to have been completely crumpled up. The will was not produced by the Appellant until these proceedings were well advanced and consequently matters other than revocation were under consideration. Long before this the Respondent had obtained letters of administration to the estate of his late wife, the testatrix, and the Appellant in respect of the same estate had been granted probate of a reconstructed will. The evidence of the Appellant as to how she came by the will and where and how she kept it was rejected, and this Court cannot in the circumstances question this finding. According, however, to the evidence accepted by the trial judge the will was last seen prior to its appearance in Court in the hands of the deceased at the Immigration Office, after its pro-

visions had been recorded; and at a time when the Respondent swore his wife was too ill to leave their home and travel to Georgetown.

The law with regard to revocation as appertaining to this case is concisely set out in Mortimer on Probate Second Edition at page 157. "When a will is once proved to have been duly executed, the party who alleges that some act amounting to a revocation has been done by the testator must prove his allegation, and in the absence of proof the revocation falls to the ground. This proposition is subject to certain exceptions in cases where a will which has been in the custody of the testator is not forthcoming, or is forthcoming in a torn or mutilated condition at the time of his death.

If a will which has been in the custody of the testator during his lifetime is found in his repository after his death so torn or mutilated as to destroy the evidence of due execution, the *prima facie* presumption is that the document was so torn or mutilated by the testator, and that he intended by his act to revoke the will."

On behalf of the Respondent, *inter alia,* I am asked to infer in the absence of direct evidence that the will in the hands of the deceased at the Immigration Office and produced long after by the Appellant in Court was in the custody of the testatrix at the time of her death or in a repository of hers, was there found after death in its present mutilated condition and accordingly the presumption arises that she mutilated or partially destroyed it *animo revocandi.* I would observe that such a presumption arises on certain proved facts and cannot arise on probability or conjecture only. The law does not favour an intestacy if a *duly executed* will is known to exist, and here is a duly executed will so found. Bearing in mind the principle enunciated that: "When a will is once proved to have been duly executed, the party who alleges that some act amounting to a revocation has been done by the testator must prove his allegation, and in the absence of proof the revocation falls to the ground", one looks in vain for evidence that the testatrix expressly at any time indicated a change of that intention declared and expressed in her will made about nine months before her death. Moreover, there is no evidence from which such change can be inferred or deduced. In my view the Respondent has not discharged the burden of proving revocation *animo revocandi.* And so, in this case in which the conscience of the Court is involved and which must not be treated as a contest between the parties, although in long measure it so started but must be regarded as concerning the intention of the testatrix, I pause to reflect on the question why the deceased, who must be taken as recognising the propriety and importance of making a will, if she wanted to deprive her aged mother of her bounty did not make another will with changed provisions. With deference and respect to the judgment for the reasons given I come to the conclusion that the will should be admitted to probate and the letters of administration to the Respondent revoked, — first allowing this appeal and setting aside the judgment.

As to costs — for the reasons advanced by counsel and in exercise of discretion in accordance with the authorities cited, the

taxed costs of both parties in this Court and the Court below, must be borne by the estate.

The judgment of the Chief Justice of the Windward Islands and Leeward Islands was as follows:

MALONE, C.J.: The question for decision in this appeal is whether or not sufficient evidence was adduced at the hearing of this case to justify the conclusion that a will dated the 8th day of December, 1943, made, as the trial Judge found, by one Sanichari (also known as Christina Jeffrey), the mother of the appellant, and the execution of which had been duly proved, was revoked by the testatrix subsequently to its execution.

The learned trial Judge rejected the evidence of the appellant as to her finding the will and characterised this evidence as teeming with falsehood. In dealing with the whole of her evidence he commented as follows: "The defendant (appellant) was utterly unconvincing and untrustworthy and I am convinced it would be unsafe to accept any statement of hers which was unsupported by documentary or other independent evidence." The evidence which he did accept shows that upon its execution this will had been delivered to the testatrix in an unspoiled condition and was last known to be in her possession prior to its somewhat belated production by the appellant in a mutilated condition, at the hearing after her case had been closed.

Where a will is found destroyed or mutilated in a place in which the testator would naturally put it there is a presumption of fact that the testator destroyed it, and that the destruction was done *animo revocandi.* This however is a *prima facie* presumption (Halsbury, Hailsham edition Vol. 34. p. 87).

This will does bear, in my view, marks of cancellation and has been crumpled and mutilated in such a manner as to create the impression that all this has been done with the object of making an end of the will, but can it be fairly inferred from its present condition, and from the fact that it was last known to have been in the possession of the testatrix having been handed to her in a clean unspoilt condition, that it was mutilated by her? Had there been evidence of the will having been found in a place where the testatrix usually kept her papers of moment and concern then the inference that this mutilation had been done by her would have been irresistible. But the testatrix did not live alone, and there is no evidence, in my opinion, from which any inference can be properly drawn as to the place where the will was found, and it should not be assumed, even though the appellant has been found not to be a witness of truth, that it was taken by the appellant from a repository of the testatrix.

The onus rests on the respondent to satisfy the Court that the testatrix revoked her duly executed will. "The intention of the testatrix to revoke must be as clear and free from doubt as the original intention to bequeath or devise and must be shown with reasonable certainty." I am unable to find, with reasonable certainty, on the facts of this case as accepted by the trial Judge that the testatrix herself mutilated this will and as I cannot do this I should pronounce for the will. There are many suspicious cir-

cumstances surrounding the production of the will by the appellant, who is also the executrix, and otherwise, but suspicion is not proof. I must therefore agree that this appeal should be allowed and I also agree, in the circumstances and bearing in mind the decided authorities, that the costs of all parties here and in the Court below should be paid from the rather modest estate of the deceased.

Appeal allowed.

Solicitors: *N. C. Janki,* for appellant (defendant);
R. G. Sharples, for respondent (plaintiff).

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of British Guiana.

Between:

SYLVINO JOSEPH CORREIA, ALEXANDER AUGUSTUS CORREIA AND HILARY CORREIA, trading under the name of the Demerara Film Exchange,
Appellants (Defendants),
and
A. A. BARRINGTON, Respondent (Plaintiff).

[1947. No 2.—BRITISH GUIANA]

BEFORE FURNESS-SMITH, President (C.J. Trinidad and Tobago); MALONE, C.J. Windward Islands and Leeward Islands; and WORLEY, C.J. British Guiana.

1948. MARCH 19, 23.

Negligence—Cinematograph film required to be stored in a vault—Cinematograph Regulations, 1928*—Film stored in another place—Spread of fire from such place—Property destroyed and damages—Liability of person so storing film—In negligence at common law, statutory negligence or nuisance—For damage.*

Damages—Buildings destroyed and damaged—Measure of compensation—Damage actually sustained—Not expense of restoring building to original condition.

The appellants erected on their land a concrete vault for the storage of cinematograph films. The competent authority under the Cinematograph Regulations, 1928, had approved of the vault as fire-proof, and had granted permission in writing to the appellants to store films therein. The vault was divided into 4 compartments separated from each other by dividing walls; each compartment had a separate fireproof door covered with galvanized iron. The 4 doors were on the north side of the vault. Attached to the vault on the north side, was a shed with a sloping galvanized iron roof supported by posts of greenheart wood. This shed was also divided into 4 compartments, separated by chicken mesh wire, corresponding with the 4 compartments in the vault. The shed had not been passed or approved as fire-proof by the competent authority under

the Cinematograph Regulations, but had been erected by the appellants with the permission of the City Engineer of Georgetown on the appellants giving an assurance that it was not to be used for the storage of films but only whilst films were in transit to and from the vault and for the purpose of the operation of winding and re-winding films on spools. The appellants retained for their own use 2 of these compartments known as compartments No. 3 and No. 4, and rented the remaining 2 to 2 other film agents.

Within 30 feet of the vault, the respondent had built a house of 2 storeys and not far from this was a small cottage which was also owned by him. Both these buildings were occupied by tenants.

Between midnight on the 30th April and the early hours of the 1st May, 1943, a fire occurred which destroyed the shed attached to the vault and a quantity of films and also the respondent's two-storeyed house and badly damaged his cottage.

There were canisters containing cinematograph films in the No. 4 compartment of the shed attached to the vault at the time of the outbreak of the fire in that shed, and the fire spread from the films to the respondent's two-storeyed house and on to the cottage.

No. 4 compartment was in the possession and control of the appellants. The storage, before the fire, of films in that shed of No. 4 compartment outside of the vault proper was done by the appellants or their agents, and was in breach of the Cinematograph Regulations, 1928.

Held (1) that, whether on the ground of statutory negligence, or of negligence at common law, or on the ground of nuisance, the appellants were liable to the respondent for the loss sustained by him through the destruction of his two-storeyed house and the damage to his cottage and palings.

Re *Polemis and Furness, Withy & Co., Ltd.* (1921) 3 K.B. 560, C.A.; and *Smith* v. *London and South Western Railway Company* (1870) L.R. 6 C.P. 14, Ex. Ch. applied.

(2) that the respondent should be compensated for the damage he has actually sustained, but not for the expense of restoring the building to its original condition.

Hide v *Thornborough* 2 C. & K. 250. *Jones* v. *Gooday* (1841) 8 M. & W. 146, and *Hasking* v. *Phillip* (1848) 3 Exch. 168, applied.

APPEAL by Sylvino Joseph Correia, Alexander Augustus Correia and Hilary Correia trading under the name and style of Demerara Film Exchange Company from a judgment of the Supreme Court of British Guiana awarding $3,678 as damages for the loss sustained by the plaintiff A. A. Barrington through the destruction and damage by fire of certain buildings owned by him.

S. L. van B. Stafford, K.C., for appellants (defendants).

H. C. Humphrys, K.C., and *R. H. Luckhoo,* for respondent (plaintiff).

Cur. adv. vult.

The judgment of the Court was delivered by the Chief Justice of the Windward Islands and Leeward Islands as follows:

The appellants who were the defendants in the action appeal against a judgment for the sum of $3,678.00 with costs awarded against them as damages for the loss sustained by the respondent, (the plaintiff), through the destruction by fire of a two-storeyed house, and damage to a cottage, both of them his property. The respondent's claim was based in negligence, alternatively, in nuisance, and in both negligence and nuisance. On behalf of the appellants it was contended that the findings of fact made by the learned trial judge were unreasonable and against the weight of

the evidence, or not supported by the evidence, and that he had erred in law in holding that the appellants were legally liable for the commencement spread or consequence of the fire. It was also contended that the trial judge had proceeded upon a wrong principle in assessing the quantum of the damages" he awarded.

So far as the findings of fact of the trial judge are concerned the principles upon which this Court proceeds in considering an appeal from such findings are well-known. This was pointed out by Lord Wright in *Collingwood v. Home and Colonial Stores, Ltd.,* when he said: "I want to make it quite clear that the practice of this court in non-jury cases will not be to attempt to re-try the issues of fact which the learned judge has decided, and *prima facie,* his decision will be accepted by this Court. That does not, of course, mean that the court will not fulfil its statutory duty to retry the case, but it will always remember that the learned judge has had the benefit of seeing and hearing the witnesses." In this case, although the Court has been strongly urged to do otherwise, it is sufficient to say that it sees no reason to interfere with the findings of fact of the trial judge supported as they undoubtedly are by the evidence.

The destruction of and the damage to the respondent's property happened in the following circumstances—The appellants who are partners trading under the name or style of "The Demerara Film Exchange Company," carry on the business of exhibiting cinematograph films at some of the cinemas in British Guiana. In the course of their business and in order to comply with the Cinematograph Regulations, 1928, of this Colony, they had erected upon their lands at lot 65 Fifth Street, Alberttown, Georgetown, a concrete vault for the storage of films. The competent authority under the Cinematograph Regulations had approved of this vault as fireproof and had granted permission in writing to the appellants to store films therein.

The vault was divided into four compartments separated from each other by dividing walls; each compartment had a separate fireproof door covered with galvanised iron. These four doors were on the north side of the vault. Attached to the vault on the north side of it was a shed with a sloping galvanised iron roof supported by posts of greenheart wood. This shed was also divided into four compartments, separated by chicken mesh-wire, corresponding with the four compartments in the vault.

The shed had not been passed or approved as fireproof by the competent authority under the Cinematograph Regulations, but had been erected by the appellants with the permission of the City Engineer of Georgetown, on the appellants giving an assurance that it was not to be used for the storage of films but only whilst films were in transit to and from the vault and for the purpose of the operation of winding and re-winding films on spools. The appellants retained for their own use two of these compartments known as compartments No. 3 and No. 4 and rented the remaining two to two other film agents. Within thirty feet of the vault the respondent had built a house of two storeys and not far from this was a small cottage which was also owned by him. Both these buildings were occupied by tenants.

Between midnight on the 30th April and the early hours of

May 1, 1943, a fire occurred which destroyed the shed attached to the vault and a quantity of films and also the respondent's two-storeyed house, and badly damaged his cottage. It was in respect of the loss and damage suffered that the respondent brought this action.

The learned trial judge in his lucid and comprehensive judgment dealt with the issues raised at the trial and found as a fact that there were canisters containing cinematograph films in the No. 4 compartment of the shed attached to the vault at the time of the outbreak of fire in that shed; that the fire spread from the films to the respondent's two-storeyed house and on to the cottage, and not from the house to the films as the appellants' witnesses testified. In the course of his judgment he said "No. 4 compartment was admittedly in the possession and control of the defendants and I find that the storage of films before the fire there in that shed of No. 4 compartment outside of the vault proper was done by them or their agents and was in breach of the Cinematograph Regulations 1928 and therefore a breach of their duty to take that reasonable degree of care of dangerous material which those Regulations of 1928 indicated as necessary and proper so as to avoid doing damage to the person and property of others. For the damage resulting from the ignition of the films there stowed in the shed the defendants would be liable, in my view, both in negligence and nuisance."

He also found that "the defendants were guilty of negligence in having the films outside of the vault without which the fire however it originated could not reasonably have spread to the plaintiff's houses and for the resulting damage flowing directly from this act of negligence the defendants are therefore liable." Continuing, he said, "The liability of the defendants may also be regarded from the point of view of nuisance, that is to say, that the negligent act of the keeping of the films in the shed constituted a nuisance, for the damage resulting from which they were liable."

It was, however, contended by counsel for the appellants that on the ground of nuisance the respondent was not entitled to succeed, for the nuisance complained of was a breach of a statutory duty imposed upon the appellants by the Cinematograph Regulations, and as this was the position, the liability by action at law was not in nuisance but in negligence, and that the statutory negligence must itself be the direct cause of the loss. It was submitted that it must be shown that the fire had a negligent origin as there was no presumption of negligence from the mere fact that there was an outbreak of fire. Counsel did not contest that cinematograph films, in breach of the Regulations, had been stored in the shed which the appellants occupied but he submitted that it could not have been contemplated that the loss which the respondent sustained could have resulted from such breach of the Regulations.

The guiding principle of the law in cases such as this is that a person is liable for all consequences which in fact directly flow from his negligence (Re *Polemis and Furness, Withy* & Co., *Ltd.*. (1921) 3 *K.B.* 560 *C.A.)*. "When negligence has been established, liability follows for all the consequences which are in fact the direct outcome of it, whether the injury is a consequence that was foreseen or not" (*Smith v. London and South Western Rail.*

Co. (1870) *L. R.* 6 *C. P.* 14 *Ex. Ch.*). There are, too, several cases which clearly establish that "so long as the consequence complained of is the natural and direct outcome of the original negligence, the interference of another, however wrongfully or even criminally that other may have acted, does not affect the liability" (*Halsbury, Hailsham ed. vol.* 23, p. 595 *and cases there cited).*

The case of *Smith v. London & South Western Rail, Co.* is instructive. In that case workmen employed by the defendants after cutting the grass and hedges bordering the railway placed the trimmings between the hedge and the line where they remained for several days.....A fire broke out in these trimmings, it spread and burnt the plaintiff's cottage 200 yards away. There was evidence that the defendants were negligent in leaving the dry trimmings, and that the trimmings either originated or increased the fire and caused it to spread and it was held that as the defendants were negligent, they were responsible for the injury that resulted to the plaintiff from their conduct, although they could not have reasonably anticipated that such injury would he caused by it.

In the course of his judgment, Kelly C.B. put the position in this way:— "It may be that they (the defendants) did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for all the consequences of their conduct, and that the mere fact of the distance of this cottage from the point where the fire broke out does not affect their liability." In the appeal now before us, the appellants' negligence consisted in leaving cinematograph films — highly inflammable material — outside the vault with a knowledge of the risk of fire which might be caused, and in breach of Regulations specially passed to protect the public against the consequences of these films being set on fire. Whether the fire came from or was increased by this inflammable material, was nothing more than a reasonable man might have anticipated.

Counsel for the appellants also invited this Court to hold that statutory negligence would only be a ground of liability if it was the direct cause of the loss, or put in another way, the appellants would only be liable if the loss in this case had flowed from the storage of the films outside the vault and nothing more, for example if they had caught fire as the result of spontaneous combustion. He was not able to produce any authority for this proposition which, on principle, and in the light of the decided cases cannot, in our view, be supported.

Applying the well-known principles to which we have referred, to the facts in the present appeal as found by the trial judge, we have come to the conclusion that whether on the ground

of statutory negligence or of negligence at common law or on the ground of nuisance, the learned trial judge was right in holding that the appellants are liable to the respondent for the loss sustained by the latter through the destruction of his two-storeyed house, and the damage to his cottage and palings.

We come now to the question of damages. It was submitted that the trial judge proceeded on a wrong principle and applied a wrong method in arriving at the amount of damages to which the respondent was entitled in respect of his two-storeyed house, when he found that the respondent should receive a sum of money which would enable him to rebuild that house on the same site, at the earliest possible time. Reference was made to the following cases:—*Hide v. Thornborough* 2 *Carr*. & *Kir*, 250; *Jones v. Gooday* (1841) 8 M. & W. 146; *Hasking v. Phillip* (1848) 3 *Ex. Rep.* 168.

The principle established by these cases is that the respondent should be compensated for the damage he has actually sustained, but not for the expense of restoring the building to its original condition. The proper measure of damage being the amount by which the land was lessened in value by the defendant's act. We agree that the diminished value of the respondent's interest should be calculated by market values and not by the cost of reinstatement and that the method adopted by the trial judge was not correct. In the absence of evidence of market value, the value of the land may be ascertained by taking the annual rent obtainable less expenses and capitalising the amount at such a number of years' purchase as represent the current rate of interest. Proceeding on these lines, we find the sum thus ascertained to approximate very closely to the amount found by the trial judge. In the circumstances, therefore, we do not propose to make any alteration in the sum which the trial judge found as damages.

In the result, therefore, this appeal must be dismissed with costs.

Solicitors: *J. Gonsalves*, O.B.E. for appellants;

D. P. Debidin, for respondent.

Appeal dismissed.

DEMERARA TURF CLUB, LTD. *v.* M. FARLEY.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL from the Supreme Court of British Guiana.

1945. No. 318, Demerara).

Between: —

DEMERARA TURF CLUB, LIMITED,

Appellant,

and

MABEL FARLEY, widow as executrix of the estate of ARCHIBALD FARLEY, deceased,

Respondent.

(1947. No. 1.—BRITISH GUIANA).

Before FURNESS-SMITH, C.J., Trinidad and Tobago, (President); MALONE, C.J., the Windward Islands and Leeward Islands; and WORLEY, C.J., British Guiana.

1948. March 16, 17, 18, 23.

Contract—Construction—Right to sue—Condition precedent—Not fulfilled—Action not maintainable.

Contract—Sweepstake ticket—Winning ticket—Holder of—Whether privity of contract—Between holder and organiser of sweepstake.

In a draw for a sweepstake organised by the Demerara Turf Club Limited under section 2 of the Gambling Prevention (Amendment) Ordinance, 1941 (No. 22) ticket No. C 7536 won the first prize.

The following terms and conditions were printed on every sweepstake ticket:

1. This ticket is sold subject to the condition that in the event of any dispute arising with respect to any matter whatever connected with the Sweepstake, the decision of the Directors of the Demerara Turf Club shall be accepted as final.

7. Payment in respect of a winning ticket may be refused if the ticket is not delivered up to the Treasurer. Payments may be made to any person presenting a winning ticket for payment; and upon payment and delivery of any such ticket all liability of the club shall cease.

Every ticket was indorsed as follows:

"All tickets are paid for at the time of issue. No counterfoil is necessary—Your ticket is your receipt".

The plaintiff had purchased the ticket No. C 7536 from a person who had purchased a book of tickets from the club.

The plaintiff demanded from the club payment of the amount of the first prize on the ground that he had purchased the ticket but had lost or misplaced the same. The Directors of the club, however, decided that no payment could be made unless the ticket was produced.

The plaintiff instituted an action against the club claiming the amount of the first prize. The club, as part of its defence, contended that by virtue of the terms and conditions of the contract between the club and all ticket holders, as expressed on each sweepstake ticket, no person was entitled to a right of action in respect of the sweepstake ticket unless he had obtained a decision of the Directors of the club in his favour on the question in dispute.

Boland, J. ordered judgment to be entered for the plaintiff against the club. The club appealed to the West Indian Court of Appeal,

Held (1) that the plaintiff, in accordance with the decision of the directors of the club, could not institute an action against the club for the recovery of the prize money, unless he produced the sweepstake ticket, and as he did not produce the ticket, his action must fail.

Cipriani v. *Burnett* (1933) A.C. 83, applied.

(2) *per* Furness-Smith, P., that there was no privity of contract between the plaintiff and the club.

The plaintiff Archibald Farley brought an action against the Demerara Turf Club Limited claiming payment of the sum of $5,014.20 being the value of the first prize in a sweepstake organised and run by them in connection with their race meeting held in May, 1944. The plaintiff claimed that he had purchased the ticket for the first prize, and alleged that he had either lost or misplaced it. Frank Mendes, Robert Small and Francis Rodrigues who also claimed to have purchased the said ticket were added as defendants by order of Court dated the 27th June, 1946.

The action was heard on the 25th, 26th and 27th days of June, 1946, the 18th, 19th, 20th and 26th days of September 1946. the 1st, 2nd, 3rd, 4th, 8th, 9th, 10th and 11th days of October 1946, and the 2nd, 3rd, 4th and 5th days of December 1946, and judgment in the action was delivered on the 15th February, 1947.

BOLAND, J.: The plaintiff commenced this action by a Writ of Summons filed only against the first-named defendants, the Demerara Turf Club, Limited, claiming from the Club payment of the sum of $5,014.20, being the value of the first prize in a sweepstake organised and run by them in connection with their race meeting held in May, 1944.

The Demerara Turf Club is expressly permitted by section 2 of the Gambling Prevention (Amendment) Ordinance, (No. 22 of 1941) to organise sweepstakes in connection with any race meeting held under the auspices of the Club which otherwise would be a breach of the Principal Ordinance, the Gambling Prevention Ordinance, Chapter 95, and by virtue of the exemption granted to the Club thereunder, the sale of sweepstake tickets by the Club is not to be deemed void, and the contract arising from any such sale of a ticket may be enforced by action.

It is admitted by the Turf Club that the ticket winning the first prize was No. C7536. It is plaintiff's claim that he was and still is the owner of that ticket, if still in existence, and that he is entitled to receive the prize although unable to deliver the ticket over to the Treasurer of the Club because of having lost or misplaced same.

After the trial in Court between the plaintiff and the Turf Club had commenced, it became obvious that no final adjudication in the matter was possible in the absence of the second-named three defendants who had also forwarded a notification to the Turf Club, alleging that they had lost the same ticket which they had held together in syndicate, and claiming from the Club payment of the first prize to them. As neither the plaintiff nor the defendant Turf Club was willing to join these other claimants as parties to the action, the Court, in exercise of its powers under Rules of Court, directed that these three other claimants should be joined in the action as added defendants. Accordingly, by direction of the Court, the second-named three defendants were served with a copy of the writ, amended so as to include them as added defendants, together with copies of the pleadings already filed. A joint appearance was

duly entered by these added defendants; pleadings, including a counterclaim against the Turf Club for the prize money, were filed by them in answer to which both the plaintiff and the Turf Club filed further pleadings. At the resumption of the trial, the second-named defendants, (hereinafter in this judgment referred to as "the added defendants"), duly appeared and took part as if originally one of the parties thereto. For them the notes of evidence already taken in Court were read out and an invitation extended to their counsel to cross-examine all witnesses who had already deposed, of which counsel availed himself to the fullest extent.

In its defence filed both against the plaintiff's claim and the counter-claim of the added defendants, the Turf Club first does not admit that either party was at the material time, or at any time, the holder of the ticket C 7536 — in other words both claimants are put to the proof of their title to the ticket. But in any event it is the submission of the Turf Club that by virtue of the terms and conditions of the contract between the Turf Club and all ticket holders, as expressed on each sweepstake ticket, the Turf Club is entitled to refuse payment of the prize to the plaintiff as well as to the added defendants.

Each sweepstake ticket, as appears from the specimens produced in Court bears on its face legibly printed certain clauses bringing to the notice of a person acquiring a ticket the terms of the contract and the conditions under which prizes will be awarded by the Turf Club. Every holder of a ticket, it was submitted, must be taken to have accepted those terms and conditions as part of the contract. The Demerara Turf Club in its defence relies upon clause 1 and clause 7 printed on the ticket.

Clause 1 reads — "This ticket is sold subject to the condition that in the event of any dispute arising with respect to any matter whatever connected with the Sweepstake, the decision of the Directors of the Demerara Turf Club shall be accepted as final."

Clause 7 reads — "Payment in respect of a winning ticket may be refused if the ticket is not delivered up to the Treasurer. Payments may be made to any person presenting a winning ticket for payment; and upon payment and delivery of any such ticket all liability of the Club shall cease."

Soon after the draw and the announcement declaring C 7536 the winning ticket, each party, that is the plaintiff as well as the added defendants, notified the Club of their right to the prize by virtue of the ownership of the ticket, which, however, could not then be produced. The plaintiff's wife notified Mr. Oscar Wight, the Secretary, that her husband, the holder of the ticket, was then away in the Bush in the interior, whilst the added defendants gave notice to Mr. Munroe, at the Turf Club office, that they had lost the ticket. From the point of view of the Turf Club it does not matter which claim was lodged first. The ticket C 7536 not having been produced — nor has it yet been produced — the Directors, whether in formal meeting assembled or not is immaterial (*vide* BROWN *v.* OVERBURY 1856 11 Ex. 715), ultimately decided that no payment would be made without production of the ticket. This, as they communicated to the parties, was to be regarded in the circumstances of the non-production of the ticket as their final decision. They were not concerned with the merits of the proof

of title to the ticket. Any invitation to a claimant to submit proof of title was not to be taken as a waiver of the Turf Club's right to refuse payment under clause 7 on the ticket.

This submission of the Turf Club was grounded upon the following contention. A right of action of a holder of a ticket issued by the Club arises against the Club only by virtue of the contract between the holder and the Turf Club as embodied on the ticket. The Turf Club of the one part in consideration of the price of one shilling received for the ticket offered to pay out specified prizes in certain contingencies but only on the decision of the Directors, which decision was to be final and conclusive. A ticket holder of the other part in acquiring the ticket must be taken to have accepted the position that he would have a right to the prize, and therefore a right of action against the Club to enforce payment of the prize, only if the Directors have given a decision in his favour. In effect, a right of action is available to him merely to implement the decision of the Directors in his favour.

Counsel for the Turf Club, Mr. Humphrys, K.C., has cited in support of the above submission the Privy Council decision in CIPRIANI and others *v.* BURNETT 1933 A.C. 83 which approved of the earlier decisions of SCOTT *v.* AVERY (1856) 5 H.L.C. 811 and BROWN *v.* OVERBURY (1856) 11 Ex. 715.

In SCOTT *v.* AVERY and BROWN *v.* OVERBURY it was decided that whilst a term in a contract to exclude recourse to the Courts for redress in respect of a breach of the contract is bad as against public policy, it is, nevertheless, permissible for the parties to agree in the contract itself that it shall be deemed that there is no breach of the contract or no right arising to a party under the contract unless a certain condition is fulfilled; such, for instance, as the decision to this effect by a third party. In the case of an agreed reference to a third party's decision on this point it would mean that by the contract itself it is a condition precedent that the decision of the third party shall be in favour of a plaintiff if he is to have a right of action.

In CIPRIANI and others *v.* BURNETT, the Respondent. Burnett, had filed a writ in the Supreme Court of Trinidad asking for a declaration that he was the winner of a certain sweepstake run by a Turf Club. The sweepstake tickets issued by the Club bore on their face the following printed matter — "This ticket is issued subject to the condition that in the event of any dispute arising with respect to any matters connected with the drawing of the sweepstake or the awarding of the prizes the decision of the Stewards of the Trinidad Turf Club shall be final." The Stewards of the Trinidad Turf Club had declared the prize to be won by a Mr. Guevara after the draw *of* the sweepstake which showed, as was declared by the Club, the winning number to be No. B 9351, the number of Guevara's ticket. The respondent Burnett, whose ticket was B 1539, claimed in his action that the digits of the number should have been read from left to right and not from right to left as they were read out at the draw, and that accordingly respondent's ticket B 1539 was the winning ticket, and should be so declared by the Court. The Supreme Court of Trinidad gave judgment in respondent's favour. On appeal, the Privy Council reversed the decision of the Trinidad Supreme

Court, holding, that as under the contract the decision of the Stewards was to be accepted as final" in connection with any matter connected with the drawing of the sweepstake or the awarding of the prize", (1) it was not essential in order to exclude the right of action that the contract should in terms prescribe that the award of a specially constituted tribunal should be a condition precedent to legal proceedings, and (2) that the fulfilment of the condition, that is, an award of the Stewards was a condition precedent before any action could be brought. But, as Lord Macmillan who delivered the judgment of the Privy Council was at pains to explain, the question whether a ticket holder is precluded from maintaining his action is dependent upon the true construction of the contract. Burnett had bound himself by the contract on the ticket to accept as final the decision of the Stewards in any dispute arising with respect to the drawing of the sweep or the award of the prize, and, in the absence of fraud which was admitted not to exist, Burnett's right of action could only arise as he had agreed, if the Stewards had given a decision that the award should be made in favour of the ticket he held. The dispute on the question what ticket was the winning ticket was essentially a dispute in connection with the award of the prize and came within the purview of the Stewards' power of final decision as Burnett had agreed.

It is to be noted that the condition in clause 7 purports to be wider, being not restricted in express terms to "a dispute arising in connection with the drawing of the sweepstake and the award of the prizes" as in the Burnett case. Do the words "any dispute arising with respect to any matter connected with the sweepstake" gives the Demerara Turf Club an unlimited and exclusive power to decide every question arising out of the sweepstake however unnecessary for determining which ticket is a winner? The question as Lord Macmillan emphasised is one of the construction of the contract. Is the contract, because of these words, to be construed as implying an agreement by the ticket holder to accept for instance the decision of the Directors, albeit acting in good faith, in favour of a person whom the ticket holder has had convicted, let us say, of the theft or malicious destruction of the ticket before a court of law? The words could never have been intended to give the Directors an unfettered and exclusive jurisdiction over matters not pertaining to their special function which would appear to be limited to deciding all matters essentially concerned with the running of the races and the running of the sweepstake. I doubt very much whether the Directors could shelter themselves behind clause 1 if they decided to pay as a prize a smaller percentage of the takings from the sweepstake than is declared on the ticket. Be that as it may I am certain, however, that the contract cannot be construed as giving an exclusive power to the Directors to decide the question of the ownership of a ticket declared by them to be a winning ticket — for instance to decide in exclusion of the jurisdiction of the courts, questions of ownership that may perhaps raise issues of the devolution of property on death or bankruptcy.

As to clause 7, it is to be noted that this clause merely permits

the Turf Club to refuse payment on the non-production of the ticket. It is not stated that production of a ticket is an absolute pre-requisite of a right to payment. The contract gives the Club a right to exercise its discretion to refuse payment; that is all. That exercise of discretion, it seems to me. as implied by the terms of the contract must be exercised by the Club reasonably and not arbitrarily. A person making a claim for a prize cannot be debarred, it seems to me, from going to the Court in protest against what he may be able to establish is an unreasonable exercise of discretion by the Club. For instance, it would be, as I have pointed out, an unreasonable exercise of discretion by the Club if they refused payment of the prize although a claimant can establish satisfactory proof of the destruction of his ticket by mistake or through the criminal malice of another — and I fail to see why a claimant should not be able also to impeach by an action in Court the purported exercise of discretion by the Club in refusing to pay, where, not actual destruction, but where mere disappearance or loss of the ticket without alienation is alleged.

Moreover, it would seem that clause 7 is intended to be read as a whole and not as containing two independent conditions. This clause was designed primarily, it would appear, to afford protection to the Club if they paid in good faith to a person who delivered the ticket to the Treasurer; and so an express power is given to the Club to refuse payment to one who does not produce the ticket and then to get a discharge from all liability if they in good faith pay to another who delivers the ticket. Until the Club pays out on delivery of the ticket they cannot claim to be discharged from liability. It is my view that before they get this discharge from liability it is permissible for a claimant to invoke the Court for a ruling that the alleged exercise by the Club of its discretion under clause 7 to refuse payment because of the non-production of the ticket is unreasonable in the circumstances. This is the position, as I see it, of the plaintiff in the claim and of the added defendants on their counter-claim. They both in effect seek a declaration from the Court that the refusal to pay the prize is, the circumstances of the non-production of the ticket by them respectively, an unreasonable and arbitrary and therefore wrongful exercise of the discretion permitted under the contract.

Accordingly I hold that the submission on behalf of the Turf Club that by virtue of clause 1 on the ticket neither of the claim-ants is entitled to a right of action because of not having in their favour a decision by the Directors on the question in dispute must fail, and I hold too that this Court is entitled at the suit of either claimant, that is the plaintiff on the claim or the added defendants on the counter-claim, to determine whether the refusal by the Club to pay out the prize is an exercise of the reasonable discretion permitted to the Club under clause 7 of the contract, appearing on the ticket.

Of course, any judgment which may be given by the Court against the Turf Club in these proceedings would be subject to an undertaking to be given by the successful claimant to indemnify the Club in the event of their being compelled to pay the prize

to a person producing the ticket later on with a good title in law to the possession and ownership thereof. In view of the fact that the period of limitation within which such a claim is enforceable by action would come to an end sometime about 30th May this year, that is three years from the date of the draw which was the time when the right of action had first accrued, it is hardly likely that the Turf Club would run much risk of such an action being brought successfully by any future claimant for the prize. But the Court, nevertheless, in protection of the Club, would, in the event of a judgment ordering the Club to pay the prize being made, make the judgment subject to the successful party giving an undertaking for indemnifying the Club. This is the form in which judgment is given in favour of a plaintiff who succeeds on a claim for payment of a lost promissory note and although a sweepstake ticket may not be a negotiable instrument in the proper sense of the term, it has a quasi negotiability in so far as the Club is concerned by virtue of the condition that the Club looks to the holder as the person entitled to the ticket, payment to whom gives the Club a complete discharge from all liability.

Deciding the point of law against the submission of the Turf Club I now turn to consider the evidence tendered by the plaintiff and by the added defendants respectively on the question whether it has been established that at the material time — that is, at the time when each party respectively gave his notice to the Turf Club — either was entitled to the ticket. It should be here remarked that the failure of one party would not necessarily establish the case of the other party claiming the prize. To be successful, a claimant has not merely to show that another claimant's claim is false and so unacceptable, he must make out a case of his right to the ticket, not only against another claimant but such as would prevail against the whole world.

It is common ground that Ernest D'Aguiar was the registered purchaser from the Turf Club on the 13th March, 1944, of a book of sweepstake tickets in numerical sequence from C 7530 to C 7539, and he was thus the purchaser from the Turf Club of the winning ticket C 7536. As such purchaser from the Turf Club D'Aguiar was recognised by the Turf Club as the registered seller of the ticket to whom, by the terms of the sweepstake, the seller's prize was to be awarded. In accordance with a condition appearing on the ticket evidence of a person being the registered seller is supplied only by the entries in the Club's Register kept for that purpose, and so D'Aguiar whose name appeared on the Register as the person to whom the ticket was sold by the Club duly received the seller's prize without the ticket itself being produced. Each party claims to have purchased this ticket direct from D'Aguiar. The plaintiff's case is that he purchased this ticket on Monday the 13th March, whilst the case of the added defendants is that they purchased this ticket on Tuesday, 14th March. D'Aguiar himself, called as a witness by plaintiff supports the plaintiff's claim that it was to him that C7536 was sold on the 13th March, and D'Aguiar testified positively against the added defendants that the ticket which he sold to them was No. C5136

and that was not on the 14th March as alleged by them but on Friday the 10th March. This man D'Aguiar was palpably from every point of view a most unsatisfactory witness and it would be very unsafe indeed to accept his evidence in its entire" the absence of corroboration. That he did sell a sweepstake ticket of the May Meeting to the plaintiff and another to the syndicate comprised of the added defendants would appear to be true. The question this Court has to decide is, did he sell C7536 to either party? In support of the plaintiff's claim D'Aguiar produced two books of stumps containing ten stumps each from which he states the tickets C7536 and C5136 were respectively detached at the time of sale by him. The stump he indicates as that belonging to C7536 has written thereon the words in pencil "C7536 Blata Bleder 13|3-Monday, Bought from me". The stump from the other book of stumps indicated by him as that belonging to ticket C5136 has written in pencil "C No. 5136. Mr. Mendes and Rodrigues and Small Sindkey 10 March Friday 8.30 a.m.". D'Aguiar explained that it had been his invariable practice for sometime as a seller of sweepstake tickets to make a note of the name of the purchaser and sometimes other details — but if a purchaser unknown to him did not wish his name to be disclosed he would write — "not to be known" — as appeared on. some of the other stumps. Because plaintiff whom he asked for his name directed him to put balata bleeder he had so noted it on the stump of C7536 at the time of sale to plaintiff. Apart from the fact that no advantage by such an entry on the stumps would be gained by a registered seller whose claim to a seller's prize is not dependent upon his identifying the purchaser from him, an examination of the entries in the two books of stumps raises a very strong suspicion that these entries were made *ad hoc* by D'Aguiar, that is, in order to support his story that it was to plaintiff and not to the added defendants that he had sold this ticket. But if, as I suspect, D'Aguiar fabricated *post litem motam* the notes on the stumps in such a way as to lend support to his account of his disposal of the ticket to plaintiff it would not necessarily follow that it was done with the consent or collusion of the plaintiff or anyone acting on plaintiff's behalf, D'Aguiar to me seemed the sort of person who would have no scruples, even without any suggestion coming from anyone, in cooking the entries on the stumps to give colour to what may be his own bona fide belief as to the identity of the person to whom he sold the ticket. I strongly suspect that D'Aguiar does not remember the actual person to whom he sold this ticket, but he has convinced himself that it must have been sold to plaintiff the balata bleeder, and to substantiate this conviction he made at any rate some of those entries on the stumps. I exonerate D'Aguiar from the dishonest motive of an expectation of some reward from plaintiff, because D'Aguiar had declared plaintiff to be the owner of the ticket long before he had first seen plaintiff after the draw, and before plaintiff's wife could have communicated with plaintiff who was far away and out in the Bush and who might have been so far as D'Aguiar was aware still in possession of the ticket. Besides, funny character

as is D'Aguiar's, he would not, I am convinced, be so foolish as to base his hope of reward upon a poor balata bleeder as plaintiff is rather than upon the apparently better salaried added defendants. It was never suggested that D'Aguiar had made the improper suggestion that they the added defendants should give him a reward if he supported their claim.

In condemning this evidence purporting to be supplied by the stumps adduced by D'Aguiar I feel that it should nevertheless not be taken as destroying the case for the plaintiff, who one can imagine may well in regard to D'Aguiar utter the exclamation "Save me from my friends!" Accordingly, if plaintiff is to succeed the Court must be satisfied in his favour by evidence independent of D'Aguiar's testimony and D'Aguiar's books of stumps. It seems to me that the validity of plaintiff's claim depends upon the genuineness of the evidence relating to the recording on the picture Alice Faye of the number of this ticket as testified by both plaintiff and his wife. I accept the evidence of plaintiff that it was on Monday 13th March that he bought a sweepstake ticket from D'Aguiar in Water Street outside the premises of the Real Daylight Balata Company on a suggestion made by one of the foremen there by name Caesar, who himself because of religious scruples had refused to buy. No one present — neither plaintiff, the actual purchaser, nor D'Aguiar, the seller, nor Caesar who was the only other person present, — could be expected to carry in his mind the actual number of the ticket until the end of May. The digits of the number had no special feature in themselves nor were they stated to be associated with any fact so as to leave an impression on the memory, but to judge from the issue of tickets to D'Aguiar by the Club around that date as shown by the Club's Register the number of the ticket bought by plaintiff must have comprised four digits together with the serial letter C. I accept the evidence that this was the sole remaining ticket in a book which D'Aguiar was then offering. This fact, a person like Caesar would perhaps remember long after the day although not the actual number of the ticket as at one stage of his evidence Caesar seemed to wish to impress the Court. I have already commented on the unreliability of the stumps produced by D'Aguiar in his effort to furnish corroborative evidence that the ticket was No. C7536. Plaintiff, however, states that on going home that afternoon he showed the ticket to his wife, and in her presence, so as to remember it if misplaced, wrote down the number at the bottom of the picture of the film actress Alice Faye which was affixed to the wall of his home. I do not think such an act is strange and unusual with persons of plaintiff's type. If that evidence is true, and if the entry C7536 on the picture as produced in Court is what plaintiff wrote at the time, then plaintiff will have established that he bought from D'Aguiar this winning ticket. If the Court is satisfied that he did not pass this ticket on to another, but is unable to produce it because of its loss or misplacement, I hold that plaintiff would be entitled to succeed in his action.

Now I have approached the consideration of the question of the genuineness of the entry on the picture from two aspects.

The first relates to what may be described as the internal evidence supplied by the entry itself and the second, the external evidence as supplied by facts and circumstances *de hors* the picture. Is there satisfactory proof that that entry No. C7536 on the picture is the handwriting of plaintiff as he and his wife allege? Under cross-examination plaintiff was made to more than once at counsel's dictation this number "7536" and "No. C"; and so also was Mabel Farley, plaintiff's wife. The Court was able to compare the entry made on the picture the writing by Mabel Farley of the very number and of the letter C as appears in the letter which she wrote to her husband in the Bush two days after the draw informing him of his good fortune. This letter was admitted in evidence on production by the plaintiff and is referred to more particularly hereafter. D'Aguiar's notes and figures on the stumps have also been closely scrutinized. He or Mabel Farley it is conceivable, may have made the entry on the Alice Faye picture *post facto*—that is, after the announcement of the draw.

Making every allowance for the not unnatural discomfiture which a man practically illiterate like plaintiff must experience who finds himself called upon suddenly in Court to write something on a piece of paper, I do not observe there is any very remarkable dissimilarity between the writing on the picture and other specimens of writing made in Court by plaintiff such as would warrant a definite conclusion that both were not written by one and the same person. On the other hand I have had no difficulty after a comparison of the writing upon the picture with D'Aguiar's admitted writings and also with those of Mabel Farley's in concluding that neither of the latter two wrote what appears on the picture. In the result, the value of the internal evidence furnished by the picture whilst not definitely positive in plaintiff's favour is certainly not antagonistic to his cause.

As to the value of what I may describe as the external evidence relative to this picture entry — that is to say, evidence supplied by other facts and circumstances and not ascertainable by examination of the writing itself but which, nevertheless, indirectly tends to establish its genuineness as being made before the draw of the sweepstake which took place on the 30th May, we have evidence in the letter of Mabel Farley written to her husband in the Bush intimating to him that the ticket C7536 whose number was recorded by him on the Alice Faye picture had won the prize. That letter is dated the 2nd June — which means that at that date the picture had that number on it. I have already stated that it is my assured view that that writing on the picture was not done by Mabel Farley or D'Aguiar — and that the writing there does not appear to be inconsistent with having been written by plaintiff. Now I accept plaintiff's evidence, which was corroborated by his wife and which was not challenged either by cross-examination or by other evidence, that plaintiff left his home in Georgetown for the Bush on the 18th March and did not return until August. If the writing on the picture is his then he could have written it only before he left his home — which would be corroborative of his own evidence that he wrote the number on the picture on the day he

purchased the ticket — at any rate before the announcement of the draw. Apart from Mrs. Farley and D'Aguiar no person in Georgetown showed any active interest in the ownership by plaintiff of this ticket. Caesar, plaintiff's witness, who in his evidence at one time appeared an eager partisan in plaintiff's favour, was far away from the middle of March to beyond June in Berbice up the Canje and only got to know of plaintiff's good luck when the Argosy newspaper of 2nd June got to him there. Therefore, Caesar, even if a partisan, could not have fraudulently on plaintiff's behalf made the entry on the picture between the announcement of the draw on 30th May and the writing of Mabel Farley's letter on the 2nd June. In view of the similarity of the writing on the picture with plaintiff's writing in Court, it would be unreasonable to set up against the plaintiff the hypothesis of a bare possibility that someone other than plaintiff with similar penmanship may have made the entry on the picture between the 30th May and the 2nd June so as to establish plaintiff's claim to the prize. A point to be noted in plaintiff's favour is that when Mrs. Farley wrote that letter on the 2nd June she could not have known whether he had the ticket I in his possession in the Bush or not. In her evidence she stated that she made a search for it before writing, and so she took the precaution of communicating with Mr. Oscar Wight, the Secretary of the Club, who assured her that no payment of the prize would be made before her husband, came to town. No step was taken by her then which can be construed as having been done so as to lay a foundation for a false claim that the ticket was lost. If this entry on the picture was made with a fraudulent design that fraudulent design would have been to produce the picture with the winning number on it with a declaration made at the same time that the ticket itself was lost, and at once, in pursuance of the fraud notification of the loss of the ticket would have been given to the Club together with the production of the picture with the number on it in support of a claim to the prize. But it was not until August that the plaintiff coming to town and satisfying himself definitely that the ticket had disappeared that Mr. Wight was told that the ticket was lost, which provoked Mr. Wight's reply — "no ticket! no money!" This course of conduct of Mrs. Farley, I think, supports the genuineness of the entry on the picture.

It is on the plaintiff if he is to succeed also to satisfy the Court that he has misplaced or lost the ticket and did not transfer it to another person. Plaintiff's evidence in Court as to when last he saw the ticket was very inconsistent with the attitude which he took up when writing to his wife in reply to her letter informing him of the win by ticket No. C7536, which she stated to him, was the number he had written on the Alice Faye picture. The plaintiff is an illiterate man and it is difficult to construe this letter of his to his wife, which, written from his camp in the Bush, is dated the 28th June. It however seems quite clear that in the letter he was directing her to search in certain places in the home in Georgetown; and yet in his evidence he stated he was sure that he had seen that ticket when on the journey from Georgetown to the interior. It is

indeed curious that he did not mention that fact in his letter to his wife, but simply directed her where to search for it in the home. Also to a man in his position one would have thought that a prize of $5,000.00 would have been such an agreeable windfall that he would have shown more concern about finding the ticket than he did. It was only an attack of filaria which caused his return in August to Georgetown earlier than he had planned, and it would appear that no further communication passed between husband and wife about the ticket than the two letters referred to. Mabel Farley, it is true, may have felt some security from Mr. Wight's the Secretary of the Club's assurance that no money would be paid out until her husband came to town, but she did not communicate this to her husband whose indifference and apathy concerning his sudden and unexpected good fortune is difficult to understand. Still, I feel, plaintiff's apathy would rule out any conspiracy between plaintiff, plaintiff's wife and D'Aguiar, as the case of the added defendants would seem to suggest, which would have been featured by an eagerness, as I have stated, to push forward the Alice Faye picture at the earliest possible moment. It is hardly reasonable to infer that this apathy was due to plaintiff's knowledge that he had transferred the ticket to someone, because he would not have written directing his wife to search for the ticket at his home, and it is indeed curious that if he did so transfer it no claimant has yet come forward with the ticket in spite of the publicity in the Argosy newspaper of plaintiff being the holder of the winning ticket with his photograph conspicuously shown therein. Plaintiff is, as I say, practically illiterate. I believe him when he said that he spent almost a night writing that letter. A less illiterate person would have stated in his letter that he was sure he had the ticket with him whilst on the journey to the interior, but to make assurance doubly sure that he had not left it behind at home she had better search about, the house. Perhaps plaintiff's filaria may have induced his apathy; perhaps he may have thought as counsel for the Turf Club has submitted, it was a case of no ticket, no money, and so being convinced that the ticket was lost to him forever because of the circumstances in which it disappeared he may have felt it was no use worrying himself further with the matter reserving to himself the faintest of hopes that after all it may be in his house. Be that as it may, I am satisfied that plaintiff lost that ticket sometime after he left Georgetown and that is why he was unable to produce it.

I now turn to the evidence given in support of the counterclaim by the added defendants. As I have shown, the circumstantial evidence is overwhelmingly strong in favour of the righteousness of plaintiff's claim, but, nevertheless, it is conceded that an examination of the evidence given in support of the claim to the ticket by the added defendants might conceivably be so strong as to discredit the even strong circumstantial evidence in favour of the plaintiff. As I have stated, the three added defendants each in his evidence testifies that it was on the 14th March that this ticket was bought by them at Booker's branch store and not on Friday the 10th March as D'Aguiar

deposed and as the stump produced by D'Aguiar sought to establish. Discounting completely, for the reasons already given, both the testimony of D'Aguiar and the stumps produced, I am satisfied from the evidence given by themselves that none of these added defendants did recollect either the number of the ticket or the date of its purchase from D'Aguiar but for the slip which Small produced as being made by Rodrigues at Small's request at the time of the purchase. Rodrigues has stated that he identifies his figures on that slip which is featured he says by the alteration of the second digit from 3 to 5 made by him at the time of the purchase when Mendes who then held the ticket in his hand repeated the number at the request of Small, so that Small should keep for himself the slip as a record of the number of the ticket which the syndicate had purchased. Mendes himself remembered nothing beyond the fact that a ticket was bought by them in syndicate and that Small asked Rodrigues to write down the number on the slip and that there was some mistake in the note which Rodrigues had made, whereupon there was an immediate correction made by Rodrigues on his (Mendes') reading out again at Small's request the actual number. I am prepared to accept Mendes' evidence as to these circumstances occurring when a ticket was purchased by them from D'Aguiar. But I am not satisfied with the identification by Rodrigues of the slip produced as being just as he had altered the figures. The first two digits on the slip show, even to the naked eye, such alterations and signs of erasure as are inconsistent with the simple alteration deposed to by Rodrigues as having been made by him; and the examination by the naked eye is confirmed not only by the aid of a magnifying glass, but also by the enlarged photographs of the slip taken specially with modern technical photographic processes to show up alterations and erasures not visible even by the aid of a magnifying lens. I am satisfied by the evidence of the expert witness Mr. Douglas that the first two digits respectively were not originally 7 and 3 nor that the latter was afterwards changed into a 5 as was the evidence for. the added defendants. Although the enlarged photos do not show clearly what the original two first figures were before alteration and erasure, it is made manifest that both of the first two digits were altered, and not merely the second. Small may have, as he stated, stuck up a slip containing the numbers purchased that day by the syndicate, but no one called as a witness except Small was able to say that the same slip, altered as it is now, which Small says he took down from the wall and produced at the store on the morning after the announcement of the draw was among the several slips which he had stuck to the wall under the steps in the store. As I have said before, I am not satisfied that Rodrigues is right in his identification of the slip as containing the figures as he wrote them on the day of purchase. But for Rodrigues' evidence the claim of the added defendants is entirely dependent upon Small's testimony. Small did not impress me as a witness of unimpeachable veracity. First, his reason for deciding to purchase this particular number which he was so eager to put before the Court, did not carry conviction. It involved a long and a very complicated process of jug-

gling with figures and delving into the mysteries of astrology as expounded by a book which he produced in evidence. There was no evidence that before deciding to buy from D'Aguiar that Small spent so much time on such involved mathematical calculations as must have been necessary before his decision to buy this ticket as a lucky number — nor was he seen making any computation. If he had been making in keeping with his description of the factors that determined his choice of the ticket such devious calculations in writing he would not have called upon Rodrigues to write anything for him as he could have done it himself. In fact it would seem that no record would have been necessary at all — as the peculiar appropriateness of the numbers in relation to the date of purchase and its other astral associations would have been sufficient indelibly to impress the particular number upon Small's memory. But if, on the other hand, although the actual number would have been remembered by him he wanted the numbers in writing from Rodrigues as he states merely so as to hold same as evidence that he was in the syndicate of purchasers, one would have thought that he would have got his two partners to sign and initial the slip, just as his name with theirs had been put down on the actual ticket. Small's conduct, according to his own evidence relating to what occurred outside of Booker's on the morning after the publication of the draw seems unnatural in one who had just learnt of his good fortune. He says that he found D'Aguiar outside the store at about 8 a.m. explaining that he was then waiting to tell the clerks that they had won the prize. And yet Small would have the Court believe that he said nothing to D'Aguiar because he was not a clerk of the store and it is strange too, that neither Small nor any of his syndicate spoke to D'Aguiar at any time after although the latter was seen by one or other of them about Georgetown later in the day. It is true that Small went and produced a slip and announced his good fortune soon after he had entered the store and before the other members of the syndicate arrived for work. But no witness to whom he made the announcement could remember what the ticket number on the slip was except Miss Elaine Evans, who said that it was C7536 because she remembered a reference to it as being the winning number of the sweep. But Miss Evans certainly could not be able to say if an alteration of figures had been made just prior to her seeing it. Nor was I impressed with the evidence of the other witnesses for the added defendants who sought to corroborate Small as to what happened outside Booker's on the morning after the draw. The evidence of these witnesses was in many vital respects very contradictory of Small's account of what had happened then. I have given every consideration to the point made by counsel for the added defendants — Mr. Woolford, K.C., — that Miss Evans speaks of seeing the slip with the number C7536 as it is now produced before Rodrigues and Mendes had arrived and that Small would have been doing a dangerous thing to represent this as the slip when he had no knowledge that the ticket itself was lost by Rodrigues or Mendes and that later he would have been shown up as a forger if the actual ticket purchased by them shown to have a different num-

ber than C7536 were produced by either Mendes or Rodrigues. But I think Small quite capable of meeting such an eventuality. He could very well decide to try to persuade Rodrigues and Mendes that there was such a ticket held in syndicate in addition to the one produced with their three names endorsed thereon — a matter he may have thought not difficult to persuade them into believing in view of the large benefits involved.

As I have said before the whole of the added defendants' claim in the last analysis is dependent upon Small's testimony, and I am satisfied that his evidence as to the genuineness of the slip is not reliable. Certainly his evidence is insufficient to discredit or even cause a doubt to be entertained as to the strength of the circumstantial evidence adduced by plaintiff in support of his claim as the person who bought this ticket, and who at the time of the announcement of the draw and of the notification to the Club was lawfully entitled to the same.

I therefore give judgment for the plaintiff for the sum of $5,014.20. But, with a view to protecting the defendant Turf Club from any claim within the time before the period of limitation expires, execution shall be stayed until the 30th May, and the judgment is subject to a covenant by the plaintiff to keep the defendant Turf Club at all times indemnified against pecuniary loss by reason of a claim made against the Club by a person producing the ticket hereafter.

The Court shall now hear argument on the question of costs.

The first named defendant, Demerara Turf Club, Limited, appealed to the West Indian Court of Appeal. The plaintiff Archibald Farley died, and his widow and executrix, Mabel Farley, was substituted as a party to the appeal in his stead.

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

S. L. van B. Stafford, K.C. and *J. A. Luckhoo*, for respondent (plaintiff).

Cur. adv. vult.

The judgment of the Chief Justice of British Guiana, in which the Chief Justice of the Windward Islands and Leeward Islands concurred, was as follows:

The appellants are a company incorporated in the Colony and authorized under the provisions of section 21 of the Gambling Prevention Ordinance, as amended by the Gambling Prevention (Amendment) Ordinance, 1941, to organise and conduct lotteries or sweepstakes in connection with race meetings held under their auspices. The original respondent having died after this appeal had been lodged the present respondent who is his widow and executrix was substituted by Order of the Court.

The pleadings in the action and the grounds of appeal were drawn on the footing that a contract existed between the parties and we are content to deal with this matter on that basis.

In 1944 the appellants organised a sweepstake in connection with their May Race Meeting and as a result of the draw the first prize of $5,014.20 fell to the ticket No. C 7536. After the announcement of the result of the draw, the appellants received conflicting claims to the prize from the respondent and from a syndicate of

three persons. Neither claimant was able to produce the ticket bearing this number and, after some correspondence which is not material, the Directors of the appellant company decided not to pay out the prize money unless the winning ticket was produced.

The respondent then began his action against the appellant company claiming the sum of $5,014.20 and costs. After the trial of the action had begun, the learned trial judge, being of opinion that no final adjudication in the matter was possible in the absence of the rival claimants, directed, in exercise of his powers under Rules of Court, that the three members of the syndicate be joined as added defendants.

A joint appearance was duly entered by these added defendants and the requisite amended and additional pleadings were filed including a counterclaim by the added defendants against the appellants for the prize money. In the result the trial judge rejected the claim of the added defendants and accepted that of the respondent, giving judgment in his favour against the appellants for the sum claimed with consequential orders for costs against the appellants and the added defendants. With a view to protecting the appellants within the period of limitation the judgment was made subject to a covenant by the respondent to keep the appellants indemnified at all times against loss by reason of any claim which might be made by any person producing the ticket thereafter. The appellants appeal against the whole of this judgment. No appeal has been lodged by the added co-defendants.

The main grounds of appeal are: (1) that the learned trial judge erred in holding that the conditions subject to which the ticket was sold did not give the appellants power to decide the dispute or matter in question, or, alternatively, that this power was exercised unreasonably and arbitrarily; (2) that it was a condition precedent, before any action could be brought by the respondent against the appellants or entertained by the Court that the respondent should obtain a decision of the Directors of the appellant company in his favour and the respondent not having obtained such a decision the Court had no jurisdiction; (3) that the period of limitation fixed by the trial judge was wrong; (4) that inadmissible evidence was wrongly admitted without which there was no, or not sufficient, evidence to sustain the finding that the respondent was the owner of the winning ticket and that the finding was against the weight of evidence.

In our view this appeal fails to be decided upon the legal issues and we do not propose therefore to refer to the evidence or to the finding of fact except so far as may be necessary for the purposes of this judgment.

It is the practice of the appellants to sell books of sweepstake tickets at a discount for cash to persons known as "sellers" who resell to the public at the full price of the ticket. The only memorandum made by the Turf Club is a note of the serial numbers of the tickets taken by each seller, in order that they may know who has qualified for the sellers' prizes. The tickets are printed without counterfoils and each ticket bears on its face the words "All tickets are paid for at the time of issue. No counterfoil is

necessary — Your ticket is your receipt." On the face of the ticket there is also printed the percentages of the fund which will be allocated to the prizes and other objects and a number of conditions of which conditions 1 and 7 are relevant to this appeal.

Condition 1 reads "This ticket is sold subject to the condition that in the event of any dispute arising with respect to any matter whatever connected with the sweepstake, the decision of the Directors of the Demerara Turf Club shall be accented as final."

Condition 7 reads "Payment in respect of a winning ticket may be refused if the ticket is not delivered up to the Treasurer. Payments may be made to any person presenting a winning ticket for payment and upon payment and delivery of any such ticket, all liability of the Club shall cease."

The argument for the appellants is briefly that a dispute having arisen with respect to a matter connected with the sweepstake, namely, who was to be paid on Ticket No. C 7536 which had not been delivered up to the Treasurer and the appellants' directors having decided that payment of the prize would not be made without production of the ticket, the respondent, claiming to be the holder of the ticket, had bound himself by the contract on the ticket to accept as final the decision of the directors and therefore had no right of action against the appellants. They relied upon the decision of the Judicial Committee of the Privy Council in Cipriani and Ors. v. Burnett (1933 A.C. 83).

The case of Cipriani v. Burnett arose out of a sweepstake run by the Trinidad Turf Club under the provisions of the law of that Colony similar to those which legalise in this Colony, the sweepstakes run by the appellant company. The respondent Burnett had bought a ticket in one of those sweepstakes upon which was printed a condition that "This ticket is sold subject to the condition that in the event of any dispute arising with respect to any matters connected with drawing of the sweepstake or the awarding of the prizes the decision of the stewards of the Trinidad Turf Club thereon shall be accepted as final."

Upon the drawing taking place the owner of another ticket was declared to be the winner of the first prize, whereupon the respondent brought an action in the Supreme Court of Trinidad and Tobago claiming a declaration that according to the correct manner of conducting the drawing, his ticket was the first prize ticket and he claimed payment accordingly: he did not allege fraud or want of *bona fides.*

Belcher, C.J., held that the condition above referred to did not make a decision by the stewards a condition precedent to a right of action and, upon the facts, that according to the correct way of conducting the drawing the respondent's ticket was the first prize ticket.

On appeal to the Privy Council this judgment was recalled and the action dismissed. In giving the judgment of the Board, Lord Macmillan said "In their Lordships' view, the question which must be determined in the first place is whether the plaintiff (now the respondent) had in the absence of a decision in his favour by the stewards of the Trinidad Turf Club any

right of action at all. The ticket, which embodies the contract on which he sues, expressly requires him, as a condition of the sale to him of his ticket, to accept as final the decision of the Trinidad Turf Club on any dispute arising with respect to any matters connected with the drawing of the sweepstake or the awarding of the prizes. The dispute between the parties is plainly of such a character, but the respondent gives the go-by to this condition, subject to which he purchased the ticket, and asks that the Court shall substitute its judgment for that of the stewards of the Trinidad Turf Club: Their Lordships are of opinion that he is not entitled to do so."

The question, said Lord Macmillan was one of construction and it was not essential in order to exclude a right of action at law that the contract should in terms prescribe that the award of the specially constituted tribunal should be a condition precedent of any legal proceedings. After referring to the cases of Scott v. Avery, (1856) 5 H.L.C. 811, Brown v. Overbury (1856) 11 Ex. 715 and Dines v. Wolfe (1869) L.R. 2 P.C. 280, Lord Macmillan said:

> "It is a condition of the legality of a sweepstake in Trinidad that it shall be 'controlled' by the club which organizes it, and the provision in this case as to the manner of determining disputes connected with the drawing of the sweepstake is a reasonable exercise and incident of that control. Their Lordships accordingly read the condition on the ticket, having regard to "the circumstances belonging to it" as a condition precedent, the fulfilment of which is essential before any action for the stakes can be entertained by the Courts. The respondent produced no decision in his favour by the stewards of the Trinidad Turf Club by whose decision he contracted to be bound".

This Court is of course bound by that decision and it must be applied to the instant case unless on the true construction of the contract it can be distinguished.

The learned trial judge was of opinion that the contract in the present case could be so distinguished and was of the opinion that the words "any dispute arising with respect to any matter whatever connected with the sweepstake" could never have been intended to give the Directors "an unfettered and exclusive jurisdiction over matters not pertaining to their special function which would appear to be limited to deciding all matters essentially connected with the running of the races and the running of the sweepstake" and he felt certain that the contract could not be construed as giving an exclusive power to the Directors to decide the question of the ownership of a ticket declared by them to be a winning ticket. As to condition 7 he held that it merely gave the appellants a discretion to refuse payment on non-production of the ticket and that it was permissible for a claimant to ask the Court for a ruling that the alleged exercise by the Club of its discretion under condition 7 to refuse payment because of non-production was unreasonable in the circumstances.

With great respect to the learned trial judge we are unable to accept these views. In the first place we would observe that it is not by any means certain that the words "awarding of the prizes" used in the Trinidad condition would not include, besides

the decision as to which ticket should be entitled to a prize (which was the question there in issue), also the decision as to who is to be paid the prize money, that is, who is the owner of the ticket. But whether that be so or not, we are of opinion that the construction put upon the condition in the present case by the appellants is correct and reasonable. The evidence of the Secretary of the appellant Company was that there had been no sweepstake run by the Turf Club when there had not been more than one claimant of an unproduced ticket, and that he had never known the Club to pay out when no ticket was produced.

In Brown v. Overbury (supra) Baron Alderson pointed out that "Every contract must be determined according to the circumstances belonging to it. This is one of racing and the universal practice has been that in order to ascertain who is to have the stakes, it must first be determined who is the winner, not in the opinion of a jury, but of the persons appointed to decide it, *viz.* the judge or the stewards." We think that these words may be applied *mutatis mutandis,* to this sweepstake.

In Collins v. Locke, (1879), A.C. 674 the Privy Council had to consider a clause in an agreement in restraint of trade which stipulated that all matters in difference which should arise touching the agreement should be submitted to arbitration and on the question as to whether a general arbitration clause afforded an answer to the action there having been no arbitration and no award under it, their Lordships said:

> "Since the case of Scott v. Avery in the House of Lords, the contention that such a clause is bad as an attempt to oust the Courts of jurisdiction may be passed by.
>
> The questions to be considered in the case of such clauses are, whether an arbitration or award is necessary before a complete cause of action arises or is made a condition precedent to an action or whether the agreement to refer disputes is a collateral and independent one. That question must be determined in each case by the construction of the particular contract and the intention of the parties to be collected from its language."

In the instant case the Directors of the appellant Company have not sought to determine the question of ownership but have stood upon their right, clearly conferred upon them by the contract, to refuse payment unless the ticket is produced. We fail to see how it can be suggested that in the circumstances of the case their action was unjustified or unreasonable, and it seems to us that, quite apart from any question of the construction of condition 1, condition 7 provided a complete answer to the respondent's claim. He is in fact complaining that the appellants have done that which by the terms of the contract on which he sues they are fully entitled to do. The words of Lord Macmillan in Cipriani's case apply here with equal force "He claims that by the rules of the game he was entitled to be declared the winner, while he at the same time declines himself to abide by the rules"

Counsel for the respondent has sought to support the judgment on other grounds, He has contended (a) that the matter

in issue, namely, the ownership of the ticket was not a dispute arising out of a matter connected with the sweepstake, (b) alternatively, if it were such a dispute that the respondent was entitled to have a decision of the appellant Directors upon it and that the so-called decision of the Directors was no, or no effective decision as it did not dispose of the matter in dispute, and (c) that the loss of a ticket was not a matter within the purview of condition 1 and that condition 7 merely provided matter of defence to an action, and could be adequately met by the offer of an indemnity.

These contentions have been substantially disposed of by the opinions expressed above but we add a few observations upon them out of respect for counsel's argument.

In support of the first contention it was argued that the drawing of the sweepstake with the allotting of the various prizes to the respective numbers drawn was the last event in regard to the sweepstake on which the discretion or authority of the Directors could operate. On the completion of the draw their powers were spent, they were *functus officio* and questions as to what persons were entitled to the prize money did not come within their purview. In our view such a construction not only involves an unwarranted restriction on the plain words of condition 1 but is inconsistent with the discretions conferred upon the appellants by condition 7.

In support of his second contention counsel relied chiefly upon the cases of Cooper v. Shuttleworth (1856) 25 L.J. (Ct. of Ex) 114 and Arkwright v. Stoveld (1825) 3 L.J. Rep. O.S. 49, which were cases where persons appointed to arbitrate or to make a valuation refused to act or failed to perform the function allotted to them. He also referred to Edwards v. Aberayron Mutual Ship Insurance Society (1875) L.R. 1 Q.B.D. 563 where the tribunal which decided the respective rights of the parties had followed a procedure which was contrary to natural justice and reason. In these cases the parties were remitted to their action at law. We can see no analogy between these cases and the one before us where the appellants have reasonably exercised a discretion to refuse payment in circumstances expressly provided for in the contract.

This is also the answer to counsel's third contention. No one is compelled to buy tickets in a sweepstake and anyone who does so, whether he be an original purchaser or a transferee, must be taken to have accepted the conditions on which the ticket is sold. There is nothing in those conditions to suggest that if a holder of a winning ticket cannot produce it he is entitled as of right to be paid the prize money in return for his promise to hold the appellants indemnified against other claims.

In Cooper v. Shuttleworth (*supra*) Bramwell, B. said "It is a rule of legal construction never to imply a term in an agreement unless there is some legal necessity to do so." We see no such necessity in this case.

For these reasons, this appeal must be allowed, the judgment of the Court below set aside except so far as it relates to the award of costs to the respondent against the added co-defendants, and judgment must be entered for the appellants.

The appellants to have their costs against the respondent of the appeal and of the trial in the Court below.

The judgment of the President was as follows:

The action out of which the present appeal is made is a claim by the supposed owner of a winning sweepstake ticket, which has been lost, against the Demerara Turf Club Limited, by whom the sweepstake was organized and controlled and the sweepstake tickets issued. On behalf of the plaintiff-respondent, it is submitted that the claim to the money prize allotted under the sweepstake rules to the lost ticket is based upon a contractual right thereto acquired by the original purchaser of the ticket and duly assigned to the plaintiff. It appears to me therefore, that before consideration is given to the merits of the plaintiff's claim as a party to the supposed contract, it is first necessary to determine whether any contractual right to the prize money was acquired by the original purchaser of the ticket and, if so, whether that right was duly assigned to the plaintiff.

Under the ordinary law wagering contracts are, of course, illegal, but sweepstakes of the kind now under consideration have been expressly legalized by section 21 of the British Guiana Gambling Prevention Ordinance as amended by the Amendment Ordinance of 1941.

The first point for consideration is whether a contractual right to the prize, when awarded, was acquired by the original purchaser of the ticket. A specimen of the lost ticket, which differs from the original only as respects its serial letter and number, is in evidence (exhibit P), and shows in the left-hand column the percentages of the total money derived from the sale of the tickets to be allocated to prizes and other charges and services connected with the sweepstake, and in the right-hand column the conditions governing the drawing of the prizes, their allocation to the winning tickets and payment to the holders thereof. The ticket is indorsed as follows: "All tickets are paid for at the time of issue. No counterfoil is necessary — Your ticket is your receipt." For the purposes of the matter at present under consideration, it is material to observe that the conditions state that the various prizes "will be paid to the holders of the tickets" and to refer to condition 7 which reads as follows: —

> "Payment in respect of a winning ticket may be refused if the ticket is not delivered up to the Treasurer. Payments may be made to any person presenting a winning ticket for payment, and upon payment and delivery of any such ticket, all liability of the Club shall cease."

What, then, is the nature of the contract between the Turf Club and the original purchaser of the ticket? On behalf of the plaintiff it is submitted that, in consideration of the payment by the purchaser of the price of the ticket, the Club promises to pay to him, or to his assignees, any prize which may be allocated to the ticket when the sweepstake is drawn. The difficulty which confronts me here is whether any such promise can be derived from the conditions of payment of the prize as expressed in the ticket. It is to be noted that there is no promise to pay the purchaser as such or his assignees. Indeed, it is clear

from condition 7 that payment of the prize may be made to anyone who presents the winning ticket and that no person has any legal right to payment thereafter. The undertaking to pay the prize money is not given to the purchaser as such, but is given to any person presenting the winning ticket who is wholly unknown to the promisor at the time when the ticket is sold, and the supposed promise made. The terms of the indorsement of the ticket which have been quoted, show that no identification of the promisee is contemplated at the time when the tickets are sold.

It appears to me, therefore, that whatever the nature of the supposed contract may be as between the Turf Club and the original purchaser of a ticket, it does not include the right to claim the prize money on a winning ticket. It was not, in fact, expected by the Turf Club that the tickets would ultimately be presented to them for payment by the original purchasers (although it is, of course, possible that they might be if they remained unsold in their possession) because they were sold to the original purchasers in books of ten at a discount price with intention that they would be sold again to members of the public generally. The whole transaction was inimical to the supposition that at any time prior to presentation for payment, there was any *consensus* between the promisor and promisee that is to say between the Turf Club and the various holders of the tickets. The original purchasers buy the books of tickets with the intention of reselling the whole of them, and thus obtaining the profit resulting from the discount price at which they bought them from the Turf Club, and with the additional prospect of obtaining a sellers' prize which is specified in the left-hand column of the ticket and is promised in condition 8 specified in the right-hand column of the ticket. It seems, therefore, that this original purchaser is buying a right to the sellers' prize if it should become due, and that this right could ultimately be enforced by legal proceedings, but is obviously not a right which he assigns to any subsequent purchaser. It may be, as has been submitted in argument on behalf of the plaintiff, that he buys also a contractual right to require that the Turf Club will conduct the draw and allocate the prizes in the manner specified in the ticket and that this is an enforceable right which he assigns to subsequent purchasers of the tickets; but this right does not include the right to demand payment of the prize.

The law governing *consensus* for the purpose of acquiring rights under a contract is stated by Lord Haldane in Dunlop v. Selfridge (1915) A.C. 847 as follows: —

> "In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum, tertio* arising by way of contract. Such a right may be conferred by way of property. As, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam."*

It is, indeed, trite knowledge that a promise to be binding must be communicated to the promisee, that is to say to the person who is to receive the benefits of the promise and must be accepted by him in the manner indicated by the promisor.

If, as in the present case, the promisee of the award is, or maybe, a person other than the original purchaser of the ticket, I am unable to see upon what legal principle such a purchaser can claim to have acquired any contractual right to the award which he is enabled to assign to others. It appears to me that these tickets do not evidence the terms of a contractual undertaking by the Turf Club to pay to the original or any purchaser any prize which may ultimately be allotted thereto as the result of the draw. It seems rather that they amount only to the offer of a promise to pay such a prize to any person who may present a winning ticket for payment.

The presentation of the ticket and its delivery to the Treasurer of the Club constitutes acceptance of the offer and makes the bargain binding. This view is in conformity with the principle enunciated by Bowen, L.J. in the Carbolic Smoke Ball case (1893) 1 Q.B. 269 as follows: —

> "One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who made the offer, in order that the two minds may come together. Unless this is so, the two minds may be apart, and there is not that consensus which is necessary according to the rules of English law to make a contract. But there is a clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so; and I suppose there can be no doubt that when a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the contract binding, it is only necessary for the other person to whom such an offer is made to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance, without notification."

There must, of course, be consideration for the offer to make it binding. In the present case, I should suppose that the delivery up of the winning ticket was a matter of real importance to the Turf Club because it finalised their obligations and avoided the consideration of vexatious claims which, I am given to understand, invariably follow the announcement of the winning tickets prior to their presentation.

If, then, no contractual right to the prize money was acquired by the original purchaser of the ticket, it follows that no such right could be assigned. On behalf of the plaintiff, it has been submitted that the ticket was a negotiable instrument entitling him to demand the prize as holder for value, seeing that he paid one shilling for it to the original purchaser. In answer to this submission, it is sufficient to say that it is an essential ingredient of every negotiable instrument entitling the holder to demand payment of money that the amount specified therein should be certain. In the case of a sweep ticket, there may be no amount payable at all.

It has alternatively been submitted that, even if the ticket cannot be regarded as a negotiable instrument, and assuming the acquisition by the original purchaser of a contractual right to sue

in due course for the prize, there has been due assignment of that right by sale of the ticket to the plaintiff. I have already indicated that no such right was acquired by the original purchaser, but, even if it were, there was no assignment in writing signed by the assignor and no express notice in writing was given to the party to be charged. These are statutory requirements (see section 19 of the Civil Law of British Guiana Ordinance) which, as I think, could not be waived by the parties; but, in any event, the first of them is in the interest of the assignor and there is no evidence of waiver by him.

It was, I think, suggested in the course of the argument before this Court that the sweep ticket is analogous to the cloakroom ticket, and that, as in the latter case the contract is to deliver the goods to the person who receives the ticket, so in the present case the contract is to pay the prize to him who buys the winning sweep ticket. This analogy, however, breaks down when the true character of the contract arising out of the cloakroom transaction is appreciated. There the proprietor of the cloak-room receives the goods of the depositor and undertakes, in consideration of a money payment, to restore them to him on demand, but subject to the condition that he must produce the receipt or ticket, and no action lies against the proprietor if the goods are subsequently delivered to some authorised person who presents the ticket. Here there is no contract with anyone but the original depositor. The goods are his and he alone is entitled to recover them, nor does the proprietor contract to deliver them to anyone but him. The sweepstake prize on the other hand, is not the property of the ticket holder and no person has a claim to it except he who accepts the offer to pay it by performance of the act which constitutes such acceptance, namely the presentation of the ticket.

In the result I am satisfied that there was no privity of contract between the Turf Club and the plaintiff in the present case. The questions therefore whether the plaintiff was the true purchaser of the winning ticket, and, if so, whether the conditions stated on the ticket preclude him from recovery of the prize, which issues alone were determined by the learned trial judge, do not arise. The present appeal must be allowed with costs both in this court and in the court below.

I wish to add that, having read the judgment of my learned brothers, I should agree with the grounds upon which they have come to the same conclusion as myself if I were satisfied, which I am not, that any cause of action is disclosed in the claim out of which the present appeal has arisen.

Appeal allowed;
Leave to appeal granted.

Solicitors: *J. Edward de Freitas,* for appellants;
Francis Dias, O.B.E. for respondent.

THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL

JUDGMENT

IN AN APPEAL FROM

THE SUPREME COURT OF BRITISH
GUIANA.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL from the Supreme Court of British Guiana.

NOOR MOHAMED, Appellant,

v.

THE KING, Respondent.

BEFORE LORD UTHWATT, LORD DU PARCQ, LORD OAKSEY,

SIR MADHAVAN NAIR, AND SIR JOHN BEAUMONT.

[1948. November 18.]

Criminal law and procedure—Indictment—Evidence of other offences—Not admissible—Unless relevant to an issue before jury—May be relevant—Where issue is whether acts alleged to constitute crime charged in indictment were designed or accidental—To rebut a defence otherwise open to accused.

Criminal law and procedure—Indictment—Evidence of other offences—Where admissible—Should be excluded by trial judge—In view of its gravely prejudicial character—If its weight is trifling.

It is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. This principle is one of the most deeply rooted and jealously guarded principles of our criminal law and is fundamental to the law of evidence as conceived in this country.

Makin v. Attorney General for New South Wales (1894) A.C. 57, 65, and *Maxwell v. The Director of Public Prosecutions* (1935) A.C. 309, 317, 320, applied.

The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused, for example the defence of an alibi.

Makin v. Attorney-General for New South Wales (1894) A.C. 57, 65, and *Thompson v. The King* (1918) A.C. 221, 230, 231, applied.

Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice.

Thompson v. *The King* (1918) A.C. 221, per Lord Sumner.

An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalent to saying "Let the prosecution prove its case if it can," and having said so much, the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more

other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said to be "crediting the accused with a fancy defence" if they sought to adduce such evidence.

In all such cases, however, the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. Cases will occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness to the judge.

The appellant was indicted for the murder on the 17th September, 1946, of A., with whom he had been living in concubinage. The death of A. was due to cyanide poisoning. The appellant is a goldsmith by trade and used a solution of potassium cyanide in the ordinary course of his business. He kept it in a press or cupboard. The cupboard was usually kept locked, but the padlock in use was defective, and it was not difficult to force the cupboard door. Potassium cyanide is a poison which acts quickly; and causes loss of consciousness in a few seconds. There was evidence that the appellant was jealous of A., that he had accused her of infidelity, had often beaten her, and that on the 16th September 1946, he had threatened to kill her. There was circumstantial evidence, but no direct evidence, that the poison was administered by the appellant: there was no evidence from which it could be inferred that the appellant had persuaded A. to take the poison by a trick. The evidence showed A. to have been acquainted with the fact that suspicion rested on the appellant in respect of the death of his wife.

At this stage of the proceedings the Crown led evidence that G., the wife of the appellant died on the 17th May 1944 from potassium cyanide poisoning, and further evidence which, at least, raised the suspicion that the appellant had persuaded G. to take the poison by a trick. There was, however, no direct evidence that the appellant had administered the poison to G. Evidence was led that the appellant was jealous of G., that he used to beat her and that he had said he had a mind to poison her.

Prior to such evidence being led, the defence had put forward no theory as to the manner in which the poison had been taken by, or administered to, A. Later, in his final address to the jury counsel for the defence suggested that the facts were consistent with A having committed suicide.

At the trial, counsel for the Crown, when submitting that evidence as to the circumstances surrounding the death of G., should be admitted, referred to the possible defences of accident and suicide. In his address to the jury he said that the evidence was led "to meet the defence of suicide," and he pointed out that the circumstances surrounding the death of the two women "followed a similar pattern."

The appellant was convicted.

On appeal, counsel for the Crown submitted that the similarity of circumstances in the deaths of the two women would lead to the inference that the appellant administered poison to A. with felonious intent.

Held (1) that an examination of the evidence of the facts proved as to the death of G. shows that it is impressive because it appears to demonstrate "that the accused is a person likely from his criminal conduct or character to have committed the offence" of the murder of A. for which he was tried;

(2) that admission of the evidence cannot be justified on any of the grounds which have been suggested, or on any other ground;

(3) that assuming that it is consistent with the evidence relating to the death of A. that she took her own life, or that she took poison accidentally, there is nothing in the circumstances of the death of G. to negative these possible views,

(4) that even if the appellant deliberately caused G. to take poison, it does not follow that A. may not have committed suicide;

(5) that the argument as to similarity of circumstances amounted to no more than this, that if the appellant murdered one woman because he was jealous of her, it is probable that he murdered another for the same reason;

(6) that the evidence as to the circumstances surrounding the death of G. was inadmissible.

R. v. Sims (1946) 1 KB. 531, *Thompson, v. The King* (1918) A.C. 232, *R. v. Bond* (1906) 2 K.B. 389, 398, and *Maxwell v. The Director of Public* Prosecutions (1935) A.C. 309, 320, considered.

Per curiam: If the appellant were proved to have administered poison to A. in circumstances consistent with accident, then proof that he had previously administered poison to G. in similar circumstances might well have been admissible. There was however no direct evidence in either case that the appellant had administered the poison.

APPEAL by Noor Mohamed from the judgment of the Supreme Court of British Guiana (Criminal Jurisdiction, Berbice) sentencing him, after conviction by a jury, to death for the offence of murder.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by Lord du Parcq as follows:

After hearing the arguments of counsel for the appellant and for the Crown, their Lordships announced that they would humbly advise His Majesty that this appeal should be allowed and the conviction of the appellant quashed, and would state their reasons for tendering this advice at a later date. Those reasons are set out in this judgment.

The appellant was tried before the Supreme Court of British Guiana on a charge of murdering a woman commonly known, and referred to during the trial, as Ayesha. The jury found him guilty, and he was sentenced to death. Evidence was admitted at the trial to which objection was taken by the appellant's counsel on the ground that it tended to show that the appellant had murdered another woman, his wife Gooriah. It was said on behalf of the appellant that the evidence ought to be excluded as being prejudicial to him and irrelevant. For the Crown it was contended, on grounds which it will be necessary to state later in this judgment, that the circumstances attending the two deaths made evidence concerning the earlier of them relevant to the charge. It was properly conceded at their Lordship's Board on behalf of the Crown that, if the evidence were found to have been wrongly admitted, it would follow, according to the settled principles by which their Lordships are guided in criminal cases, that the appeal must be allowed.

The evidence which related directly to the charge of murdering Ayesha may be summarised as follows. The appellant's wife Gooriah died on the 17th May, 1944. At some time in that year Ayesha had left her husband and gone to live with him. They lived together as man and wife, and there was evidence that in the year 1945 they went through a ceremony of marriage according to the rites of the Mohammedan religion, although Ayesha's husband was still living. After the first few weeks of their union, their life together had not been happy. It was said that the appellant had often beaten Ayesha, and had some-

times driven her from his house. On one occasion she had lived apart from him for two weeks, though she seems to have continued to feel affection for him, and to have been anxious to return to him. The earlier quarrels were due to the fact that the appellant suspected and accused her of infidelity. Later, he made a different charge against her. On a day in August, 1946, a neighbour named Mildred James, who employed Ayesha to do some dress-making, witnessed an assault on her by the appellant. She tried to rescue Ayesha, whereupon the appellant said, according to the witness, "Through this woman people got to say I kill my first wife. She must go away." Ayesha refused to go, and the appellant was alleged to have threatened her with the words, "If you can't go alive you got to go dead." There was also evidence of a quarrel and a threat by the appellant to kill Ayesha on the night of the 16th September, 1946. On the morning of the following day, Ayesha died of poisoning by potassium cyanide.

It must here be stated that the appellant is a goldsmith by trade and used a solution of potassium cyanide in the ordinary course of his business. He kept it in a press or cupboard. This cupboard was usually locked, but the padlock in use was defective, and it was not difficult to force the cupboard door. Potassium cyanide is a poison which acts quickly; and causes loss of consciousness in a few seconds.

Ayesha was said to have been seen alive at or after 9 o'clock in the morning of the 17th September. A witness called for the Crown swore that he had then seen her go with the appellant into the house in which they lived. This evidence was inconsistent with statements made by the appellant. According to him, his daughter, a child of fourteen, had awakened him shortly before 9.30 a.m. from a sleep which followed a drinking bout, and had told him that Ayesha "was frothing". He said that he had found the woman unconscious. After some delay, he had reported this to a chemist in the neighbourhood. It appeared that he had told this chemist that he had gone to fetch a doctor, but had not found him at home. He was advised to take his "wife" to hospital and did so between 9 and 10 a.m. The appellant, at the request of the assistant dispenser there, had produced a sheet on which Ayesha had vomited. There was a stain on it which the appellant said smelled like gold solution. The assistant dispenser said he could smell nothing. Ayesha was given a stimulant by the assistant dispenser, and the appellant was advised to take her to the doctor. At 11 o'clock the appellant arrived at a doctor's surgery, bringing with him what the doctor found to be the dead body of Ayesha.

A post-mortem examination showed without doubt that death was due to cyanide poisoning. It also indicated that there had been exaggeration in some of the evidence as to the more recent assaults on Ayesha by the appellant, since, although some "bruise blood" was found near the right kidney, there were no external signs of violence.

This evidence having been given, the question was argued, in the absence of the jury, whether evidence tendered as to the death of Gooriah should be admitted. The learned Judge, after an elaborate argument, decided to admit it. At this stage the

defence had put forward no theory as to the manner in which the poison had been taken by, or administered to, Ayesha. Later, in his final address to the jury, counsel for the defence suggested that the facts were consistent with suicide.

Counsel for the appellant at their Lordships' bar laid stress on the fact that, at the trial, counsel for the Crown in the course of his submission that the evidence complained of was admissible, stated, according to the note of his submission, that the appellant had said to Ayesha, "I will get rid of you as I got rid of my first wife." This sentence certainly occurs in the notes, but their Lordships think that it must have been intended and understood as a gloss or comment on the facts proved rather than an allegation of fact. If it had been intended as a quotation from a statement made by the appellant it would have been easy for the appellant's counsel to point out, what indeed the learned Judge would himself have observed, that there was no evidence that he had used the words imputed to him.

Their Lordships do not find it necessary to set out in any detail the evidence relating to Gooriah's death. It is sufficient to quote in full paragraph 7 of the respondent's case which is as follows: —

"The prosecution then called a great deal of evidence relating to Gooriah's death, including evidence of the following facts:

(1) The appellant believed Gooriah to be unfaithful and used to beat her.

(2) The appellant had said of Gooriah to Ayesha's husband 'Buddy ah got a mind to poison this bitch.'

(3) Gooriah on the day of her death, the 17th May, 1944, went to the nearby house of the appellant's brother-in-law, carrying a piece of folded white paper wrapped in her hand. She had had toothache and the appellant was overheard to say to her 'You must drink this it will do you good.'

(4) Shortly after a boy ran for the appellant shouting 'Pawah Gooriah dead.' The appellant went to the house and summoned Dr. Besson, who was passing.

(5) The accused went to the window and called a boy to bring him a paper, similar to that which Gooriah had had in her hand, from the yard. The boy brought the paper which the appellant handed to Dr. Besson saying it smelt of cyanide. The doctor found that the paper had no substance oh it and had no smell. A little later the appellant brought the doctor an enamel cup saying 'This cup smells of cyanide.' The cup was empty and had no smell.

(6) Gooriah died, and Dr. Besson's examination showed her death to be consistent with potassium cyanide poisoning. On analysis 2 grains of potassium cyanide were found in Gooriah's stomach. Dr. Besson stated that her death was caused by cyanide poisoning."

Their Lordships now turn to the important question of law raised by this appeal. By the terms of the Criminal Law (Procedure) Ordinance in force in British Guiana the practice and procedure there are in general the same as the practice and procedure in force in criminal causes in the High Court of Justice

and Courts of Assize in England. There are no special provisions in the Ordinance to which their Lordships find it necessary to refer.

The first comment to be made on the evidence under review is that it plainly tended to show that the appellant had been guilty of a criminal act which was not the act with which he was charged. In *Makin* v. *Attorney-General for New South* Wales (1894) A.C. 57, 65, Lord Herschell, then Lord Chancellor, delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these the first was that "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried." In 1934 this principle was said by Lord Sankey, then Lord Chancellor, with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted and jealously guarded principles of our criminal law" and to be "fundamental in the law of evidence as conceived in this country." (*Maxwell* v. *The Director of Public Prosecutions* (1935) A.C. 309, at pp. 317, 320.).

The second principle stated in *Makin's* case was that "the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

The statement of this latter principle has given rise to some discussion. A plea of not guilty puts everything in issue which is a necessary ingredient of the offence charged, and if the Crown were permitted, ostensibly in order to strengthen the evidence of a fact which was not denied and perhaps could not be the subject of rational dispute, to adduce evidence of a previous crime, it is manifest that the protection afforded by the "jealously guarded" principle first enunciated would be gravely impaired.

This aspect of the matter was considered by the House of Lords in *Thompson* v. *The King* (1918) A.C. 221. Their Lordships need not allude to the facts of that case. It is enough to say that the evidence there admitted was held to be relevant as one of the indicia by which the accused man's identity with the person who had committed the crime could be established. (See per Lord Parker of Waddington, at p. 231.). In the words of Lord Atkinson it rebutted the defence of an alibi which otherwise would have been open (pp. 230-1). Nothing of the kind can be suggested in the present case. The value of the case for the present purpose is that Lord Sumner dealt particularly with the difficulty to which their Lordships have referred, and stated his conclusion as follows: "Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have

been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."

Their Lordships respectfully agree with what they conceive to be the spirit and intention of Lord Sumner's words, and wish to say nothing to detract from their value. On principle, however, and with due regard to subsequent authority, their Lordships think that one qualification of the rule laid down by Lord Sumner must be admitted. An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalent to saying "Let the prosecution prove its case, if it can", and, having said so much; the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be "crediting the accused with a fancy defence" if they sought to adduce such evidence. It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

Their Lordships have considered with care the question whether the evidence now in question can be said to be relevant to any issue in the case. They have asked themselves, adopting the language of Lord Sumner in *Thompson's* case, at p. 236, “What exactly does this purport to prove?” At the trial the learned counsel for the Crown, when submitting that the evidence should be admitted, referred to the possible defences of accident and suicide. In his address to the jury he said, according to the note, that the evidence was led "to meet the defence of suicide", and pointed out that the circumstances surrounding the deaths of the two women "followed a similar pattern." At their Lordships' bar it was submitted that this similarity of circumstances would lead to the inference that the appellant administered poison to Ayesha with felonious intent.

There can be little doubt that the manner of Ayesha's death, even without the evidence as to the death of Gooriah, would arouse suspicion against the appellant in the mind of a reasonable man. The facts proved as to the death of Gooriah would

certainly tend to deepen that suspicion, and might well tilt the balance against the accused in the estimation of a jury. It by no means follows that this evidence ought to be admitted. If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of Lord Herschell in *Makin's* case, "that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried", and if it is otherwise of no real substance, then it was certainly wrongly admitted. After fully considering all the facts which, if accepted, it revealed, their Lordships are not satisfied that its admission can be justified on any of the grounds which have been suggested or on any other ground. Assuming that it is consistent with the evidence relating to the death of Ayesha that she took her own life, or that she took poison accidentally (one of which assumptions must be made for the purposes of the Crown's argument at the trial) there is nothing in the circumstances of Gooriah's death to negative these possible views. Even if the appellant deliberately caused Gooriah to take poison (an assumption not lightly to be made, since he was never charged with having murdered her) it does not follow that Ayesha may not have committed suicide. As to the argument from similarity of circumstances, it seems on analysis to amount to no more than this, that if the appellant murdered one woman because he was jealous of her, it is probable that he murdered another for the same reason. If the appellant were proved to have administered poison to Ayesha in circumstances consistent with accident, then proof that he had previously administered poison to Gooriah in similar circumstances might well have been admissible. There was, however, no direct evidence in either case that the appellant had administered the poison. It is true that in the case of Gooriah there was evidence from which it might be inferred that he persuaded her to take the poison by a trick, but this evidence cannot properly be used to found an inference that a similar trick was used to deceive Ayesha, and so to fill a gap in the available evidence. The evidence which was properly adduced as to Ayesha shows her to have been acquainted, as were, it may be supposed, most of the inhabitants of the village in which the appellant lived, with the fact that suspicion rested on him in respect of Gooriah's death, and the theory that Ayesha was deceived into taking poison by a similar ruse to that which is supposed to have succeeded with Gooriah seems to their Lordships to rest on an improbable surmise. The effect of the admission of the impugned evidence may well have been that the jury came to the conclusion that the appellant was guilty of the murder of Gooriah, with which he had never been charged, and having thus adjudged him a murderer, were satisfied with something short of conclusive proof that he had murdered Ayesha. In these circumstances the verdict cannot stand, notwithstanding the care with which the learned Judge summed up the case, and the fairness with which the trial was conducted in all other respects.

Their Lordships are aware that their statement of the principles to be applied to such a case as this, and of the right way of applying them, may not accord with some at least of the dicta contained in a recent decision of the Court of Criminal Appeal in England, to which counsel rightly directed their attention. In

Rex v. *Sims* [1946] 1 K.B. 531 the Lord Chief Justice, delivering judgment, expressed the opinion of the Court as to the proper method of approaching a question concerning the admissibility of evidence of other offenders than that charged in these words: —

> "If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general position that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view. It is plainly the sensible view."

With all due deference to the Court of Criminal Appeal, their Lordships feel bound to say that they are not convinced that the method of approach which it thus approved has any advantage over that which it rejects as incorrect. The expression "logically probative" may be understood to include much evidence which English law deems to be irrelevant. Logicians are not bound by the rules of evidence which guide English courts, and theories of probability sometimes cause a clash of philosophic opinion. It would no doubt be wrong to interpret the observations of the Court of Criminal Appeal as meaning that evidence can sometimes be admitted merely for the reason that it shows a propensity in the accused to commit crimes of the nature of that with which he is charged. It cannot be supposed that the Court intended to lay down a proposition which would conflict with principles which have been laid down, or approved, by the House of Lords. It may be assumed that it is still true to say, as Lord Sumner said thirty years ago: "No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime." (*Thompson* v. *The King*, at p. 232.) If all that the Court meant to say was that evidence of the kind specified in the first of the principles stated in *Makin's* case may be admitted if it is relevant for other reasons, then the dictum has no novelty. It does seem, however, that the passage quoted was intended at least to bear the meaning that evidence ought to be admitted which is in any way relevant to a matter which can be said to be in issue, however technically, between the Crown and the accused, because a little later in the judgment the following passage occurs: —

> "In any event, whenever there is a plea of not guilty, everything is in issue and the prosecution has to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent."

The Court of Criminal Appeal would thus appear to have rejected altogether the opinion of Lord Sumner which, although, as their Lordships have said, they believe that it must in one respect be somewhat qualified, has hitherto been generally accepted as a governing principle. Recent dicta of the Court of Criminal Appeal, though carrying great weight, do not necessarily out-weigh earlier dicta in the House of Lords or the Court of

Crown Cases Reserved, or in the Court of Criminal Appeal itself, and if their Lordships have correctly understood those which they have quoted, they can only regard them as in some degree inconsistent with settled principle. Their Lordships think that a passage from the judgment of Kennedy, J. (as he then was) in the well-known case of *R.* v. *Bond* [1906] 2 K.B. 389, at p. 398, may well be quoted in this connection: —

> "If, as is plain, we have to recognise the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which (to the credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions."

Their Lordships respectfully approve this statement, which seems to them to be completely in accord with the later statement of the Lord Chancellor in *Maxwell's* case (*ubi sup.*, at p. 320) when he said "It is of the utmost importance for a fair trial that the evidence should be *prima facie* limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined." They would regret the adoption of any doctrine which made the general rule subordinate to its exceptions. They must add, however, that though they have been unwilling to adopt the approach to the problem which the Court of Criminal Appeal has recommended, they of course refrain from expressing any opinion as to propriety of the actual decision in *Sims's* case. It is unnecessary, and therefore undesirable, that they should do so.

Appeal allowed.

AYUBE MOHAMED EDUN,
Petitioner,

v.

GEORGE MAYO GONSALVES,
Respondent.

(1947. No. 613.—DEMERARA).

BEFORE WORLEY, C.J.

1948. FEBRUARY 2, 3, 4, 5, 6 AND 14.

Constitutional law—Crown and Government of Colony—No distinction between—Since British Guiana (*Constitution*) *Order in Council,* 1928.

Constitutional law—Public Officer in Colony—Contract of service—Provision as to notice of dismissal—Officer dismissed without notice—Dismissal not wrongful—Unless statutory provision as to notice.

Election petition—Legislative Council—Election to—Disqualification for—Holder of office of emolument under Crown in Colony—Contract by person with Government—For services to Government—Power of such person to appoint a substitute to render such services—Party to contract not holder of office of emolument under Crown in Colony—British Guiana (*Constitution*) *Orders in Council,* 1928 *to* 1945, *article* 21 (3).

Whatever may have been the position prior to the constitutional changes effected by the British Guiana (Constitution) Order in Council, 1928, there has not since those changes been any legal or constitutional distinction between the Crown and the Government of the Colony.

A person appointed to a public office in the Colony under an agreement which purports to entitle him to notice of dismissal may, in the absence of statutory provision as to such notice, be dismissed without notice if the Crown so thinks fit.

Dunn v. *The Queen* (1896) 1 Q.B. 116, 119, and *Shenton* v. *Smith* (1895) A.C. 229, applied.

A person is not the holder of an office of emolument under the Crown in the Colony within the meaning of Article 21 (3) of the British Guiana (Constitution) Orders in Council, 1928 to 1945 where

(a) there was a contract for services, and not a contract of service, between the person and the Government; and

(b) the person was empowered under his contract with the Government, to appoint a substitute if he was at any time unable to perform his obligations under the contract.

ELECTION PETITION by Ayube Mohamed Edun under the Legislative Council (Elections) Ordinance, 1945 (No. 13) praying that it may be determined that George Mayo Gonsalves who was declared by the Returning Officer of Electoral District No. 1

Eastern Berbice to be duly elected and returned as Member of the Legislative Council to represent such Electoral District, was not duly returned or elected, that his election and return were wholly *null* and *void,* and that the petitioner was duly elected and ought to have been returned.

S. L. van B. Stafford. K.C, and *Amineen M. Edun,* for petitioner.

H. C. Humphrys. K.C, and *John Carter,* for respondent, George Mayo Gonsalves.

Cur. adv. vult.

WORLEY, C.J.: This petition arises out of the election of a member for the Legislative Council to represent Electoral District No. 1 Eastern Berbice held on the 24th November, 1947, at which election the respondent obtained a majority of 579 votes over the petitioner and was declared to be duly elected and returned as such by the Returning Officer. The petitioner alleges that the respondent was at the time of his election incapable of being elected to or of sitting or voting as a member of the Legislative Council and he prays that it may be determined that the respondent was not duly returned or elected, that the election and return of the respondent were wholly *null* and *void* and that the petitioner was duly elected and ought to have been returned.

The first question for determination is therefore whether or not the respondent is, as alleged, disqualified from being elected a Member of the Council under Article 21 (3) of the British Guiana (Constitution) Orders in Council 1928 to 1945 by reason of being the holder of an office of emolument under the Crown in the Colony. The respondent is a dental surgeon resident in New Amsterdam in the County of Berbice where he has practised his profession since 1935. He has at all material times had private patients and in addition has, since 1937, also done dental work at the Public Hospital, New Amsterdam, and among the school children of that town for which he is remunerated, in part at least, from public funds and it is in respect of these services that the alleged disqualification arises.

The contract under which the respondent undertook to perform this work is set out in a series of letters which passed between him and the Surgeon-General and which it is necessary to consider in some detail. In 1936 or early 1937 dental work at the Public Hospital, New Amsterdam, was performed by a Dr. Meikle who fell ill and requested the respondent to substitute for him: the respondent did so and after Dr. Meikle's death, the Surgeon-General wrote in June 1937 to the respondent that he was about to make a recommendation to Government for appointment to the post of Dental Surgeon, Public Hospital, New Amsterdam, setting out the terms of the appointment and asking if the respondent was prepared to accept. The respondent having replied favourably, the Surgeon-General wrote again in September asking whether the respondent was also prepared to accept the appointment of dental officer to the children in the primary schools of New Amsterdam on the conditions set out in the letter. After further correspondence leading to the respondent's acceptance the Surgeon-General wrote in November 1937 informing the

respondent that he had been appointed and re-capitulating the terms agreed; I set out the letter in *extenso:* —

"BRITISH GUIANA SURGEON-GENERAL'S OFFICE.
No. 1001|1937. Georgetown, Demerara.
4th November. 1937.

Sir,

I have the honour to inform you that His Excellency the Officer Administering the Government has been pleased to appoint you to be dental Surgeon, Public Hospital, Berbice, and school dental officer, New Amsterdam, as from 1st October, 1937, on the terms and conditions set out in my (previous) letters.....

2. The duties of the dual office and the remuneration attached thereto are fully set out in the letters referred to above and you have already agreed to these terms of the appointment in your (previous) letters…….

3. For ease of reference I recapitulate herein the terms of the appointment:—

Duties	*Remuneration*
(a). As dental surgeon, Public Hospital, New Amsterdam—to hold a dental clinic thrice weekly at the Public Hospital, New Amsterdam, on days to be specified from 9 a.m. to 11 a.m. or later if necessary on each day.	(a) As dental surgeon. Public Hospital, New Amsterdam—(i) to be paid an honorarium at the rate of £ 100 per ~~an~~num. (ii) To receive one-half of the fees paid by "poverty" patients treated by you. ("Poverty" patients pay a fee of 24c. per extraction in accordance with the rates set out in Schedule IV to the Hospital Fees Regulations. 1932).
(b) As school dental officer, New Amsterdam— (i) To carry out a school dental inspection of the primary school children in the town of New Amsterdam and to forward reports on the conditions found to the Surgeon-General. (ii) To hold a dental clinic at your surgery thrice weekly on days to be specified, from 1 p.m. to 3 p.m. or later if necessary. (iii) To attend at the clinic all primary school children requiring dental treatment, the treatment to be limited to the forms set out in the attached schedule of fees. The children will attend according to schools on a roster prepared by the Education Department; (iv) To carry out at the clinic such emergency extractions as may be required by the school child as occasion arises.	(b) As school dental officer. New Amsterdam—Payment on the basis of work actually done in accordance with the attached Schedule of fees it, being understood that fees pay able must not exceed $120 in any given quarter of the year

4. It is a condition of these appointments that they may be terminated on either side on one month's notice, and that in the event of the person appointed being unable anytime to perform the duties of the offices and to make arrangements suitable to the Surgeon-General for the performance thereof, it shall be open to the Surgeon-General to make such arrangements as may be necessary at the person's expense.

5. The appointment is a part-time one on the Unfixed Establishment

and the person appointed will not be entitled to any leave of absence, pension, gratuity or retiring allowance.

I have the honour to be,
Sir,
Your obedient servant,
(Sgd.) B. N. V. WASE-BAILEY,
Surgeon-General (Ag.)"

On November 25th an executive order was issued by the Colonial Secretary for the purpose of authorizing payments to the respondent in the terms of the agreement, as follows: —

"71|27|5

25th November, 1937.

His Excellency the Governor has been pleased to approve of the appointment of Dr. G. M. Gonsalves to the post of Dental Surgeon, Public Hospital, New Amsterdam, and Dental Officer to the primary schools of New Amsterdam, from 1st October, 1937, *vice* Dr. L. S. Meikle, deceased.

2. As Dental Surgeon, Dr. Gonsalves will receive an honorarium at the rate of $480 per annum (Head XIX—Medical—Hospitals and Dispensaries, sub-head 1 (23)) and will be entitled to one-half of the fees paid by "poverty" patients treated by him, in accordance with the rates set out in Schedule IV to the Hospital Fees Regulations, 1932.

3. As Dental Officer to the primary schools in New Amsterdam (Head XVI—Medical—sub-head 14) Dr. Gonsalves will be paid fees in accordance with an approved schedule of which a copy is attached, provided the fees payable do not exceed S120 in any quarter of the year.

C. W. H. COLLIER
for Colonial Secretary."

In 1944 the honorarium was increased to S720 a year. It is admitted that the respondent continued to perform the duties and receive the remuneration specified in the agreement up to and after the date of his nomination and election, and the question which has to be answered is whether he thereby became the holder of an office of emolument or was merely the holder of a contract for services.

Before examining the nature of an "office" and the distinction between an officer and an independent contractor, I will consider the contention of respondent's counsel that the conditions of his employment preclude the possibility of his being a servant of the Crown. In the course of the discussion on this, reference was made to the omission from the Order-in-Council now in force of the words "or under the Government of the Colony" which were included in the disqualification as enacted in paragraph (iv) of Article 21 of the British Guiana (Constitution) Order in Council 1928. These words were repealed by the British Guiana (Constitution) Order in Council, 1943. I do not think anything turns upon the omission of these words. It would indeed be strange to find that the Legislature while retaining the disqualification of servants of the Crown, removed the disqualification in respect of servants of the local Government. The point was not fully argued before me but I think that the reason for the omission of these words is that, whatever may have been the position prior to the constitutional changes in 1928, there has not since

those changes been any legal or constitutional distinction between the Crown and the Government of the Colony.

Mr. Humphrys contended that the condition that respondent's appointment might be terminated on either side by one month's notice conflicted with the essential principle that appointments to office under the Crown are made by royal authority, that no servant of the Crown holds office otherwise than at pleasure and that to confer another tenure statutory provision is necessary. In this respect a Colonial Government is on the same footing as the Government of the United Kingdom (Shenton v. Smith J.C. 1895 AC. 229). Section 10 (3) of the Colonial Medical Service (Consolidation) Ordinance is an example of a statutory provision of this nature but there is no statutory provision applicable to the case before me. What then is the position of a person appointed to a public office in the Colony under an agreement which purports to entitle him to notice of dismissal but is not covered by the requisite statutory provision? The point was decided in the case of Dunn v. The Queen 1896 1 Q.B. 116. In that case the suppliant on a petition of right had been engaged for service under the Crown in the Niger Protectorate for a period of three years certain and he claimed damages for having been dismissed before the expiration of that period. The Court of Appeal held that there must be imported into the contract the term which is applicable to civil servants in general, namely, that the Crown may put an end to the employment at its pleasure. Lord Herschell says at p. 119 "It seems to me that it is the public interest which has led to the term which I have mentioned being imported into contracts for employment in the service of the Crown. The cases cited shew that, such employment being for the good of the public, it is essential for the public good that it should be capable of being determined at the pleasure of the Crown, except in certain exceptional cases where it has been deemed to be more for the public good that some restriction should be imposed on the power of the Crown to dismiss its servants." Lord Esher, M.R. pointed out that the decision was in accordance with a previous decision of the House of Lords in an unreported case and that Shenton v. Smith was really equally conclusive of the matter.

The position therefore is that the officer's status as a servant of the Crown is not affected by such a term in the contract which exceeds the Governor's authority but that the term is optional so far as it affects the Crown.

Next, the point was made in argument that the respondent was not subject to the Colonial Regulations relating to discipline and cognate matters but in my view no conclusive inference can be drawn from this. The Regulations are merely directions for general guidance and do not constitute a contract between the Crown and its servants. The Governor has a discretion in applying them to any particular case and in Shenton v. Smith the Privy Council pointed out that "any Government which departs from the regulations is amenable, not to the servant dismissed, but to its own official superiors to whom it may be able to justify its action in any particular case." The application of or the failure to apply the Regulations to any particular individual

is therefore at best no more than an indication of the Government's attitude towards his status.

In the case of the respondent the Government's attitude does not seem to have been very consistent. He was for some time an elected member of the" Town Council of New Amsterdam and also Mayor of that town. These are activities of a type which the Government does not usually permit to its officers, even when the law allows them, but no objection has ever been made to the respondent's activities nor did the Government object to his standing for election to the Legislative Council. Indeed he consulted the Director of Medical Services whose opinion was that so long as the respondent performed the services for which he had contracted; he as head of the Medical Department was not concerned. On the other hand respondent's name appears in the Civil List of British Guiana, published by the Government, under the head of Dental Surgeon New Amsterdam, but the evidence of the acting Colonial Secretary was that this list was not limited to public officers and was only published for information and general guidance. In the Estimates for 1947 as approved by the Legislative Council, the financial provision for the respondent's emoluments is included in two "block vote" items, namely "Honorarium to Dental Surgeons S2,460," with a footnote that this is divided amongst Georgetown, New Amsterdam and the Tuberculosis Hospital, and "Dental Treatment for School Children S2.000." The wording of these items does not indicate the existence of separate offices of dental surgeons but it would not be right to give much weight to this factor as the Estimates make "block vote" provision in some cases for persons who are unquestionably holders of offices.

I pass on then to consider the nature of an office and the criteria which distinguish an officer and the holder of a contract. I have been referred to and have considered a number of cases in which attempts have been made to define what is meant by an office and from them there seem to emerge some generalisations which afford some guidance, namely: — (1), the Court must look to the substance of the thing not the name by which it has been dignified. "We must not suffer ourselves to be led away by names however dignified or high sounding (per Cockburn, C.J. in Heartley v. Banks 5 C.B. N.S. 55).

(2) An office necessarily implies there is some duty to be performed (ibid).

(3) If the obligation is continuous the person engaged is not an independent contractor (per Lord Macnagten in Williams v. Macharg 1910 A.C. 476). If the employment is of such a nature that the person employed is employed on each occasion as it occurs for the particular matter that may arise on that occasion it does not come within the term office or employment (per Vaughan Williams L.J. in Carpenter v. Bristol Corpn. 1907 2 K.B. 617 at p. 622).

(4) Office implies a subsisting, permanent and substantive position which has an existence independent of the person who fills it and which goes on and is filled in succession by successive holders (per Rowlatt J. in Great Western Railway Co., v. Bater 1920 3 K.B. 266 at p. 274).

Applying these criteria to the instant case, the first warns

me not to pay too much attention to the language used in the correspondence and letter of appointment; the second is satisfied because the respondent was under a duty or an obligation to perform the work he had undertaken to do, the third requires that I should look more closely at the substance of the arrangement and the relationship thereby created between the Government and the respondent. The fourth test might be satisfied if it were shewn that the office were a statutory creation or formed part of a permanent scheme. In the Cambridge case relied on by the petitioner and referred to in Rogers on Election Petitions 20th Ed. at page 10, standing counsel who received a yearly salary in addition to the usual fees of counsel was held to be disqualified as the holder of an office, but the reference to this case in May's Parliamentary Practice 9th Ed. at page 708 shews that he was appointed to an office created under the Government of India Act 1858 having previously held the same office under the Honourable East India Company.

The fact that the same duties or work have been performed by a predecessor and may be performed by a successor is inconclusive and only an examination of all the circumstances will shew whether the present holder is a servant or a contractor; examples will be found in the cases of Carpenter v. Corporation of Bristol (1907 L.R. 2 K.B. 617) and Lawson v. Marlborough Guardians (1912 L.R. 2 Ch. 154). In the instant case there is, apart from the language used in the letters, little or no evidence of the existence of a separate office of Dental Surgeon New Amsterdam.

I pass on then to examine the substance of the agreement and the relationship thereby created, and proposes to resolve the question by two tests.

It is necessary to remember that the disqualification does not extend to everybody who receives "emoluments" from the Government. An independent contractor is not disqualified and the example was given during the argument of King's Counsel Who while a member of the Legislative Council was retained to prosecute for the Crown. To distinguish between an independent contractor and an officer or servant the general test is whether or not the employer retains the power, not only of directing what work is to be done but also of controlling the manner of doing the work. (Simmons v. Heath Laundry Co. 1910 1 K.B. 543: Mersey Docks and Harbour Board v. Coggins and Griffith Ltd. 1947 A.C. 1). It is true that this test is subject to special considerations in the case of professional men when the question is responsibility for negligence and Evans v. Mayor etc. of Liverpool (1906 L.R. 1 K.B. 160) is, as I understand it, authority for the view that a visiting physician who acts under the general direction of the employing body may be their officer for certain purposes but not their servant in matters involving the exercise of his professional skill and judgment so as to make his employers vicariously liable for his negligence. See also Gold v. Essex C.C. (1942 2 K.B. 293) and Collins v. Hertfordshire C.C. (1947 1 K.B. 598). For my present purpose the test is whether there is a contract of service or a contract for services and that, as Goddard L.J. says in the Essex case must depend on the facts of the particular case. In the instant case the evidence of both the respondent and the Director of Medical Services shewed that no directions had ever

been issued to him and he had never been controlled as to the manner in which he performed the work done but like any other professional man he acted on his own responsibility and according to his own judgment.

The second test has the authority of the Divisional Court of the King's Bench which decided Braddell v. Baker (1911, 104 L.T. 673) and refers to the provision in the agreement whereby, if the respondent were unable at any time to perform his obligations, he could appoint a substitute. The respondent said that he had on one occasion availed himself of this permission and arranged for two dentists to carry on for him. In Braddell v. Baker the question was whether a man employed as a "jobbing gardener" was a male servant within the meaning of the statute requiring male servants to be licensed. The jobbing gardener was employed by Baker for four days a week at a daily rate and was at liberty to work for another employer in the same capacity on other days of the week, and it was part of the contract that if he could not come himself on any date he was to send a qualified substitute and he had done so on various occasions: on other occasions he had exchanged days. The Court, comprised of Lord Alverstone C.J., Hamilton and Avory JJ., were unanimous in holding that the gardener was not a servant and Hamilton J. (as he then was) said in his judgment:— "The jobbing gardener in this case, if he could not come on any date was to send a qualified substitute. A servant contracts to render personal service and if illness or other lawful excuse prevents his rendering personal service, he commits no breach of contract by his absence and is not bound to find a substitute: whereas a tradesman who contracts that a certain result shall be obtained — namely, a garden kept in order — may break his contract unless someone keeps it in order. That is why this man was at liberty, if he could not come, to send a qualified substitute and so procure the performance of his contract." The other two members of the Court expressed similar opinions. The principle appears to me to apply equally to professional men who contract to render personal service.

I may add that it appears to me inconceivable that permission to supply a substitute should be granted to the holder of a public office. In most cases, a public officer has to discharge statutory duties and is accorded special protection for his acts and he is only clothed with these powers and privileges by the act of the Governor or other prescribed authority in appointing him to the office. In such cases it is abundantly clear that the officer cannot appoint a substitute. But, even apart from the need to vest a public officer with authority, such a permission would seem to me to be inconsistent with the principle of public policy, so emphatically declared in the cases of Shenton v. Smith and Dunn v. The Queen, that the Crown must have complete control over its servants.

I may also refer to the unfortunate position in which a public officer might be placed if he were to contract with someone to substitute for him and were then himself summarily dismissed by Government. He would be bound by his contract with the substitute but would have no legal redress against the Crown.

In my opinion, then, the application of both these tests shews that the respondent was not a servant of the Crown but the

holder of a contract and that the true view of the contract is that he was employed on each occasion as it occurred: there was no obligation on the Government to send him any school children for treatment and no guarantee that any pauper patients or Government employees would come to him for extractions. It was obviously a matter of convenience to all concerned and in accordance with the usual professional practice to have fixed hours for attendance on such persons as might wish to avail themselves of the respondent's skill. In the case of the pauper patients it was necessary that the respondent should do the extractions at the hospital because the Government provided the anaesthetic, and I think that the true view of the nature of the honorarium is that it was not paid in return for the recipient's time and skill in the sense that a salary is so paid but was an extra inducement, a "premium," as it might be called nowadays, to make the contract more attractive, the fees for this service being very low and the clientele uncertain.

For these reasons, I hold that the respondent was not at the time of his election the holder of an office of emolument under the Crown and was qualified to be elected. Therefore the second prayer in the petition does not arise. I declare that the respondent's election and return were good and valid and the petition must be dismissed with costs. Certified fit for Counsel: Taxation on higher scale.

Petition dismissed.

Solicitors: *W. D. Dinally; J. Edward de Freitas*

BABULAL TIWARI,
Plaintiff,
v.
JOHN DANIEL,
Defendant.

(1946. No. 46.—BERBICE) .

EDWARD REGINALD JANSEN,
Plaintiff,
v.
JOHN DANIEL,
Defendant.

(1946. No. 62.—BERBICE).

BEFORE JACKSON, J. (Acting).

1948. January 26, 27; February 24.

Principal and agent—Sale of immovable property—Offers made to agent—Principal reserves right to accept or refuse—Unless special agreement to the contrary.

Principal and agent—Where agent authorised to sell immovable property—Prima facie power in him to make sale effectual in point of law—To execute contract in writing, if law so requires.

Principal and agent—Sale of immovable property—Offer of purchaser submitted to and accepted by principal—Terms specified and complete—

Agent authorised to close sale—Power of agent to conclude contract of sale on behalf of principal.

Principal and agent—Contract entered into by agent without authority—Not deemed to be ratified by principal—Where principal enters into negotiations with other party for compromise.

Principal and agent—Contract made by agent without authority—Adopted or recognised by principal—Ratification.

Principal and agent—Ratification—Onus of proof of—On person alleging.

Unless express authority is given to a house or estate agent to sell immovable property and for that person to enter into a binding contract, the principal reserves his final right to accept or refuse.

Chadburn v. *Moore* (1892) 67 L.T. (N.S.) Ch. D. 257.

Authority given to an agent to sell immovable property prima facie means authority to make a sale effectual in point of law, including the execution of a contract where the law requires a contract in writing.

Rosenbaum v. *Belson* (1900) 2 Ch. 267.

When an agent is authorised to close a sale on terms specified and complete, the offer having been submitted to and accepted by the principal, the agent has authority to conclude a contract on behalf of his principal.

Allen & Co., *Ltd.* v. *Whiteman* (1920) 89 L.J. Ch. 534.

A principal is not deemed to ratify a contract merely because he enters into negotiations for a compromise by the other party.

Burrell v. *Irvine* (1907) 2. Ir. R. 462.

Ratification of a contract may be implied where the conduct of the person on whose behalf the contract was made is of such a nature as would unequivocally show that that person adopted or recognised such agreement either in part or in whole.

Benham v. *Batty* (1865) 12 L.T. 266. and *Keary* v. *Fenwick* (1876) 1 C.P.D. 745, C.A.

The obligation to produce evidence of clearly adoptive acts or of conduct by the principal after the transaction, consistent only with acquiescence in the agent's acts lies on the person who alleges ratification.

Wall v. *Cockerel* (1863) 10 H.L.C. 229.

ACTIONS by Babulal Tiwari against John Daniel for specific performance of an agreement, and by Edward Reginald Jansen against the said John Daniel for commission. The actions were, by consent, taken together.

Mungal Singh, for plaintiff.

L. A. Luckhoo, for defendant.

Cur. adv. vult.

Jackson, J. (Acting): The two cases were by consent of the parties taken together.

The plaintiff Babulal Tiwari on the 21st August, 1946 issued his writ claiming from the defendant specific performance of an agreement alleged to be entered into on the 24th July, 1946 by him with the other plaintiff Edward Reginald Jansen as agent for defendant, for the purchase for the sum of $12,500 of two parcels of land, a theatre building with its furniture, operating machines etc. more particularly described in the claim, and for damages in the alternative. The plaintiff Jansen seeks to recover the sum of $250 money alleged to be due as commission based partly on a written authority of the 7th September, 1945 between him and the defendant and partly on an alleged oral authority of the 19th July, 1946. The defendant denies the oral

authority, the authority to Jansen to enter into any such agreement, and does not admit liability.

Tiwari and defendant are businessmen living at Rosignol, West Bank, Berbice within a quarter of a mile of each other. Jansen is a commission agent; he lives in New Amsterdam; Rosignol and New Amsterdam are situate on opposite sides of the River Berbice at its mouth. Defendant is the owner of a building at 42 D'Edward, Rosignol in which he gives Cinema shows and runs a liquor bar when shows are on.

On the 26th January, 1945 defendant authorised in writing the plaintiff Jansen as his "sole agent to sell" his properties therein described upon conditions indicated in the document for $18,000; the life of the authority was limited to three months with a right of renewal if the properties were not sold within that time. Jansen wrote the authorisation; defendant signed. Jansen did not effect a sale at that price; on the 31st May defendant agreed to accept $16,000; Jansen was again unsuccessful. On the 7th September, 1945 he approached defendant and after consultation he dictated a new authorisation which defendant wrote and signed. It is as follows: —

> "I hereby authorise you to close the sale for fifteen thousand dollars in accordance with my authority 26|1|45. Transport expenses 50.50 Possession after passing of transport. Stock of the Bar to be taken over at market rate.
>
> Commission (2%)
> Two %
>
> 7|9|45 J. Daniel"

This authorisation was written in Jansen's notebook. Jansen said in respect of it, "I told him I would like to have it in writing to protect myself." This transaction fell through as the prospective purchaser was unable to raise the purchase money from the source he had expected it. On subsequent dates according to Jansen he communicated offers of $11,000 and $12,000 which defendant rejected, the latter being made on the 9th July, 1946 when defendant said he would accept $14,000.

It must be ascertained what authority resided in Jansen to effect the alleged sale to Tiwari and if there was, its extent and scope. Plaintiff's Counsel contended there was authority in Jansen to conclude a binding contract with Tiwari; whereas Counsel for defendant submitted there was no such authority, and if authority there existed, it was to find a purchaser, submit his offer for approval and any arrangement made would be "subject to contract."

In *Chadburn v. Moore* (1892) 67 *L.T. (N.S.) Ch. D.* p. 257, Chadburn brought an action for specific performance on the basis of a contract for sale of leasehold houses entered into with estate Agents who purported to act as agents for Moore. Moore repudiated the contract on the ground that the agents had no authority to bind him. After several interviews between the plaintiff and the defendant, plaintiff brought the action; plaintiff failed. Kekewich J. at p. 258 says: "No evidence was brought to show that the position of a house or estate agent resembles that of a broker on the Stock Exchange or any other exchange. A house or estate agent is in a different position owing to the peculiarity of the property with which he has to deal, which

does not pass by a short instrument as stocks and shares do, but has to be transferred after investigation of title and in accordance with strict laws. An agent for sale of real estate must be more formally constituted than a seller of stocks and securities of a similar nature. I must perforce refer to *Prior v. Moore* 3 T.L.R. 624 in which I indicated my own opinion distinctly, that instructions to a house agent to procure a purchaser and to negotiate a sale does not amount to authority to the agent to bind his principal by contract. Here the circumstances must not be forgotten that Moore on the second occasion told Newman (for the estate agents) what he was prepared to take for the twenty-nine houses. Newman then jumped at the conclusion that he had power at that price to enter into a contract. That is in my opinion not sufficient and unless express authority is given to the agent to sell and for that purpose to enter into a binding contract the principal reserves his final right to accept or refuse."

There is yet another aspect which cannot be overlooked; although a plaintiff agent ordinarily may not have authority to enter into a contract on his principal's behalf yet if he has instructions to sell, or to close a sale for a specified sum, and he submits the offer to the principal who notifies his acceptance, the agent may be held to have authority to conclude and sign a contract on behalf of his principal. In a claim for specific performance in the case of Rosenbaum v. Belson 1900 2 Ch. 267 where instructions were given by an owner of real estate to sell the property for him, and an agreement to pay commission on the purchase price accepted, Buckley J. said: "The contract relied upon being here signed by an agent, the plaintiff must no doubt make out that the act done by the agent was within his authority as agent. The defendant's Counsel went so far as to contend that an agent for sale has not authority to sign a contract unless express authority to sign a contract, as distinguished from authority to sell, is proved. In my opinion this is not the law. The authority in the present case is in the terms: 'Please sell for me my houses, and I agree to pay you a commission on the purchase price accepted.' This is an authority to sell. A sale *prima facie* means a sale effectual in point of law, including the execution of a contract where the law requires a contract in writing."

There seems no room for doubt that when an agent is authorised to close a sale on terms specified and complete, the offer having been submitted to and accepted by the principal the agent has authority to conclude a contract on behalf of his principal. (Allen & Co. Ltd. v. Whiteman 1920 89 L.J. Ch. 534). If there be any condition attached to the authority still unfulfilled the position would be different.

Chadburn v. Moore is still good law. Was express authority given to Jansen to sell? had he any authority to enter into a binding contract? The authorisation E.R. J.2 which superseded the first one authorised Jansen to close the sale for $15,000; he supports his case by urging that this authorisation on which he relied was only varied by the substitution of $12,500 for $15,000 and that he had communicated the offer of $12,500 to defendant, Jansen a property agent for about 20 years said: "In the course of my business I sign for the person. Sometimes I am author-

ised in writing and at other times I am authorised orally. It is usual to take the purchaser to the vendor and let them sign the agreement if they so desire; it is the custom among some agents, not among all, to take the purchaser to the vendor and let them both sign the memorandum……..The agreement was to be prepared later at Mr. Burch-Smith's office; both parties would then sign the agreement." It emerges from this that the prevailing practice is for the principal parties to sign the agreement or contract but in some cases the practice is unstable as to who would sign the memorandum. Both the written authorisation and the oral evidence have to be considered here in order to determine the true nature of the contract between Jansen and defendant. (Luxor v. Cooper 1941 A.C. 108); Giddys v. Horsfall 1947 1 A.E.R. 460). I find from a review of the evidence that Jansen was to negotiate a sale in terms of the authority E.R.J.2, report to defendant who would tell him whether or not to close the sale; Jansen possessed no express authority to bind defendant. The Court cannot make a contract for the parties; if it was intended to give to Jansen power to conclude a binding contract it would have not been difficult to find words to express that intention clearly. Moreover Jansen was not slow to write or dictate the precise nature of the authority he required, nor did he appear to suffer from defect in expression; if by lack of foresight he failed to make the desired provision the court however sympathetic it may be is not empowered to make good his omission.

I advert to the question of the oral authority to sell for $12,500. It does seem strange that Jansen who was so very careful to take an authority in writing in his own terms "to protect himself" when the sale price was reduced from $18,000 in the first authorisation to $15,000 did not seek another when it was alleged to be further reduced to $12,500; he however excused himself by saying that the price alone was changed on this last occasion; indeed it is so for in that of the 7th September, 1945, the Commission was reduced from 3% to 2% the bar stock was added, and the words "I hereby authorise you as my sole agent to sell" were replaced by "I hereby authorise you to close the sale." The authority on which he relies would then read "I hereby authorise you to close the sale for $12,000 etc."

Jansen's case is that his request to defendant to sign an authority for him to sell for $15,000 was in pursuance of an offer of $15,000 he had received; he stated in examination-in-chief "I received an offer of $12,500 on the 17th July, 1946 from Tiwari in New Amsterdam. I communicated the offer to defendant on the same day in writing. I did not get a reply to my letter. I saw defendant on the next day 18th July, 1946 in New Amsterdam. He said he got my letter and that I must close the sale for $12,500. I notified Tiwari the same day 18th July or the next day by letter." This is the evidence he supplies for the variation of the amount from $15,000 to $12,500. This defendant denied and said that on the 18th July Jansen asked him to accept $12,000 and on a later date $12,500 and he refused to consider any such figure. Is Jansen a person on whose testimony reliance can be placed? The letter of the 17th July, 1946, from Jansen to defendant is in evidence (exhibit E.R.J.5). It shows

there is not the vestige of a truth in Jansen's statement of communicating in writing an offer of $12,500; it strongly urges defendant to accept $12.000. Tiwari was most positive "that he never made any offer of $12.500 before the 24th July. 1946 and that it was on the morning of that day when Jansen visited him that he made that offer. Jansen cut a pitiful figure in the witness box; under cross-examination he admitted "I received the offer of $12,500 for the first time from Tiwari and that at his home at Rosignol on the 24th July, 1946. I accepted that offer without consulting defendant…….On the 18th July, I had no offer of $12,500 to make to defendant. I did not on the 18th July say to defendant 'what about $12,500?' it is not true that defendant said plain No; he said No. he would accept $14,000. I went away and defendant went to Rosignol." This admission disposes of Jansen's contention and irreparably demolishes the case he sought to establish. He must therefore fail for it is clear he was neither authorised "to sell" nor had he any authority to close the sale for $12,500. Tiwari said Jansen had told him weeks before that defendant knew he was buying the property, that on the morning of the 24th July, 1946, when he offered $12.500 for the property he asked Jansen for his authority to sell, that Jansen in response showed him the authority in his notebook; that he pointed out the price mentioned was $15.000; that Jansen then told him he and defendant had agreed to reduce the price to $12,500; that satisfied him; he went on "The book or authority that I looked at had nothing about the bar stock to be taken over. On the 25th July Jansen wrote me about the bar stock; when I arranged and signed the memorandum of agreement nothing was mentioned about the tavern; nothing was spoken of the stock; I was not buying that."

The testimony of Plaintiff Tiwari cannot be placed on a plane higher than Jansen's; he strove to impress that defendant knew beforehand of the part he played for he swore that from Jansen he learnt that defendant knew he was buying the property; Jansen denied, nay more he admitted that he never until after the alleged memorandum was signed on 24th July indicated to defendant who was the purchaser. In his letters to defendant of the 9th July, 1946 and 17th July, 1946 Jansen refers to "his client" and "the person" carefully refraining from mentioning Tiwari's name. It would appear that Jansen's primary consideration was for some reason known to himself either to procure the property for "his client" Tiwari as cheaply as possible as well as or to earn a much needed commission. Since Jansen had no authority to sell it follows that Tiwari's claim cannot be sustained. Tiwari relied on a written authority which stated a selling price of $15, 000; that the purchaser should take over the bar stock at the current market price was to form part of the contract of sale. Tiwari was emphatic he was not buying the bar stock. He would also fail on this ground were it necessary so to determine for he never entered into an agreement in terms of the authority he had scrutinised.

There remains to be considered the question whether the defendant by his subsequent conducts ratified the agreement reached by Jansen and Tiwari. The law is well settled that where "an act is done in the name or professedly on behalf of a

person without his authority by another person purporting to act as his agent, the person in whose name or on whose behalf the act is done, may by ratifying the act, make it as valid and effectual as if it had been originally done by his authority;" such ratification may be implied from the conduct of the person for whom the act is done.

The facts found are as follows:— On the early morning of the 24th July, 1946, Jansen crossed from New Amsterdam to Rosignol by the ferry steamer; he rode his cycle past defendant's shop and home and went directly to Tiwari; Tiwari offered $12,500; Jansen accepted, drew up a memorandum of agreement which both signed, Jansen signing as agent for defendant; Jansen thereafter took to defendant a document purporting to be a copy along with Tiwari's cheque for $1,000 drawn in favour of defendant; the cheque was folded in the document. Jansen told defendant to keep the document as he was in a hurry to get the ferry boat back to New Amsterdam, and left. Defendant who was engaged at the counter of his shop put the document into his pocket but later read it; he discovered that it was a rough copy of an agreement entered into by Tiwari and Jansen. Defendant became annoyed and on the next day 25th July returned by registered post the cheque to Tiwari without even a note. Tiwari with this note "Surprised at your action sales genuine, cannot relinquish, will be at Mr. Smith's office on Tuesday according to agreement to complete sale" returned the cheque by post the same day 25th July to defendant who took no further notice of it. On the 25th July or very soon after Jansen spoke to defendant who emphasised he was not honouring the transaction that he was not carrying through the sale. Five days later 30th July, Jansen and Tiwari went to Tiwari's solicitor, Mr. P. M. Burch-Smith for "affidavits and agreement to be drawn up and sworn to" by Tiwari and defendant. In keeping with the attitude he maintained all through defendant did not go. On the 2nd August defendant went to New Amsterdam on business; he says "Jansen and I met in New Amsterdam; he asked me to take a walk with him to Mr. Burch-Smith's office; he told me I had to go to Mr.Burch-Smith's Office to meet Tiwari; he told me to go and complete the sale; he led me there. I did not complete it...."Tiwari told me he would relieve me if I gave him $1,000. I told him to give me until Tuesday, 6th August to consider." Defendant wrote under date 6th August

"Tiwari Esq.,
Rosignol.
Dear Sir,

According to our discussion in Mr. Burch-Smith's office I decide to meet you; please inform me when I could meet him, say Friday.

Yours,
J. Daniel."

Tiwari replies on the same day as follows

"Dear Mr. Daniel,

I don't quite follow you if you decide to hand over the property then we will meet at Mr. Smith's office at say 10 a.m. on Friday.

Please let me know so that I can telephone Mr. Smith this afternoon.
Yours truly.
B. Tiwari."

Defendant replies: —

"Dear Sir,

I decide to hand over the $1000 as arranged.
J. Daniel."

Counsel for the plaintiffs submitted that the defendant's conduct by returning the cheque on the 25th July when he could have done so on the 24th July amounts to ratification and if not his subsequent conduct by entering into negotiations for a compromise and promising to pay $1.000 amount to ratification of the contract.

I understand ratification may be considered to be implied when the conduct of the person on whose behalf the agreement was made is of such a nature as would unequivocally show that that person adopted or recognised such agreement either in part or in whole. (Benham v. Batty (1865) 12 L.T. 266: Keary v. Fenwick (1876) 1 C.P.D. 745 C.A.). I have been unable to find any act of the defendant which may be interpreted as being an adoption of any term of the agreement; the defendant acted with promptitude in returning the cheque; Tiwari sent it back to him; what else could the latter do but put it aside. Tiwari in his note showed astonishing awareness of the intentions of the defendant in relation to the contract and an amazing prescience of the issues likely to be raised although defendant returned the cheque without a note. Defendant made known that he was not acknowledging the contract and declined to attend Mr. Smith's office on the date fixed. There is not a single part of the transaction defendant recognised as good.

Very little evidence has been offered as to what took place at Mr. Smith's office on 2nd August and that little is hardly reliable in view of the unsatisfactory nature of plaintiff's evidence in relation to other incidents and the poor recommendation Tiwari gave to his own memory; the defendant's scanty version is perhaps nearer the truth. The solicitor who might have been in a position to give independent testimony is not called. In any event this much is certain; even then the defendant refused or refrained from swearing to the affidavits or entering into the agreement; instead negotiations for a compromise, and I daresay without prejudice to the rights of the parties, were begun and four days later defendant wrote saying he would pay $1,000. Why was the sum to be paid? Was it because of a threatened suit or was it because defendant felt it would cost him less to pay $1,000 rather than contest a suit at law even though he may be right? Was it because Tiwari said he would not release him unless he paid $1,000? The answers cannot be satisfactorily elicited from the type and quality of the evidence adduced. The sum total of it all is when the parties met on 2nd August there commenced negotiations for a compromise, then followed the correspondence of 6th August when Tiwari pressed for a decision whether defendant would honour the agreement of contested authority or hand over $1,000;

defendant persisted in his repudiation but offered to hand over $1,000 which he never did.

In view of the material made available to the Court, Counsel's submission cannot be held to be sound. In Burrell v. Irvine 1907 2 Ir. R. 462 C.A. it was held that a principal is not deemed to ratify a contract merely because he enters into negotiations for a compromise by the other party. This applies here. The obligation to produce evidence of clearly adoptive acts or of conduct, by the defendant after the transaction, consistent only with acquiescence in the agent's acts lies on the plaintiffs (Wall v. Cockerel 1863 10 H.L.C. 229). I content myself with expressing the view that such obligation has not been discharged.

The case for the plaintiffs has been argued with conspicuous care and ability on the part of their Counsel but the vagaries in the testimony of his clients on oath were the insupportable burden he had to carry-

At the close of his reply Tiwari's counsel asked that paragraph 6 (iii) be amended by striking out the relief claimed there and by substituting the following: —

> "In the alternative the plaintiff claims $1,000 as damages being the sum the defendant agreed to pay to the plaintiff on the 6th August 1946 to release him from the said contract of sale."

The amendment though opposed was granted, counsel intimating that he did not wish an amendment of his statement of claim.

As this is only a relief sought, I think, in the circumstances of this case, it would be a proper exercise of my discretion if it is refused. It has occurred to me that there may be possible defences to an action for that amount; and as the question has not been argued I am of opinion the parties should be left free to take such action as they may be advised.

The plaintiffs' claims are dismissed and there shall be judgment for the defendant in each action with costs.

Judgment for defendant.

Solicitors: *P. M. Burch-Smith* for the plaintiffs; *E. A. Luckhoo,* O.B.E., for the defendant.

F. KAWALL *v.* B. B. Mc C. & Co. LTD.

FRANCIS KAWALL,
Appellant.

v.

BOOKER BROS. McCONNELL & CO., LTD.,
Respondents.

(1947. No. 611—DEMERARA).

BEFORE FULL COURT: WORLEY. C.J., LUCKHOO AND BOLAND. J J.

1948. January 30; February

Rent restriction—Order for possession—Application for postponement of date of possession—Decision on—No appeal lies from—Rent Restriction Ordinance, 1941 (No. 23), *s.* 7(2) (*b*); *Ordinance No.* 13 *of* 1947. *s.* 8 (1).

No appeal lies from the decision of a Magistrate on an application under section 7 (2) (b) of the Rent Restriction Ordinance, 1941 (No. 23), as enacted by section 8 (1) of Ordinance No. 13 of 1947, to postpone the date of possession.

Appeal by Francis Kawall from the decision of a Magistrate of the Georgetown Judicial District refusing to postpone the date upon which the appellant was required to deliver possession to Booker Bros. McConnell & Co. Ltd., of certain premises let by the latter to him. The premises were premises to which the Rent Restriction Ordinance, 1941, applied.

C Vibart Wight, for appellant.

H. C. Humphrys, K.C., for respondent.

Cur. adv. vult.

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

This appeal raises an important point under the Rent Restriction Ordinance. 1941, as amended by the Rent Restriction (Amendment) Ordinance, 1947, as to the right of appeal from a refusal by a Magistrate to postpone the date of possession of premises fixed by order made by consent on an application by the respondents for possession of their premises situate at lots 13 and 15 water Street, Georgetown.

The application for the recovery of possession was made by the respondents under the provisions of section 8 (1) of the amending Ordinance which repealed and substituted for section 7 of the Principal Ordinance the following: —

"7 (1) — No order or judgment for the recovery of possession of any premises to which this Ordinance applies, or for the ejectment of a tenant therefrom shall, whether in respect of a notice given or proceedings commenced before or after the commencement of this Ordinance, be made or given unless—

(e) the premises being ..... a commercial building are reasonably required by the landlord for (iii) use by himself for business trade or professional purposes; or (h) the premises being a commercial building are required for the purpose of being repaired, improved or rebuilt :

Provided that an order or judgment shall not be made or given on any ground specified in this paragraph of this subsection, unless

the Court is also satisfied that, having regard to all the circumstances of the case, less hardship would be caused by granting the order or judgment than by refusing to grant it. and such circumstances are hereby declared to include the question whether other accommodation is available for the tenant."

It must be assumed that when the appellant consented to an Order for vacant possession on the 1st October, 1947, he was satisfied that he could not have successfully invoked the aid of the proviso in his favour.

Appellant made an application on the 26th September, 1947, for a postponement of the date of possession. It is against the Order refusing appellant's application that this appeal is brought. It would seem that the application was made by virtue of section

7 (2) (b) of the Ordinance as amended which reads —

"(2) A Court asked to make such an Order or give such a judgment may—

(b) Stay or suspend execution of the order or judgment, or postpone the date of possession for such period as it thinks fit, and from time to time grant further stays or suspensions of execution and further postponements of the date of possession."

He did not apply for a re-hearing of respondents' application for possession or for a revision of the Court's decision on the ground that altered circumstances since the order or judgment made it just for the Magistrate to do so, in which case, there would have been as this Court recently decided in *Forde v.* Wilson, No. 584 of 1947, a right of appeal to the Full Court given by section 15 of the amended Ordinance.

But was his application made *simpliciter* for a postponement, of the date of possession a "proceeding" as contemplated by that section?

In the former instance the Magistrate is obliged to hear the application and may revise his decision in any case in which, in his opinion, altered circumstances make it just that he should exercise such powers in which case he might discharge or rescind the original order or judgment.

In the latter case, his original order is still extant but he has a discretion, on an application being made to him, to stay or suspend execution thereof, or postpone the date of possession. That in our view is purely permissive, and in no way affects his original order and is not a "proceeding" contemplated by section 15 of the amended Ordinance. The Magistrate is not in that case called upon to give a decision in respect of any claim or proceeding.

In *Rossiter v. Langley* (1925) 1 K.B. 741 the Divisional Court held that there was power in a County Court Judge to vary a consent order for possession as he has in the case of such an order made in *invitum.* There the application was made to vary the order under the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which in effect, are similar to those contained in subsection 2 and 3 of Section 8 of the amended Ordinance. It was a case of applying for relief under section 5 subsection 2 of the Act.

In the instant case the application was one for an extension of time within which to vacate the premises and not to discharge or rescind the order originally made; nor was it an application that the order should be subject to review.

The proceeding contemplated by section 15 of the Rent Restriction (Amendment) Ordinance, 1947, is, in our view, some process in Court leading up to a judgment or order, and not the bare extension of time already fixed by such judgment or order.

For the above reasons we held that there was no right of appeal from the discretion exercised by the learned Magistrate on the application then before him.

Appeal dismissed.

ALBERTINA BOWEN,

Plaintiff,

v.

FRANCES ELIZABETH JONES,

Defendant.

(1945. No. 431.—DEMERARA).

BEFORE LUCKHOO, J.

1946. September 23; 1947. May 13;

1948. February 24, 25; March 24.

Evidence—Of surveyor—As to measurements taken by him—May be given—Even though in making survey—Section 20 (1) *of Land Surveyors Ordinance. Chapter* 167, *not complied with.*

Immovable property—Part of a parcel of land taken over by local \authority for use as a street—Diminution thereby of land of proprietor—Land of proprietor not adjacent to street unaffected.

Execution sale—Immovable property—Possessory rights—Extinguished by sale.

Construction—Statutes—Proprietary rights not taken away by statute without compensation—Unless so clearly stated.

Construction—Statutes—Where there is doubt whether rights of the subject are encroached upon—Benefit of doubt to be given to the subject.

A surveyor may give oral evidence of measurements taken by him, even though in making his survey he failed to comply with section 20 (1) of the Land Surveyors Ordinance, Chapter 167.

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

By transport dated the 21st March, 1896, A. became the proprietor of S1/2 of N1/2 of lot 25, Wortmanville, Georgetown as defined on a plan by Prass dated the 29th October, 1385. The municipality of the city of Georgetown made a street running through, among other lots, lot 25 Wortmanville, and the street had the effect of reducing the depth of S1/2 of N1/2 of lot 25 Wortmanville. That quarter lot was subsequently purchased by B. at an execution sale which took place on the 23rd May, 1939 consequent on the non-payment of rates and taxes, and on the 1st July, 1940 B. obtained judicial sale transport for the quarter lot.

Held (1) that the portion of the quarter lot which was taken over by the Municipality as a street was excluded from the land for which B. had acquired title.

Belmonte's Petition (1893) L.R.B.G. 42; *Gillis* v. *Seequar* (1920) L.R.B.G. 35; and *Madray* v. *Sealey* (1940) L.R.B.G. 124, applied.

(2) that whatever possessory rights B. enjoyed prior to the date of the execution sale, such rights were extinguished by the sale.

Incorporated Trustees v. *McLean (*1939) L.R.B.G. 182,

The plan approved by the Governor in Council under Ordinance No. 30 of 1902 authorised the making of a street, and thus interfered with the rights of adjacent property owners, but it in no way affected the ownership of land not adjacent to the street.

Proprietary rights should not be held to be taken away by Parliament without provision for compensation unless the Legislature has so provided in clear terms.

Consett Iron Co. v. *Clavering Trustees* (1935) 2 K.B. 42, 65.

Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction; and where an ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to express itself. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights.

Walsh v. *Secretary of State for India* (1863) 10 H.L.C. 367.

ACTION by Albertina Bowen against Frances Elizabeth Jones claiming (a) that she was the legal owner and entitled to the possession of a certain parcel of land unlawfully and illegally occupied by the defendant, (b) an order to compel the defendant to remove a building and paling on the said parcel of land, and (c) mesne profits for the beneficial use and occupation of the said parcel of land.

Sir Eustace G. Woolford, K.C., for plaintiff.

J. L. Wills, for defendant.

Cur. adv. vult.

Luckhoo, J. ; The plaintiff is the owner by Transport dated the 1st day of July, 1940, of the south half of the north half of lot number 25 (twenty-five) Upper Norton Street, in the Wortmanville District in the City of Georgetown, with the buildings and erections thereon, and alleges in her Statement of Claim that she is the legal owner and entitled to the possession of a certain piece of land occupying an area of 442.15 square feet which she asserts is being unlawfully and illegally occupied by the defendant, such piece of land forming part of the south half of the north half of the lot contained in her title. She also claims an order to compel the defendant to remove a certain building and paling which encroach on her said property, and payment by the defendant to her of a sum of $480: - as mesne profits for the beneficial use and occupation by the defendant of the said piece of land encroached upon since the month of April, 1937.

The defendant who holds transport in her name bearing date 11th June, 1935, for the north half of the north half of the said lot as shown and described on a diagram of what was formerly a section of Lodge Village and now called Wortmanville District part of the City of Georgetown, by John Peter Prass, Sworn Land Surveyor, dated 29th day of October, 1885, and deposited in the Office of the Registrar of British Guiana on the 11th day of December, 1885, disputes the allegations of the plaintiff and claims that the said piece of land complained of is comprised within her title.

That in my opinion is the simple issue in this case. The defendant, however, *ex majore cautela,* has pleaded that she and her predecessors in title of the north half of the north half of the said

lot have for the period of 3G years and upwards next preceding the commencement of this action enjoyed as of right nec *vi, nec clam, nec precario,* possession of the piece of land in question, which if established would bar the plaintiff's right, if any thereto, and/or to bring the action to recover the piece of land as the right to do so accrued more than twelve years before the commencement of the action, claiming all the benefits conferred by the Civil Law of British Guiana Ordinance, Chapter 7 and the Limitation Ordinance, Chapter 184.

The plaintiff not to be ousted of her alleged right by these preventive forms of plea traced in her reply the possession undisturbed of her predecessors in title up to at least the month of April, 1937, a period of less than twelve years prior to the commencement of this action on the 16th October, 1945.

At the time Prass made his diagram all the lots running north to south between D'Urban Street and Princes Street and what is now known as Hayley Street on the East and Hardina Street on the West were of equal length and width. According to Sworn Land Surveyor Insanally's measurements on the ground using Prass' diagram the length of each lot was 605.4 English feet and the width 37 feet. At that time there was not in existence what is now known as Upper Norton Street which takes its course almost through the centre of those lots from West to East connecting Hardina Street with Hayley Street. Upper Norton Street was laid out subsequent to the 20th January, 1902, by Luke M. Hill who was then the Town Superintendent and City Engineer of the Municipal Corporation of the City of Georgetown, his outline diagram showing the proposed line that street would take.

Long before the year 1902, the original owners of several lots now falling between Hardina and Hayley Streets, began to dispose of portions of the same. On the 13th day of February, 1897, Antoniqua Pereira, a widow, became the owner by Transport of the north half of the north half of lot 25 (twenty-five) part of Plantation Werk-en-Rust, as described on Prass' diagram dated the 29th October, 1885. The documentary evidence in this action discloses that that very portion of land so described became vested in the defendant by transport as above stated. It does not appear from any record and there is no evidence that the delimits of the boundary of the North half of the North half of the lot so originally transported were ever questioned until the year 1937, when Counsel for the plaintiff on the 27th day of April, 1937, in a letter on behalf of his client to the defendant complained that the defendant was in possession of 12 (twelve) feet (meaning in length by the whole width of the lot) of the plaintiff's land.

In so far as the south half of the North half of the lot was concerned one Joseph Rotheram Griffith on the 21st March, 1896, obtained transport from Antoniqua Pereira abovementioned and one John Rodrigues for the South half of the North half of lot 25 (twenty-five) part of Plantation Werk-en-Rust, as described on Prass' diagram of the 29th October, 1885, so that on the 21st March, 1896, and on the 13th day of February, 1897, both Joseph Rotheram Griffith and Antoniqua Pereira held transports in their respective names of the South half of the North half, and the North half of the North half of lot 25 (twenty-five) part of Plan-

tation Werk-en-Rust, as described on Prass' diagram. Measurements on the ground in accordance with Prass' diagram made on the 12th November, 1946, by S. S. M. Insanally, show that the whole length or depth of lot 25, is 605.4 English feet and the width 37 English feet, and that before Upper Norton Street was made each quarter lot should be 151.36 English feet in length or depth.

The plan by this surveyor-witness which is dated the 1st day of December, 1946, and deposited in the Lands and Mines Department on the 11th December, 1946, of a survey made by him showing the measurements of the two quarter lots of lot 25 north of Upper Norton Street, and marked Exhibit "H" was tendered in evidence during the hearing of this action and not objected to by Counsel for the plaintiff, but at a later stage an objection was raised by him with regard to the value of the plan on the ground that the surveyor had not complied with or disregarded certain provisions of the Land Surveyor's Ordinance Chapter 167 in making his survey. In my view apart from any defect which might be urged as above stated the surveyor qua witness was competent to give the measurements as he found them according to the diagram of Prass, on whose diagram the titles to the lands of the parties through whom both plaintiff and defendant base their ownership were founded.

The plaintiff deposed to the fact that she purchased her interest from one Amanda Griffith, the widow of Joseph Rotheram Griffith who owned the South half of the North half of the lot by transport already referred to for the sum of S100:—Griffith died on the 12th March, 1901. She produced a receipt Exhibit "L" as evidencing her purchase, as far back as the 2nd February, 1916, although the date of acquisition is stated in her claim as the month of September in that year. It is also alleged in the reply that Amanda Griffith wholly succeeded to her deceased husband's interest at the time of sale by her to the plaintiff. Whatever interest passed to Amanda Griffith on the death of the children of her marriage with her husband of which this Court is not concerned, the plaintiff by way of execution sale on the 23rd day of May, 1939. obtained a Judicial transport, on the 1st day of July, 1940, for the South half of the North half of lot 25 (twenty-five) Upper Norton Street, in Wortmanville District, in the City of Georgetown, with the buildings and erections thereon which she had acquired since February or September, 1916.

The question which therefore arises is whether her title is based on Prass' diagram, and if so, to what extent her interest was reduced by Upper Norton Street having been made over a portion of the southern end of the quarter lot at a time when she had not yet purchased from Amanda Griffith; or did the transport to her convey half of land in lot 25 lying between D'Urban Street on the north and Upper Norton Street on the South; and in the latter case could the Judicial transport without an exact delimitation of the land described therein take away any existing right in the owner of the north half of the north half of the lot.

The question is an interesting one and much depends upon the legal interpretation of the effect of Ordinance No, 30 of 1902

which referred to the outline diagram of Luke M. Hill of the 20th January, 1902, Exhibit "G," and by reason of which he (also a Sworn Land Surveyor) laid out and built Upper Norton Street as shown on a plan made by him and dated 6th May, 1908.

This plan of Luke M. Hill which is marked as Exhibit "K" was objected to by Counsel for the defendant on the ground that there was no or proper record of its deposit in the Registrar's Office—in compliance with the law regarding the deposit of a plan. For the purpose of this case I shall apply the principle of "Omnia Praesumuntur" the plan having been found among other records in the Deeds Registry by E. S. E. Parker, a Sworn Land Surveyor, who was called on behalf of the plaintiff. This plan can do no more than illustrate and carry out the provisions contained in the Ordinance referred to—

It was an Ordinance to provide for certain matters relating to the inclusion in the City of Georgetown of the District known as Wortmanville.

The Council was authorised by section 3 thereof to prepare a plan of the Wortmanville Section on a scale of not less than one inch to one hundred feet showing the roads, streets, drains and trenches which the Council proposed to make; and also the lots in the said section with their numbers. Public notice was to be given after the preparation of the plan so that the same may be inspected by all persons who desire to do so, without any fee, for one month from the date of such notice. Then followed subsection 3

> "Every person who would be in any way prejudicially affected by the said lands being laid out as shown on the said plan may, within the said period of one month from the date of the said notice, file his objections in writing, with the grounds thereof, at the office of the Council."

This subsection makes reference to every person who may be prejudicially affected; *not* all the owners of *every lot* so as to bring them within the purview of the subsection. If the Ordinance contemplated the inclusion of every such owner then in my view it should manifest that intention plainly, if not in express words, at least, by clear implications and beyond reasonable doubt. It is not for me to supply the defects of language or to eke out the meaning of an obscure passage, if obscure it is, by strained or doubtful inferences.

All that the Ordinance, in my opinion, provided was to interfere with the adjacent property owner's right, to make a street over or through the land, as the section impliedly authorised such interference in the reasonable exercise of the powers which it conferred; but in no way to affect the ownership of land not so adjacent.

Section 3 (4) and (5) made provision for all objections together with the plan to be forwarded to the Governor-in-Council which plan after consideration may be altered or modified in any way by him as may seem meet, and when finally settled and approved of by the Governor-in-Council to be transmitted to the Council to be forthwith deposited as of record in the Registrar's office of British Guiana.

Section 4 gave power to the Council, by resolution to levy a

special rate not exceeding one per cent, per annum on all lots in the Wortmanville Section and the buildings thereon according to the appraised values thereof, respectively……There the special rate was to be levied on all lots. The language used is clear as the sum of $13,500 was to be expended on the improvement of the Section as a whole.

No where can I find any provision, or even by implication cryptic or otherwise, which would affect any existing rights of owners of land over or through which the proposed road was not intended to pass, and this view is reflected in the plan prepared and dated the 6th May, 1908, where on a scrutiny of the lay-out the whole lot from D'Urban to Princes Street is shown with the road passing through almost the centre of the lot from west to east. If it were intended to reduce proportionately the holdings of owners of each quarter lot, (there were such transports in existence) the Ordinance would have provided for such a case, and the survey by Luke M. Hill would have shown new delimitations of the quarter lots in each case.

Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction that where an ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights. See *Walsh* v. *Secretary of State for India* (1863) 10 H.L.C. 367. As was said in *Consett Iron Co. v. Clavering Trustees* (1935) 2 K.B. 42 at p. 65 "Proprietary rights should not be held to be taken away by Parliament without provision for compensation unless the Legislature has so provided in clear terms."

Nothing short in my opinion of the vesting of all the lands in that area in some proper person appointed under the Ordinance, or in the Municipality of the City of Georgetown, and re-transporting to the several owners in accordance with the plan of Luke M. Hill would defeat the titles already subsisting under Prass' diagram.

This procedure is not a novel one and would have been analagous to that in cases of the partition and re-allotment of lands under the District Lands Partition and Re-Allotment Ordinance, Chapter 169.

I cannot agree with counsel for the plaintiff that the only plan the Court could properly look at is that of Luke M. Hill, and that of Prass has no value legal or otherwise.

The plaintiff's title in my view is based on Prass' diagram. It must necessarily be so as she claims to have purchased from Amanda Griffith who succeeded to her husband's interest based on Prass' diagram.

Assuming however, that the plaintiff having purchased after the street was made, and received transport after an execution sale in the words of her title recited above, would she be entitled to possession of the half of the lot between D'Urban Street and Upper Norton Street as shown on Hill's plan? In other words to the area shown in Parker's plan Exhibit "A."

The law has been laid down in several well-known cases among them being *Belmonte's petition* (1893) L.R.B.G. 42, *Gillis* v. *Seequar* (1920) L.R.B.G. 35, and *P. Madray* v. *E. Sealey* & *ors.* (1940) L.R.B.G. 124 that a sale at execution only passes to the purchaser whatever interest the debtor had, and the proprietor or beneficial owner on whose interest the Mayor and Town Council levied execution was none other than Amanda Griffith whose interest before she sold to the plaintiff was diminished by reason of the street having been made over or through her interest.

While Hill's plan had statutory effect in as much as no action for trespass would lie against him, the municipality or their servants in making the street over or through lands it passes, no where can I find in the Ordinance that that plan superseded the one of Prass. Nor was there anything in the Ordinance to support the view as adumbrated by Counsel for the plaintiff that the new plan (Hill's) should be the only authority for basing titles in respect of all the lots in the area involved.

Failing an exact and detailed description of the boundaries of the quarter lot in the plaintiff's transport it could not avail her as against the title of the defendant based on Prass' diagram. The description given in the plaintiff's transport is not only too general in its nature, but it lacks any measurements and does not define the boundaries of the quarter lot.

In showing an encroachment of the area complained of, the plaintiff has been guided by the survey made by Parker which shows that he took measurements from the southern line of palings of the north half of lot 25 commencing from Upper Norton Street and then proceeding northwards to D'Urban Street where there was another line of palings. Between these two points the measurement on the ground showed 268 feet. He then divided that number by two and concluded that each quarter lot measured 134 feet, and determined the encroachment north of the intersecting line of palings between the two quarter lots to be 10.5 feet on the eastern side and 13.4 feet on the western side by the full width of the lot 37 feet, a total area of 442.15 square feet. He also stated that a part of the two room building nearest the intersecting line of palings is built on 61.125 square feet of the area above-mentioned.

Insanally's plan Exhibit "H" shows that the whole depth of lot 25 measured on the ground is 605.4 English feet and that the North half of the North half of the lot 25 measures 151.36 English feet which coincides with the measurement of a quarter lot according to Prass' diagram. Parker himself when giving evidence scaled a copy of Prass' diagram which was tendered without objection and ascertained that a quarter of lot 25 measured in depth 153 feet.

By Insanally's plan the intersecting line of palings in accordance with the title of the defendant is in its correct position and in alignment with the lines of palings marking the sub-divisions of lots 24, 23 and 22 on the western side. From his examination and survey Insanally concluded that there is no encroachment by the defendant on the lands of the plaintiff. What Insanally did is fully stated in the legend attached to his plan. Even if Insanally did not comply with the provision of section 20 (1) of the Land Surveyor's Ordinance, Chapter 167, a fact which I do not find,

yet his survey would in no way be ineffective—see *Lacon* v. Matthews (1931—37) L.R.B.G. 516.

The plaintiff in further support of her claim gave evidence that prior to the year 1935 some old galvanised tins nailed on wooden runners divided the two quarter lots and that in the said year in order to build a two-room cottage the defendant cut down two cherry trees, erected the building and a line of wallaba palings to the south of it. She protested, as both the building and palings encroached upon the land she had been in occupation all her life. She however admitted that the defendant used to pass over her land and she over that of the defendant until the events which she said occurred in 1935.

The defendant who is 69 years of age, ill and was unable to attend Court supported her case by her son William Jones, and Herman Payne who built the two-room cottage. They both stated that in 1935, there already existed a fence or palings made of paling staves and stretchers, that it was an old fence and that it ran across the width of the lot. Defendant's son said that that fence was in existence as far back as the year 1923; and that when his mother attempted to repair it in 1944, the plaintiff objected to this being done and claimed the land and fence as belonging to her.

There is, however, some evidence that on the 27th April, 1937, plaintiff's Counsel sent on her behalf a letter to the defendant in which it is alleged that the defendant was in possession of 12 (twelve) feet of her (plaintiff's) land on which there was a building occupied by the defendant.

This allegation the defendant promptly denied, and thereafter a survey was made by Parker prior to the commencement of this action.

I have given careful consideration to the evidence on this part of the case and I find as a fact that the palings were in existence since 1923, and coincided with the measurements on the ground with both Prass' diagram and Insanally's plan as to depth of the North half of the North half of the lot. In plaintiff's Counsel's said letter, no mention is made of the erection of the palings only that as a result of a survey made on the 6th April, 1937, the defendant was in possession of 12 feet of plaintiff's land. How that survey was made the Court is not aware, but it is reasonable to infer that it was done in the same manner as Parker did his, for we find that 12 feet encroachment by 37 feet in width gives 444 square feet to Parker's 442.15 square feet.

I have already found that Parker's survey has been erroneously made. However, whatever possessory rights the plaintiff enjoyed prior to the date of the execution sale by which she obtained her title, such rights were extinguished by the sale—see *The Incorporated Trustees of the Church in the Diocese of Guiana* v. *Isaac Mclean* (1939) L.R.B.G. 182.

I therefore find as a fact in view of the considerations which I have given above that the plaintiff has failed to establish any encroachment on her property by the defendant.

There must be judgment in favour of the defendant, with costs.

Judgment for defendant.

Solicitor for defendant: *W. D. Dinally.*

N. A. FORDE *v.* S. W. WILSON.

NORMAN A. FORDE, Appellant (Defendant),
v.
SAMUEL W. WILSON, Respondent (Plaintiff).

[1947. No. 584.—DEMERARA.]
BEFORE FULL COURT: WORLEY, C.J. BOLAND. J. AND JACKSON, J. (Acting).
1948. JANUARY 9, 17.

Rent restriction—Order for possession—Application to revise decision—Decision on—Right of appeal against—Rent Restriction Ordinance, 1941 (*No.* 23), ss. 13 (1), 13 (2), 14.

Rent restriction—Order for possession—Application to revise decision—Issues on.

An appeal lies to the Full Court from the decision of a Magistrate on an application under section 13 (2) of the Rent Restriction Ordinance, 1941 (No. 23) to revise a decision.

The respondent obtained an order for possession of premises on the ground that the premises were reasonably required by him for occupation as a residence for himself. The tenant applied under section 13 (2) of the Rent Restriction Ordinance, 1941, to have that decision revised. His case before the Magistrate was that the basis on which the order for possession was made no longer existed, in that the premises were no longer reasonably required by the landlord for occupation as a residence for himself and that in these altered circumstances it was not just or reasonable to enforce the order for possession.

Held that the issues before the Magistrate were: (1) to determine questions of fact as to the respective positions of the parties as at the date of the hearing, and (2) on the basis of those facts, to determine whether the premises were still reasonably required by the landlord and whether in all the circumstances it would or would not be reasonable to revise the order for possession.

APPEAL by Norman A. Forde from the decision of a Magistrate refusing to revise a decision ordering the possession of premises let by the respondent Samuel W. Wilson to the appellant.

S. I. Cyrus, for appellant.

A. J. Parkes, for respondent.

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

The appellant is tenant to the respondent of a cottage at Lot 177 Barr Street, Kitty which falls within the Rent Restriction Ordinance 1941 (No. 23 of 1941) as amended by the Rent Restriction (Amendment) Ordinance 1947 (No. 13 of 1947). These Ordinances are hereinafter referred to as the Principal Ordinance and the amending Ordinance respectively.

On the 28th May, 1946, the respondent obtained an order for possession of the premises under section 7 (1) (d) of the Principal Ordinance on the ground that the premises in question were reasonably required by him for occupation as a residence for himself. His evidence was "I sold my property Lot 178 Barr Street where I live and have to quit at the end of May.....I have debts and sold the other house."

Possession was ordered for 1st August, 1946, and on the 2nd August, the Respondent applied for the issue of a Warrant of Ejectment, but from time to time the Appellant obtained extensions of time on the ground that he could not find other premises. Eventually on the 18th October, 1946, the Magistrate made an order for the issue of the Ejectment Warrant.

On 27th October, 1946, the Appellant filed an affidavit, made by his wife in which she swore, *inter alia*, that the Respondent had given notice to another tenant of his in other premises on the same grounds and that, subsequently to the order of 28th May, he had actually obtained possession of that other cottage. It was therefore sought to have the Warrant of Ejectment cancelled "and the order for possession varied, the landlord having already obtained suitable premises." This application came before the Magistrate on February 27th, was part heard and then adjourned to March 29th, 1947. In the meantime the Respondent had on 1st January and again on 13th February written to the Appellant offering him as alternative accommodation the lower storey of the front house on Lot 177 i.e. of the house of which the Respondent had gained possession. The only oral evidence taken at the hearing was that of the appellant's wife who swore that the Respondent had offered her the upstairs of this house but had subsequently withdrawn this offer and that the ground floor was not suitable accommodation. The two letters and her affidavit were put in evidence and she was not cross-examined on the contents of the latter. It appears from the letters that the Respondent intends to alter and reconstruct the premises in question if and when he gets vacant possession and that he has already acquired some materials for this purpose. At the conclusion of the woman's evidence the Magistrate dismissed the application and ordered that ejectment should issue on 15th April 1947. Notice of appeal was given on April 12th and the reasons for decision promptly supplied by the Magistrate. The delay in the hearing has been occasioned by the preparation of the copy of the proceedings in the Magistrate's Court office.

At the hearing Mr. Parkes for the respondent took the objection in limine that no appeal lay from the Magistrate's order of March 29th 1947. The right of appeal is conferred by section 14 of the Principal Ordinance, the material words for our present purpose being that an appeal shall lie "from the decision of a magistrate on any claim or proceedings" in respect of any premises to which the Ordinance applies.

The application which the Magistrate heard and determined on March 29th 1947 was one brought under section 13 (2) of the Principal Ordinance, which provides "A magistrate shall have full powers to re-hear any application and to revise any decision in any case in which, in his opinion, altered circumstances make it just that he should exercise such powers." Subsection (1) of the same section provides that any claim or other proceedings arising out of this Ordinance shall be made or instituted in a magistrate's Court

Mr. Parkes contended that the words "the decision" in section 14 referred only to the magistrate's decision upon the original claim itself and could not be construed and were not intended

to cover his decision upon an application to revise that decision; and further that an application to revise was not a proceeding instituted in the magistrate's court. It would indeed be strange to find that the Legislature having given a right of appeal against the original decision and, further, given power to the Magistrate to revise it if he saw fit, had not given a right of appeal against the revised decision but it is clear that the language used does not warrant such a conclusion.

When the Magistrate is asked to revise his decision, he has to re-hear and reconsider the claim in the light of the altered circumstances established by the applicant, and his decision thereon is just as much a decision on the claim as was his original decision. Further, there seems no ground for the suggestion that the application for revision is not a proceeding within the meaning of section 14. We therefore overruled the objection and heard the appeal.

The appellant's argument was that the learned Magistrate had failed to appreciate the effect of the evidence led and the issues which that evidence raised. The appellant's case before the "Magistrate was that the basis on which the order for possession was made no longer existed, in that the cottage was no longer reasonably required by the landlord for occupation as a residence for himself and that in these altered circumstances it was not just or reasonable to enforce the order. The issues therefore before the Magistrate were, firstly, to determine questions of fact as to the respective positions of the parties as at the date of the hearing and then on the basis of those facts to decide whether the premises were still reasonably required by the landlord and whether in all the circumstances it would or would not be reasonable to revise the order for possession. In determining this last issue he might properly have regard to such matters as the conduct of the parties subsequently to the making of the order, the suitability of the alternative accommodation offered and so on, in short, he should direct himself in accordance with the judgments of this Court in *McDoom v. Fung* and *Jacob v. Oudkirk* and *Kulsum Boodhoo*. In his statement of reasons for decision the Magistrate reviews the history of this matter, refers to the collection by the respondent of materials for repairing the premises and to the offer and rejection of alternative accommodation and then concludes "I could see nothing in the hearing of the last application which was in favour of the defendant (appellant), in fact the letters supported the plaintiff's (respondent's) case for possession." There is nothing here to indicate that the learned Magistrate appreciated or directed his mind to the main issue raised by the application, namely that the premises were no longer reasonably required by the landlord for himself. If the evidence for the appellant is true it establishes facts which are "in his favour" though not necessarily conclusively in his favour, for it is still open to the respondent to shew that he still reasonably requires the premises in dispute.

In this case this Court has not before it all the facts and is not in a position to determine the issues raised. We accordingly allowed the appeal to the extent of setting aside the order of March 29th 1947 and remitted the matter to the Magistrate with

a direction to re-hear and determine the appellant's application for revision of the order for possession made on 28th May. 1946.

Appeal allowed.

S. CROPPER *v.* PUBLIC TRUSTEE

SELINA CROPPER,
Plaintiff,

v.

PUBLIC TRUSTEE,
Defendant.
(1947. No. 477.—DEMERARA).

BEFORE LUCKHOO, J., IN CHAMBERS:

1947. DECEMBER 8, 31; 1948. MARCH 31.

Will—Construction—Unpaid purchase price of immovable property—Payable in monthly instalments—Legacy payable monthly during life time of legatee—Payable out of unpaid purchase price—After death of testatrix, payment of purchase price accelerated—Legacy not extinguished.

Will—Construction—Intention of testator.

The fundamental rule in construing the language of a will is to put upon the words used the meaning which, having regard to the terms of the will, the testator intended.

Perrin v. *Morgan* (1943) 1 A.E.R. 187, 190.

A testatrix had sold certain immovable property under an agreement whereunder the purchaser was to pay $136 per month. It was anticipated that the purchaser would take about 18 years to pay the purchase price in full. On the 19th August, 1942, the testatrix made her will in which she directed that, out of the said monthly sum of S136, the sum of $50 per month was to be paid to her sister, who was advanced in years; and the sum of $30 per month to a friend, who was 68 years of age at the time. Each sum was payable during the life of the legatee. The testatrix died on the 12th March, 1944, and in September, 1946 the purchaser anticipated the payments under the agreement and obtained transport of the property.

Held that the payments directed under the will must continue.

APPLICATION by Selina Cropper, a legatee under the will of Emily de Castro Belgrave, deceased, for the determination of certain questions and matters which had arisen in the administration of the estate of the deceased.

W. J. Gilchrist, for applicant.

L. M. F. Cabral, for Public Trustee, the administrator with the will annexed of the estate of the deceased.

Cur. adv. vult.

This is an application made under the provisions of Order XL. (c) ii., rule 3 (a) of the Rules of Court 1932, by Selina Cropper, spinster, of lot 85 Murray Street, Georgetown, who claims to be a legatee under the last will of Emily de Castro Belgrave, deceased, for a determination of the following questions or matters which have arisen in the administration by the Public Trustee of British Guiana of the estate of the said deceased.

1. Whether upon the true construction of the said will and in the events which have happened the sum of thirty dollars directed by the said will to be paid to the said Selina Cropper each month during her life from the monthly receipt of $136 under an agreement of sale of the property known as Lot 85 Murray Street, should not continue to be paid to her notwithstanding that

the purchaser anticipated payment of the purchase price and has received transport of the said property.

2. How and in what manner provision should be made by the Public Trustee of British Guiana for the payment of the said sum?

3. How the costs of this application are to be borne? Emily de Castro Belgrave (hereinafter referred to as "the deceased") died at Georgetown, on the 12th day of March, 1944. Her will dated the 19th day of August, 1942, was duly proved, and on the 26th day of August, 1944, letters of Administration (with the will annexed) were granted to Harrie Emile de Castro Belgrave who died during his administration thereof when the defendant was appointed on the 9th day of July, 1946, to carry on the administration.

The relevant portions of the will of the deceased which are pertinent to the consideration of the above questions are contained in the dispositions made under "sixthly" and "seventhly" as follows: —

SIXTHLY: From the monthly receipt of $136.00 under an agreement of sale of my property lot 85 Murray Street, South Cummingsburg, Georgetown, with Mrs. Emilie Antoinette Wrong, I direct as follows: —

(a) Fifty dollars per month to be paid to my sister Eloise Belgrave of Flat number 4, 40 First Avenue, Hove, Sussex, England, during her life.

(b) Thirty dollars per month to be paid to my friend Selina Cropper of Georgetown, British Guiana, during her life.

SEVENTHLY: I devise to my trustees upon trust the entire residue of my property, movable and immovable, and wheresoever situate, to retain the same until the receipt in full by them of the money payable by Emilie Antoinette Wrong under the agreement of sale to her of lot 85, South Cummingsburg, referred to in clause six hereof, and thereafter to pay such residue in equal shares to the children of my niece Marjorie Smith.

Upon the return day, the 20th day of October, 1947, for the hearing of the Originating Summons, an Order was made by Mr. Justice Jackson that the plaintiff be at liberty to file an affidavit in support of her claim on or before the 14th day of November, 1947; that the defendant be authorised to retain solicitor and counsel on behalf of the residuary legatees, namely the children of the deceased's niece Marjorie Smith; that the defendant be at liberty if so advised to file an affidavit in reply within 21 days thereafter; and that the hearing of the Summons be fixed for Monday the 8th December, 1947.

On the 11th day of November, 1947, in pursuance of the said Order, the plaintiff filed an affidavit to which was annexed a copy of the agreement referred to under "sixthly" above.

It will only be necessary in dealing with the above-mentioned questions to refer to certain paragraphs both in the plaintiff's

affidavit and the copy of the agreement. No affidavit was filed on behalf of the defendant who appeared by counsel at the hearing on the 8th day of December, 1947, to represent the interest of the children of Marjorie Smith. The facts as disclosed by the affidavit of the plaintiff show that the deceased was the owner by Transport No. 267 of the 18th March, 1929, of the property described in the agreement of sale between her and Emilie Antoinette Wrong, (hereinafter referred to as "the purchaser") wherein it was provided that the purchaser should pay to the deceased monthly instalments of not less than $136 towards the sale of the property, the purchase price of which was fixed at S11,000 (with interest at six per cent, per annum). The purchaser pursuant to the said agreement duly paid to the deceased the said monthly instalments, and after her death to her personal representative until September, 1946, when the property was transported and the balance of the purchase price paid in full. In the will the property is mistakenly described as lot 85 Murray Street, the correct description being "the south half of lot number 86 (eighty-six) and the east half of lot number 85 (eighty-five) in South Cummingsburg District, in the city of Georgetown.

It would appear that the plaintiff who is 74 years of age was an old and intimate friend of the deceased, such friendship having existed continuously since they were 10 and 12 years old respectively down to the day of the death of the deceased. The deceased was well aware of the improvident circumstances of the plaintiff who needed a regular sum to maintain her during the evening of her days.

On the 16th November, 1941, when they were discussing the sale of the property to the purchaser, (it was described in the written document as a Tenancy-Purchase agreement) the deceased mentioned that it will take the purchaser about 18 years to complete her payment. Most likely she fixed in her mind that period because not only of the interest which would accrue due but also monies which she might under the conditions contained in paragraphs 3 and 5 of the agreement have to advance on behalf of the purchaser.

It is only reasonable to infer that with the foregoing circumstances in mind on the 19th day of September, 1942, the deceased made and executed her said will.

Plaintiff's affidavit recounts that about ten days before the deceased died, the purchaser saw her and obtained from her a document which permitted the purchaser to sell the property under the agreement.

Under the terms of the will the plaintiff has been paid her legacy at the rate of $30 per month from the 13th March, 1944, to the 9th day of September, 1946, when she was informed that no further payment would be made to her as the property had been sold and transported on the latter date. It therefore became necessary for her to institute these proceedings in order that paragraphs "sixthly" and "seventhly" of the will should receive judicial interpretation.

The first rule of interpretation is to read the clause in the simple language in which it is couched, and if there be no ambiguity to give the words their natural meaning. As *Viscount Simon* L.C. remarked in the case of *Perrin v. Morgan* (1943) 1

A.E.R. 187 at p. 190 "The fundamental rule in construing the language of a will is to put upon the words used the meaning which, having regard to the terms of the will, the testator intended." and later at page 191 "The duty of a judge who is called upon to interpret a will containing ordinary English words……..is to construe the particular document so as to arrive at the testator's real meaning according to its actual language and circumstances."

"From the monthly receipt of $136 under an agreement of sale of my property…….with Mrs. Emilie Antoinette Wrong, I direct as follows:—" (a) and (b) above set out.

Those words are clear and positive.

At the time of the execution by the deceased of her will, that sum was being paid by the purchaser to her, and she anticipated that that monthly sum would continue to be paid by the purchaser for a period of 17 years more. (a) "Fifty dollars per month to be paid to my sister Eloise Belgrave of Flat number 4, 40 First Avenue, Hove, Sussex, England, during her life."

There the object of her bounty is certain and the time is controlled; during the life of Eloise. It would appear that Eloise was also advanced in years and there is a clear intention by the deceased to provide for the closing years of her life.

Equally clear are the words in (b) "Thirty dollars per month to be paid to my friend Selina Cropper of Georgetown, British Guiana, during her life."

But for the fact that the payment of the full purchase price of the property has been accelerated by the purchaser and since the 9th September, 1946, there is no longer any monthly receipt of $136:— from her as was contemplated by the deceased, no question of the payments of $50:— and $30:— to the persons named in (a) and (b) during their respective lives would have been raised.

Can those circumstances which have occurred as posed by the first question determine that Clause of the will so as to render it of no further effect?

It is true that on the 2nd March, 1944, the deceased gave the purchaser the right to sell her (deceased's) property, but such right must be read in conjunction with Clause 7 of the agreement: "The Purchaser shall have no right to transfer or assign her rights under this agreement without the written consent of the vendor" which clearly indicates that the deceased knew of the existence of this Clause when she made her will, and nevertheless directed that her sister Eloise and the plaintiff should be paid the amounts stated in the will, out of the sum of $136: —

Is there *sufficient indication* of intention to be found in the will as to justify me in saying that the deceased had in mind even if she gave permission to the purchaser to sell her (deceased's) property that the legacies she gave her sister and the plaintiff should be continued to be paid month by month during their respective lives?

If I can nevertheless find a sufficient context to justify me in giving effect to the plain language used by her which is not inconsistent with the provisions contained in "seventhly" of the will, it is my duty to so order, I must look at the document as

a whole and endeavour to construe the language in relation to the subject matter with which it was dealing, and, having done so, to see to what extent, if any, circumstances may tend to abrogate such intention. Clause "seventhly" is not inconsistent in my view to the dispositions contained in "sixthly." The words in "seventhly" "I devise to my trustees upon trust the entire residue of my property, moveable and immovable, and wheresoever situate, to retain the same *until the receipt in full by them* of the money payable by Emilie Antoinette Wrong under the agreement of sale to her of lot 85, South Cummingsburg, referred to in clause six hereof, and *thereafter* to pay such residue in equal shares to the children of my niece Marjorie Smith" must in my view be read together with the provisions contained under "sixthly." At first reading it might appear to be inconsistent with the continuance of payment to the two ladies, there being no restraint on the purchaser to anticipate payment, but when the whole scheme of the will is considered the intention of the deceased was to benefit each of those ladies for the rest of their respective lives. As *Lord Atkin* set out in his speech in the above-mentioned case "The construing Court has to ascertain what was meant, being guided by the other provisions in the will and the other relevant circumstances including the age and education of the testator, the nature of his property at the date of his will, his relations to the beneficiaries chosen whether of kinship or friendship, the provision for other beneficiaries, and other admissible circumstances. Weighing all these the court must adopt what appear the most probable meaning. To decide upon proven probabilities is not to guess but to adjudicate. If this is to decide according to the "context" I am content: but I cannot agree that the Court is precluded from looking outside the terms of the will. No will can be analysed in *vacuo."*

A Judge should lean against the defeat of a clear provision to benefit a near relative, in this case, a sister, for whom the deceased made no other bequest in her will. Whilst it is true that the deceased could easily have inserted a provision to clause "sixthly" to give effect to a continuance of payments in case the purchaser accelerated the completion of her purchase, the language in "seventhly" is not inconsistent with the continuance of such payments. In my opinion with the agreement in mind, the deceased has, under "sixthly," used language which is too strong to overcome.

"In order to justify a departure from the natural or ordinary meaning of any word or phrase, there must be found in the instrument containing it a context which necessitates or justifies such departure. It will not be enough that the natural and ordinary meaning may produce results which to some minds appear capricious or fail to accord with a logical system of disposition" *Gilmour v. MacPhillamy* (1930) A.C. 712 at p.716 P.C.

There is a very wholesome rule exemplified by many cases that where there is a clear gift in a will it cannot be cut down by a subsequent clause which is not clear and decisive. It requires something unequivocal to show that it does not mean what it says.

Upon a careful examination of the following words in "seventhly" — "until the receipt in full by them of the money

payable by Emilie Antoinette Wrong under the agreement of sale to her" I hold that at least they are not sufficiently clear and decisive to undermine the foundation for the continuance of the payment of the legacies under "sixthly."

That being my view I made the order which was entered and sealed on the 31st day of December, 1947.

Directions given.

Solicitors: *J. Edward de Freitas; F. I. Dias*

JOHN IGNATIUS DeAGUIAR, Plaintiff,

v.

PHILIP NATHANIEL OBERMULLER, Defendant.

(1944. No. 366.—DEMERARA).

BEFORE WORLEY, C.J.

1948. January 19; April 8.

Immovable property—Positive title by prescription to—How secured—Only under Civil Law of British Guiana Ordinance, cap. 7, s. 4 (1).

Limitation of actions—Civil Law of British Guiana Ordinance, cap 7, *s.* 4 (2)*—Merely negative in operation.*

Limitation of actions—Civil Law of *British Guiana Ordinance, cap.* 7, *s.* 4 (2)*—Plea under—Whether defendant can rely not only cm his own possession but also on possession of his ancestors.*

Immovable property—Action for possession—Of three undivided fourths of a *parcel of land—Defence—Ownership by prescriptive title of other undivided fourth—Not sustainable.*

Possession—Immovable property—Of one co-proprietor—Possession of other co-proprietors.

Trespass to land—Where one co-owner is ousted—Action by him for trespass.

Possession—Immovable property—Co-owner ousted—Action by him for possession.

Immovable property—Ownership in common—Rights of co-proprietors.

Immovable property—Ownership in common—Sole occupation by one co-owner—Rights of other co-owners against him.

Positive title by prescription is secured only in the circumstances which fall within section 4 (1) of the Civil Law of British Guiana Ordinance, Cap. 7, and section 4 (2) confers no positive right or title but is merely negative in its operation.

Frank et al v. *Ali Buksh* (1943) L.R.B.G. 78, 81, *Khan* v. *Boodhan Maraj* (1930) L.R.B.G. 9, and *Knights* v. *Gobin* (1947) L.R.B.G. followed.

The defendant was the legal owner of three undivided fourth parts or shares of and in a parcel of land. His judgment creditors levied upon the said interest which was sold at execution and purchased by the plaintiff who obtained judicial sale transport therefor. The defendant refused to deliver up possession to the plaintiff, and the plaintiff sued for an order of possession. The defendant pleaded section 4 (2) of the civil Law of British Guiana Ordinance, Chapter 7, and that he was entitled by prescription to the remaining one undivided fourth part or share of and in the parcel of land.

Held that plaintiff was not debarred from making entry on, or bringing a suit for the recovery of possession of, the other three undivided fourth parts or shares of the parcel of land.

J. I. DE AGUIAR *v.* P. N. OBERMULLER.

The possession of one co-owner is in law the possession of the other co-proprietors, there being no question of ouster.

Corea v. *Appuhany* (1912) A.C. 230, and *Phillips* v. *Dublin* L.J. 27th April, 1912, applied.

A co-owner of land who has been ousted can bring an action for possession or for trespass.

Henderson v. *Eason* (1851) 17 A. and E.N.S. 701, 718, *Murray* v. *Hall* (1849) 7 C.B. 441, and *Jacobs* v. *Seward* (1872) L.R. 5 A.C. 464, applied.

Joint owners of land are entitled to make a reasonable use of all the land so held proportionate to the share of each therein. Each owner is entitled to access to the whole of the land and to an interest in every square inch of it, proportionate to his share and to everything upon it.

By the very fact of holding the property in undivided shares with another, a person acknowledges an associate.

Re Downer (1919) L.R.B.G. 165, 166, followed.

In a proper case one tenant in common who has enjoyed the sole occupation and taken all the profits will be accountable to his co-owner or co-owners. In such an account, the expenses of working will generally be allowed, but such expenses will not be allowed in favour of a trespasser in the computation of damages or mesne profits.

Henderson v. *Eason* (1851) 17 A. and E.N.S. 701, and *Jacobs v. Seward* (1872) L.R. 5 A.C. 464, 467.

Quaere: Whether in support of a plea under section 4 (2) of the Civil Law of British Guiana Ordinance, Chapter 7. a defendant can rely not only on his own possession but also on the possession of his father who was in possession of the land up to the date of his death.

Knights v. *Gobin* (1947) L.R.B.G. per Luckhoo, J,, and *Burnett* v. Osborne, L.J. 22nd November, 1912, and *In re Acquisition of land at Pouderoyen* (1914) L.R.B.G. 73, considered.

ACTION by John Ignatius de Aguiar against Philip Nathaniel Obermuller for an order compelling the defendant to deliver up possession of three undivided fourth parts or shares of the eastern half of Plantation Berlin, left bank Pomeroon River, purchased on the 13th May, 1941 at execution sale by the plaintiff and transported to him on the 20th. October, 1941. The three undivided fourth parts or shares had been the property of the defendant at the time of the execution sale, and those parts or shares were taken in execution at the instance of the judgment-creditors of the defendant. The plaintiff also claimed mesne profits at the rate of 100 per month from the 20th October, 1941.

R. H. Luckhoo, for plaintiff.

Sir Eustace G. Woolford, K.C., for defendant.

Cur. adv. vult.

WORLEY, C.J.: The facts in this case are simple and for the most part undisputed. The defendant was the owner by transport passed on 15th June, 1936 of three undivided fourth shares of and in the eastern half of a tract of land lying on the left bank of the Pomeroon River known as Pln. Berlin and containing about fifty acres. At all material times the land was and still is planted with coconuts and ground provisions.

On the 13th May, 1941, this property *i.e.* the three undivided fourth shares was sold at execution sale in Georgetown at the instance of certain creditors on a judgment of this Court obtained against the defendant, and was bought by the plaintiff for the sum of $400. The defendant knew of and attended the sale in

Georgetown. On 20th October, 1941 the Marshal of the Court transported the property sold to the plaintiff.

Immediately after the sale, the plaintiff gave to one Mr. Ribeiro (who is the owner of an estate adjoining Pln. Berlin) a letter of authority to look after his interests and Ribeiro put two of his men on to the property purchased. When the defendant returned to the Pomeroon he found these two men living in his logies on Pln. Berlin and turned them off the land. Defendant in his evidence said he knew that they were Ribeiro's men but denied that he knew or was told that Ribeiro in putting them on the land was acting as plaintiff's agent. He admitted however, that Ribeiro and two police officers subsequently came to see him about this matter. He further admitted that he considered the land had been sold for less than its full value and he had been trying since 1941 to get it back for himself. On this evidence I find that the defendant knowingly prevented the plaintiff through his agents from taking possession.

Shortly after the sale at execution plaintiff agreed to sell the property to Ribeiro for $700 but transport has not been passed. Subsequently Ribeiro as plaintiff's agent sued defendant in the Magistrate's Court for trespass but was non-suited apparently for want of jurisdiction. The plaintiff then through his solicitor gave defendant notice in writing to quit and deliver up possession on the 28th February, 1942. The receipt of this letter was admitted in the pleadings though defendant in his evidence attempted to deny it. No reply was sent and defendant remained and still remains in possession. This suit was instituted in September, 1944.

The plaintiff's claim is for an order compelling the defendant to deliver up possession of the three undivided fourth parts or shares of the property for which plaintiff holds transport and is entitled to possession and for mesne profits from the date of passing of the transport at the rate of $100 per mensem.

A defence was filed on 14th November, 1944 but was ordered to be expunged from the record with costs to the plaintiff. Another defence was filed in December of the same year. On 1st May, 1946 plaintiff obtained a judgment from this Court in his favour, the defendant not being present or represented at the hearing, and on the 17th of August of the same year this judgment was set aside and leave given to the defendant to file an amended defence with leave to the plaintiff to file a reply and consequential orders as to costs. Neither of the orders for payment of costs by the defendant has been satisfied. The hearing of the action was peremptorily fixed for the 24th September, 1946 but, for some reason which does not appear on the record, it was on that day taken out of the list to be refixed by the Registrar.

In the amended defence filed on 23rd August, 1946 the defendant pleaded (a) that the premises in question were formerly owned by the defendant's mother who acquired a title thereto in the year 1914 but occupied and took possession of the whole of the said eastern half of the tract of land in question.

(b) that his mother was married to his father in 1907 and that there was no other issue of the marriage but the defendant and that his mother died intestate in 1924.

(c) that defendant's father died testate in 1933 having himself during his lifetime and after his marriage occupied and taken possession, along with his wife, of the entire east half of the tract of land.

(d) that the defendant resided with his parents up to the time of their respective deaths.

(e) that since the death of his father the defendant has been in sole and undisturbed occupation and possession as were his parents before him.

(f) that the defendant was entitled by prescription to the undivided one-quarter share in the said East half "being in sole and undisturbed possession by himself and his said predecessors in title for the number of years above specified and that in the circumstances and by virtue of section 2 subsection (3) and section 4 subsections (1) and (4) (sic) of the Civil Law of British Guiana Ordinance, (Chap. 7) it is not competent for the plaintiff to dispossess him or for the Court to order him to deliver up possession or to make an order against him for mesne profits."

Counsel for defendant did not suggest nor can I find in the circumstances of this case any right, title or interest for the protection of which he could pray in aid the provisions of subsection (3) of section 2 of the Civil Law Ordinance, and it is abundantly clear that subsection (1) of section 4 of that Ordinance can have no application. There is left to the defendant only the defence pleaded under the provisions of subsection (2) of that section. This defence is pleaded in inapt and misleading terms. Verity, C.J. pointed out in Frank et al v. Ali Buksh (1943 L.R. B.G. 78 at p. 81) that positive title by prescription is secured only in the circumstances which fall within subsection (1) of section 4 and subsection (2) confers no positive right or title but is merely negative in its operation. See also Khan v. Boodhan Maraj (1930 L.R.BG. 9) and the judgment (unreported) of Luckhoo, J. in Knights v. Gobin (Demerara C.S. No. 236|46).

If the defence based on Section 4 (2) of the Civil Law Ordinance had been properly pleaded, the fallacy inherent in it would have been immediately apparent. The defendant could not have pleaded possession of the three undivided fourth shares which now belong to the plaintiff but would have been obliged to plead that by reason of the defendant's sole continuous and undisputed possession of the remaining one fourth undivided share for a period of twelve years and upwards, the plaintiff was debarred from making entry on or bringing a suit for the possession of the other three undivided fourth shares. Such a defence is a patent absurdity since the defendant's occupation of the one-fourth share could never be adverse to himself as co-owner of the remaining three-fourths share or to the plaintiff-purchaser of

Section 12 of the Real Property Limitation Act 1833 (3 & 4 Will IV c. 27) has no equivalent in this Colony and therefore the possession of one co-owner is in law the possession of the other or others of the co-proprietors (there being no question of ouster). See Corea v. Appuhamy 1912 A.C. (Py.Co.) 230 and Phillips v. Dublin 1912 B.G. Judgments L.J. dated 27.4.1912.

The pleadings therefore disclose no defence in law and it becomes unnecessary to consider whether the defendant has

proved the facts alleged in his defence. I may however refer briefly to two material allegations which were not substantiated by the evidence. Joinder of issue operates as a denial of every material allegation of fact pleaded in the defence. The defendant in his evidence said nothing as to the extent of his mothers or father's occupation of the land in question and the Court cannot infer from this silence that his parents enjoyed the sole occupation of the entirety; or, if they did so that it was without the knowledge and consent of or adverse to the true owner of the remaining one-fourth share as to whose identity there is no evidence whatever. Defendant's evidence also conflicted with the allegation that he resided with his parents up to the time of their respective deaths. He admitted that prior to his father's death he was living on his own estate. Pln. Helena and that Pln. Berlin was transported to him in 1936 by the administrator *de bonis non* of his mother's estate. Even if he had lived with his parents up to the time of their respective deaths and even if he assisted them in looking after the estate it would be impossible for the Court to hold that he was in possession during such time. The possession was the possession of his mother first and then after her death of his father. (See *In re* Acquisition of land at Pouderoyen 1914 L.R.B.G. 73).

These findings are sufficient to dispose of the case but the propositions of law put forward by the defence are so novel that I think it advisable to give them some consideration.

Counsel for the defendant contended that in this Colony the Court could not make an order for possession of an undivided share in land as it would be impossible to indicate what specific portion of the land would be affected, and all co-owners had an equal right to exercise rights of ownership and possession over any part of the property. Counsel also contended that any co- owner, however small his undivided share, can take as much of the produce as he wants and from any part of the land. If I understood the argument aright the plaintiff's remedy, if any exists, would be by way of an action for damages. Neither counsel was able to give me any assistance with the law on these points and I have had to rely upon my own researches.

I have not been able to find any reported decision in this Colony bearing directly upon these contentions, but there are two passages in the judgment of Dalton J. in *In re* Downer (1919 L.R. B.G. 165 at p. 166) which are of assistance. The nature of undivided ownership is there defined in these terms "Joint owners of land are entitled to make a reasonable use of all the land so held proportionate to the share of each therein. Each owner is entitled to access to the whole of the land and to an interest in every square inch of it, proportionate to his share and to everything upon it,"and this does not differ from the ancient definition given by Bracton "*Quilibet totum tenet, et nihil tenet; scilicet, totum in communi. et nihil separatum per se*" (and see Murray v. Hall 1849 7 C.B.R. 441 at p.455).

In the same judgment Dalton J. quotes with approval the following passage from Voet X, 2, 33 "By the very fact of holding the property in undivided shares with another, a person acknowledges an associate," and that passage seems to me to expose the fallacy of the defence. Even assuming that the defendant could

establish a negative right which will protect him against being ousted by the true owner of the one-fourth undivided share, how can that right possibly entitle him to oppose an application for possession by the owner of the remaining three-fourth shares?

English authorities give no support to the contention of defendant's counsel that a co-owner who has been ousted cannot bring an action for possession. In Henderson v. Eason 1851 (Q.B.R. 17 A & E.N.S. 701 at p.718) Parke B. in delivering the judgment of a full bench of the Exchequer Chamber stated the common law of England on this point. "If one tenant in common occupied and took the whole profits, the other had no remedy against him whilst the tenancy in common continued, *unless he was put out of possession, when he might have his ejectment*……." Peaceable d. Hornblower v. Read 1801 (1 East 568) was an action for ejectment for one-third part of a manor held in common and see also Doe d. Fisher & Taylor v. Prosser 1774 1 Cowp. Rep. 217 and Corea v. Appuhamy (supra). In Culley v. Doe d. Taylerson 1840 11 A. & E 1008 the defendant and the plaintiff were entitled as tenants in common and defendant had had the entire enjoyment of the property claimed for thirty years. There was no finding that this possession had been adverse to the plaintiff. It was held that, apart from the Real Property Limitation Act 1833, the possession of the one tenant in common was *prima facie* the possession of the other, so that the one who had been out of actual possession could not maintain ejectment against the other, but that the effect of section 12 of the Act was to enable one tenant in common to bring his ejectment without an actual ouster and the other could defend his possession under the statute.

This case is therefore no authority for the contention that where the possession of one co-owner is adverse to the other co-owner the one who is out of possession cannot bring an action for possession.

In Mew's Digest 1911 Edition Vol. VI at p.339 there is a note of the case of Mc Carthy v. Hatch (9 Ir. Eq. R 206) "A. on behalf of herself and her infant children filed a bill against B, who was tenant in common with her husband C, alleging that on his death B entered into receipt of the entire rents, claiming the whole and kept possession of the title deeds, for want of which she could not proceed at law: and praying that they might be put in possession of C's moiety and an account of the rents of it since his death and for the title deeds." The Irish Reports are not available in this Colony but the note in the Digest shows that there was an unsuccessful demurrer to some parts of the bill but not, it would seem, to the prayer for possession. This case therefore does not assist the defendant's contention but rather suggests that an order for possession was regarded as the proper equitable remedy. Indeed it would be surprising if a Court of Equity, which acts *in personam*, did not have the jurisdiction to make and enforce such an order.

Murray v. Hall 1849 (supra) and Jacobs v. Seward 1872 (L.R. 5 A.C. 464) shew that trespass will lie by one of several tenants in common against a co-tenant where there has been actual expulsion.

My conclusion therefore is that the application for an order

for possession is one that this Court can entertain and that it would be proper to make the order in the instant case.

Nor do the English authorities give support to the contention that an owner of an undivided share is entitled to take as much of the produce as he pleases. The common law was modified by statute 4 Ann. c 16 s. 17 which provided that one co-tenant occupying alone the property should be answerable as bailiff to his co-tenant in an action of accounts if he received more than comes to his just share. Henderson v. Eason (supra) distinguishes between, on the one hand, the receipt of money or something else given or paid by another, which the co-tenants are entitled to simply by their being tenants in common and, on the other hand, the enjoyment of profits by one co-tenant who is in sole occupation and which are in truth the return for his own labour and capital. In the latter case the co-tenants have no right to a proportion unless, of course, there has been an ouster or there has been a mutual agreement that one co-tenant should manage the property for the common benefit of all.

In Glyn v. Howell 1909 (L.R. Ch.D 666) the defendant, who was entitled to a one-sixth undivided share in certain coal mines, had worked out the whole of the coal and was held accountable to the plaintiffs who were entitled to an undivided one-sixth share. See also Job v. Potton (L.R. 20 Eq. 84) where the lessee working under a licence from the owners of two-thirds of the coal was careful to leave unworked and *in situ* what he considered to be one-third of the coal which he encountered.

In Pascoe v. Swan 1859 (27 Beav. 508) plaintiff and defendant were tenants in common of a farm. The defendant himself occupied and farmed the estate during the plaintiff's infancy, excluded the plaintiff therefrom and denied his right to any interest in it. It was held that defendant was accountable.

These cases shew that in a proper case one tenant-in-common who has enjoyed the sole occupation and taken all the profits will be accountable to his co-owner or co-owners. In such an account, the expenses of working would generally be allowed (see Jacobs v. Seward supra at p.476) but such expenses will not be allowed in favour of a trespasser in the computation of damages or mesne profits.

The defendant who has kept the plaintiff out of his property for over seven years has failed to shew any right in himself to the occupation and enjoyment of plaintiff's three-fourths share. He must therefore be treated as a trespasser and liable to compensate the plaintiff on that footing.

There is one other point to which I wish to refer briefly before concluding this judgment. Assuming everything else in the defendant's favour, the question would arise whether the period or periods of occupation pleaded would be sufficient to establish the defence under subsection (2) of section 4 of the Civil Law Ordinance. Defendant's own occupation and possession dates only from 1933 the date of his father's death i.e. about eight or nine years only prior to the date of plaintiffs transport and the plea could only succeed if defendant could add to his own possession the period of his father's possession before him. In Knights v. Gobin (supra) Luckhoo J. in a dictum which is obiter but entitled to great respect, was of opinion that the “protective shield”

afforded by the subsection is not an inchoate right which is transmissible or inheritable.

The rule of English law as to the transmissibility of such an interest is stated in Halsbury's Laws of England 2nd Ed. Vol. XX paragraph 1014 and the rule as to possession by a series of trespassers holding adversely to one another in paragraph 1016. I mention this point as I should wish to be free to consider the question should it arise in any matter before me. It seems to me that the English authorities distinguish clearly between cases where the title of the original owner is extinguished by the possession of a succession of persons claiming through one another and cases where the last of a series of occupiers not claiming through one another is able successfully to defend his possession against an action by the rightful owner: see Willis v. Earl Howe 1893 41 W.R. 435: Dixon v. Gayfere (No. 1) 1853 17 Beav. 421 and contrast Doe d. Goody v. Carter 1847 9 QBR A. & E. N.S. 863 with Doe d. Carter v. Barnard 1849 QBR 13 A. & E. N.S. 945. Reference may also be made to Burnett v. Osborne B.G. Judgments L.J. 22.11.12 and *In re* Acquisition of land at Pouderoyen (supra): both of these cases turned upon whether a prescriptive title had been acquired according to Roman-Dutch law.

I order that the defendant do deliver up possession to the plaintiff immediately of the three-undivided fourth shares of the land in question and that he pay to the plaintiff mesne profits from the 20th October, 1941 till the date of giving up possession and I assess these profits at $50 per month. The defendant must pay the plaintiff's costs of this action.

Judgment for plaintiff.

Solicitors: *Francis Dias,* O.B.E.; *R. G. Sharples.*

RAMCHANDAR *v.* G. DENNISON

RAMCHANDAR.
Plaintiff,
v.
GRACE DENNISON.
Defendant.
(1944. No. 467.—DEMERARA).

BEFORE LUCKHOO,
1947. December 30; 1948. April 8, 9; May 14

Contract—Required by law to be in writing—Variation not made in writing—Cannot be given in evidence.

Contract—Required by law to be in writing—May be totally abandoned or rescinded by parol contract.

Contract—Performance—Waiver of right to immediate performance—By conduct, different mode of performance, substitution of new agreement.

Contract—Agreement under seal—Subsequent arrangement not under seal—Intention of parties that legal relations be created thereunder—Promise made in pursuance of arrangement—Not supported by consideration in strict sense—Party making promise knows it will be acted upon by other party—Promise acted upon—Must be honoured.

A parol variation of a contract required to be in writing cannot be given in evidence.

A contract required by law to be in writing may be totally abandoned or rescinded through the instrumentality of a new agreement which does not comply with the statutory formalities.

Morris v. *Baron* (1918) A.C. 1, 18, 25, and *British Benningtons* v. *N.W. Cachar Tea* Co. (1923) A.C. 48.

A party to an agreement may waive his right to the immediate performance of a term of the agreement by his conduct, by rescission of the original agreement and substitution of another, or by a different mode of performance.

Where the parties to an agreement under seal subsequently entered into an arrangement by which they intend that legal relations should be created between them, and a promise is made in pursuance of such arrangement which, to the knowledge of the person making it, will be acted on by the person to whom it is made and such promise is in fact acted on, the Court will hold that the promise must be honoured notwithstanding that the arrangement in pursuance of which it was made involves the variation of an agreement under seal by one of lesser value and the promise is not supported by consideration in the strict sense of the term.

Central London Property Trust Ltd. v. *Hightrees House Ltd.* (1946) 62 T.L.R. 557.

ACTION by Ramchandar against Grace Dennison for $2,437 damages for breach of contract.

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

Lionel A. Luckhoo, for defendant.

Cur. adv. vult.

LUCKHOO, J.: The plaintiff's claim in this action is founded on an alleged breach by the defendant by reason of the delay to deliver to him possession of twenty-five acres of land under an agreement of sale entered into on the 16th day of April. 1941, but since fully executed by the defendant, whereby the plaintiff was deprived of his right to cultivate with rice and to reap same from a portion of the land containing 171/2 acres for crops ending

October 1941 and February 1942, and likewise with respect to the remaining 71/2 acres but for additional crops ending October 1942 and February 1943, by reason whereof he claims damages to the extent of $2,437: —

Plantation Enterprise, comprising 250 acres and situate in the Island of Leguan, previous to the year 1940, was owned by the late James G. Guyadeen who let certain parcels out to rice farmers including one Jairam of La Bagatelle. Portion of the land was covered in bush with patches here and there suitable for grazing live-stock. Guyadeen in the month of July, 1940, sold this plantation to the defendant and passed transport in her favour in the month of March, 1941.

The plaintiff and two Seeboo brothers who were well acquainted with the plantation and were aware of Jairam's tenancy of ten beds of rice lands, on the 16th day of April, 1941, purchased 25 acres and 18 acres respectively from the defendant. Mr. G. R. Reid then of the firm of Messrs. Cameron and Shepherd, Solicitors, acting as agent for the defendant executed the Agreements on her behalf. The agreement with the plaintiff after setting out the names of the parties, the description of the property, and the price and how to be paid, provided for possession to be given forthwith. It also provided how the expenses, for transport should be borne, and then finally for a survey of the piece of land sold.

It is important to observe that the defendant being unable to pay the whole of the purchase price when she purchased the plantation in order to secure the balance to the vendor executed a first mortgage in favour of one Pitamber Doobay of De Kinderen and a second mortgage in favour of the estate of one Philip D. Guyadeen, deceased.

In his agreement with the defendant the plaintiff paid on account of the purchase price of $1,500:— the sum of $200: — agreeing to pay on the passing of transport to him $1,000:— and the balance of $300:— three years from the date of the agreement.

A brother of the defendant who acted for her throughout the subsequent events admitted that it was expected Jairam would deliver up his tenancy within a few days so as to give efficacy to the term of the agreement for possession.

In order to ensure this fact Cameron and Shepherd were instructed to serve a notice on Jairam who, however, refused to vacate the land occupied by him. As to the remainder of the 25 acres there does not seem to have been any obstruction to the plaintiff's entry thereon. That portion of the twenty-five acres was not in a cultivable state for rice being for the most part covered with white-wood trees and various kinds of undergrowth. The plaintiff, who had been a tenant of rice lands at La Bagatelle a plantation adjacent to Enterprise before his purchase of the 25 acres and had given up possession to his landlord Haricharan realising that every effort was being made by the defendant to obtain possession for him of the 10 beds occupied by Jairam, was able on the payment of the sum of $25:— to obtain back his previous tenancy of six (6) acres with Haricharan which he admitted he cultivated with rice throughout the years 1941 and 1942.

It would be well to set out his evidence given in his re-examination, in extenso, as it reflects his mind at the time, and bears greatly upon his subsequent conduct and of his instructions to Mr. Sharples, his Solicitor, in the year 1944.

This is what he said —

> "I purchased land to plant myself, not to rent out. I have four head at Chowky's place. In 1941, I gave up the lands I had rented from Haricharan of La Bagatelle.I spoke to Haricharan and he told me he had rented the land to someone else. I had to pay $25:— to get back my previous tenancy—6 acres—which I planted in 1941 and 1942. I planted two crops in each year. I got full returns from the land. If I had got possession from Jairam in 1941 I would not have gone to Haricharan and ask for the six acres back."

In spite of Jairam's refusal to quit the plaintiff evidently was satisfied with the defendant's efforts, for not only was the portion of 25 acres surveyed by Mr. D. C. Moses, but transport to him by defendant and a Mortgage by him to one Henry Bovell of Leguan who was lending him $1,000:— to pay to the defendant were advertised in the Gazette for the first time on the 5th and 19th days of July, 1941, respectively. In the ordinary course both transport and mortgage would have been ripe for passing on any day after the 4th August, but Mr. Clarke, Solicitor, who gave evidence after the defence had been concluded stated that he was told by defendant's agent that Doobay was reluctant, meaning not disposed, to cancel the Mortgage of the defendant to him on the piece sold to the plaintiff and now to be mortgaged to Bovell. Mr. Clarke also said that Carrington, clerk to Messrs. Cameron and Shepherd informed him that Doobay was not going to cancel the mortgages on the pieces of land. It should be mentioned that the Seeboos who were also receiving transport from the defendant were to raise money to pay the balance of the purchase price for their 18 acres by way of Mortgage to Bovell. Mr. Clarke's recollection is that he spoke to both defendant's agent and Carrington at the Deeds Registry on the 2nd August, 1941, the day of the third advertisements in the *Gazette*, yet on the 18th day of September, Messrs. Cameron and Shepherd sent a letter to the plaintiff which reads as follows:—

Ramchandar, male East Indian — 18th September, 1941.
La Bagatelle, Leguan,
Essequibo.

Dear Sir,

We have been asked by Miss Grace Dennison to request you to be present on Monday the 6th day of October, 1941, for the purpose of accepting transport in your favour.

Yours faithfully.
Cameron & Shepherd,
per H. C. B. H.

It may be that Doobay had changed his attitude and that the defendant expected him to effect the cancelments on the 6th day of October, for if it were not so I can hardly conceive Carrington, Chief clerk to Messrs. Cameron and Shepherd not informing his principals what he had told Mr. Clarke on the 2nd day of August.

It is quite clear, however, that for some reason not fully disclosed by either side, the conveyances to the plaintiff and Seeboo Bros. were not carried out, and there the matter remained until the receipt by the defendant of a letter sent on behalf of the plain-

tiff by Mr. Carlos Gomes, Solicitor. In that letter Mr. Gomes mentioned that he was authorised to accept the sum of $322.08 in settlement of plaintiff's claim, in which sum it was mentioned that the amount of $50 rent for 10 beds of land for 1941 paid by Jairam to the defendant was included. Plaintiff apparently was willing to receive back the sum of $200 he had paid on account of the purchase price, $50 mentioned above and the balance of $72.08 to cover transport, mortgage and survey fees thrown away.

On the receipt of this letter defendant's agent said he at once got in contact with Doobay. Defendant wrote the plaintiff and so did Doobay inviting him to the office of Mr. Fitzpatrick, Solicitor, on Tuesday the 16th December in order to discuss matters relative to Plantation Enterprise.

It has not been disputed and it is the plaintiff's version that defendant's agent, Doobay and he met at Mr. Fitzpatrick's office on the Tuesday, as arranged, and that Doobay agreed to accept a mortgage of the land plaintiff purchased as well as that purchased by the Seeboos. The witness Dennison however related a much fuller version of what transpired, and if his evidence is accepted it would, in my opinion, establish the defence of a rescission of the original agreement of the 16th April, 1941, and a substitution of a new agreement containing all the elements necessary for the formation of a new contract.

In *the 8th edition* of *Leake on Contracts* at p. 612, there appears this statement of the law "The new agreement in rescission or alteration of a prior contract must in general satisfy all the requirements of an independent contract. The rescission or variation of a former agreement, so long as it remains executory, will in general form a sufficient consideration for a subsequent agreement" and *at* p. 616 "A total rescission and discharge of the written contract on both sides may be effectually made by a mere verbal agreement to that effect, though the original contract is one within the statute; for all that the statute enacts is that no action shall be brought upon such contract unless it is in writing." The following is the evidence given by defendant's agent of a new agreement between the parties —

> "We met at the Solicitor's office as arranged. At the office Mr. Fitzpatrick asked Ramchandar (plaintiff) 'if he had got a mortgage.' Plaintiff said no, and that he was unable to get a mortgage. Doobay at that time was willing to lend $1,000 on mortgage.
>
> Plaintiff said that he wanted more than $1,000. Plaintiff explained his position with another proprietor—Harry Roopchand of La Bagatelle—on whose land he was then planting—meaning a tenant. He said he wanted money to put one or two things in his house in order, he would want money to clear bush from the land which he had bought from the defendant, and he wanted to purchase a pair of bulls to work the land. Mr. Fitzpatrick said then you were not in a position to take up transport. He (plaintiff) said he had no money in hand. Doobay asked me if I thought the plaintiff was a good sort and that he could give more money. I told Doobay that he could give another $200. He (plaintiff) pointed out that the additional sum of $200 would not be enough and that he preferred to have one debt in one straight way. Doobay was then asking 14% per annum as mortgage interest. Plaintiff spoke privately to me and asked me if I could arrange the whole thing—meaning $1,500 from Doobay at 12% and he promised to give the milling to Enterprise factory carried on by the defendant. I spoke to Doobay and he

agreed to give the $1,500 at 12% on condition that the defendant give security to him. I told Doobay, yes. I will get my sister to do that. Doobay then instructed Mr. Fitzpatrick to prepare the mortgage papers that is after I had given him the assurance that I would get my sister to give the security Mr. Doobay asked for. Plaintiff had no money and I advanced the fee for the mortgage—over $20. Doobay said the $1,500 he was lending will be discounted from the amount which defendant owed Doobay on her mortgage of Plantation Enterprise. In other words no money would be paid to her, but the amount would be credited to her debt. I asked what then would happen to the $200 which plaintiff had paid towards the purchase price. Mr. Fitzpatrick said that amount must be paid back to the plaintiff. I drew attention to the fact that as my sister would be signing as security for the mortgage, the mortgage fee which I was advancing would be discounted from the $200 and the balance paid to him (plaintiff) as he clears the bush and improves the land purchased by him. Mr. Fitzpatrick said that was a right thing and Doobay said that would increase the value of land and make his mortgage secured."

In pursuance of this new agreement it is contended by defendant that Doobay accepted a Mortgage from the plaintiff on the 25 acres of land for the sum of $1,500, and on the 19th day of January, 1942, the defendant executed in favour of Doobay a written guarantee that the mortgage debt of the plaintiff would be paid. Transport of the land was accordingly passed to the plaintiff subject to a first Mortgage in favour of Doobay. The defendant has also fully repaid to the plaintiff the sum of $200. The last receipt issued by the plaintiff for such payment was in the words and figures following:—

La Bagatelle,
Leguan.
23.7.42

Received from Grace Dennison the sum of Forty-six dollars and seventy-four cents, $46.74, in full payment on the agreement.

Ramchandar.

The agreement of the 16th April, 1941, being one which related to immovable property was required by statute to be evidenced in writing, but the alleged subsequent verbal agreement although unenforceable *per se*, could nevertheless operate in rescission of the former if intended or expressed to do so absolutely — see *British Benningtons* v. *N. W. Cachar Tea Co.* (1923) A.C. 48. Part performance of the verbal contract may, however take it out of the provisions of the statute and admit it to proof in answer to the claim of the plaintiff to execution of the original written agreement.

Viscount Haldane in his speech in the case of *Morris* v. *Baron* & *Co.* (1918) A.C. p. 1 at p. 18 said "While a parol variation of a contract required to be in writing cannot be given in evidence, the very authorities which lay down this principle also lay down not less clearly that parol evidence is admissible to prove a total abandonment or rescission. Now there is no reason why this should not be done through the instrumentality of a new agreement which does not comply with the statutory formalities just as readily as by any other mode of mutual assent by parol" and as *Lord Dunedin* enunciated in that same case at page 25 "The difference between variation and rescission is a real one, and is

tested to my thinking by this. In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because the second dealing with the same subject matter as the first but in a different way it is impossible that the two should be both performed."

At the discussion at Mr. Fitzpatrick's office in the month of December, 1941, defendant's agent stated it was agreed that defendant should take steps to sue Jairam for possession of the ten beds which were still being occupied by him, and accordingly this was done by the defendant early in 1942. Thereafter plaintiff, Dennison said, told him he had attended the Magistrate's Court at Leguan, and the Magistrate had made an order that Jairam should leave the land at the end of October that year; and that the rent for the land should be paid to him plaintiff, all to which the plaintiff expressed entire satisfaction, as he would be in a position to reap the little or spring crop in 1943 from lands planted by him at La Bagatelle, as well as the little crop from Jairam's tenancy, the Enterprise lands. There is some dispute as to the exact time Jairam vacated his tenancy, but the weight of evidence points to the fact that after Jairam reaped his October crop in 1942, the plaintiff entered into possession of the ten beds and actually reaped 110 bags of padi in the Spring of 1943. The rice lands in Leguan seem to be very prolific in its yield for the witnesses who deposed to the returns per acre put it as high as 30 bags in October and 20 bags in April. Plaintiff it would appear had been gradually clearing a portion of the remainder of the 25 acres, on which he planted corn and other vegetable products besides depasturing his cattle on grazing areas which he did as early as June, 1941.

On the 21st February, 1942, the defendant filed a plaint in the Court at Leguan claiming $26 amount due for land rent from Jairam and obtained judgment. This amount obviously represented the rental due by Jairam for ten rice beds; 61/2 acres in extent, at $4 per acre for crop ending October, 1941 — see Exhibit "L" where his tenancy with his previous landlord is set down.

On the 7th February, 1944, after the plaintiff had not only taken possession of the ten beds of rice-lands but had cultivated and reaped the October, 1943 crop, he instructed his Solicitor to demand payment from the defendant of the sum of $109 made up of $100 founded upon an alleged arrangement between him and the defendant to pay him $50 for every crop year in which he was denied possession, and the sum of $9 alleged to be due by defendant for labour in connection with the survey of the piece of land sold to him and *of another piece* not included in the sale. In this letter plaintiff's solicitor referred to the agreement of purchase and sale of the 16th April, 1941; and stated that under the agreement he was entitled to immediate possession of the land sold but he was unable to obtain possession until October, *1943;* and that his client a rice farmer had to find other land to plant rice and obtained 9 beds at $54 per annum. It has been admitted by counsel for the plaintiff that October, 1943, should read October, 1942. No specific reference is made as to the extent of the land he (plaintiff) was denied possession, but it is a fair inference to

draw from his own pleadings and the evidence in the case that he intended to refer to the land which was in the occupancy of Jairam. Had this sum. been paid by the defendant, no action would have been filed, for the threat to take proceedings is contained in the last paragraph of the Solicitor's letter. "I would be glad if you would let me have the $109 on or before the 21st inst. as my client has instructed me to proceed for its recovery if it is not paid."

This demand stated defendant's agent was the outcome of a refusal to sell to plaintiff a portion of land between the 25 acres surveyed by Moses and the estate dam of Plantation Enterprise. Dennison said "That portion of the land has coconut trees. I told him I would not sell. He brought Moses (Surveyor) to the Registry to ask me to sell that portion of land. I again told him I would not do so." This statement seems to have some foundation for we find in Mr. Sharpie's letter reference made to an amount due for labour in connection with another piece of land not included in the sale.

It was in the above circumstances that a writ was filed on the 1st day of December, 1944, in which damages, not exceeding the sum of $500 for breach of the agreement of the 16th April, 1941, were claimed. A perusal of the statement of claim show that the gravamen of plaintiff's complaint is not that the contract has not been fully performed by the defendant but a breach of one of the terms to put him in possession forthwith on the execution of the agreement in consequence of which he suffered a loss in the contemplation of both parties.

The law that contractual obligations must be fulfilled has been laid down in all recognised text-books on the law of contract with the utmost clarity and it is no excuse that contracts with third parties prevent the fulfilment unless there is included an exception clause, and there is none in the agreement under consideration, in the contract to give the promisor the option in certain circumstances to avoid the agreement. It is common ground that both the plaintiff and the defendant knew on the 16th April, 1941, that Jairam was a tenant of 10 beds of land, between 5 and 61/2 acres in extent, called by some people "Lucy Field"; and that defendant hoped Jairam would surrender his tenancy so that the plaintiff may obtain possession, and for that purpose the then ranger of the defendant one Oodit Narain (a witness) accompanied by the plaintiff visited the land and spoke to Jairam but without success. From the language of the contract it can be implied that there was some obligation on the defendant to place the plaintiff in possession if he insisted on that being done and if he could not do so to pay damages which may fairly flow therefrom as a result of the period he is so kept out of possession. But he may waive his right to the immediate performance of a term of the agreement by his conduct, by a rescission of the original agreement and a substitution of another or by a different mode of performance.

The good faith of agreements requires that, so long as anything remains to be done, each party should do what is reasonably necessary for carrying out the intention. There is no doubt in my mind that the plaintiff realising the inability of the defendant to obtain possession of "Lucy Field" in time for him to cultivate it

for the big crop of 1941, in order to minimise any loss by not planting was able to become re-possessed of his 6 acres tenancy at La Bagatelle which he cultivated and received full returns during 1941 and 1942.

The plaintiff no doubt acted wisely being fully aware, at least, at that time, of the date when Jairam's tenancy of the 10 beds would expire, for I believe the evidence of Jairam that plaintiff when he inspected the land before purchase was told by him of an agreement he had with the late J. G. Guyadeen who was then alive and from whom the plaintiff could have verified Jairam's statement. I also accept the evidence of defendant's agent and Jairam that plaintiff entered into possession of the uncultivable area of the 25 acres soon after he purchased part on which he grazed his cattle and later started to clear the remainder which he subsequently planted with vegetable crops. The evidence shows that in the month of July, 1941, transport was advertised in his favour as already stated.

It was not until the letter of the 10th December, 1941, from Mr. Gomes that the plaintiff complained possibly after the abortive journey to Georgetown following on the letter of the 18th day of September, 1941, from Messrs. Cameron and Shepherd, and expressed his willingness to accept the sum of $322.08 made up as I have already stated. Thereafter the parties met at Mr. Fitzpatrick's office where on the evidence of Dennison which I accept there was a rescission of the written agreement of the 16th April, 1941, and a new agreement substituted in its place. Although the latter agreement was made verbally it is nevertheless effective.

To refer to a recent case where the parties to an agreement under seal subsequently entered into an arrangement by which they intend that legal relations should be created between them, and a promise is made in pursuance of such arrangement which, to the knowledge of the person making it, will be acted on by the person to whom it is made, and such promise is in fact acted on, the Court will hold that the promise must be honoured notwithstanding that the arrangement in pursuance of which it was made involves the variation of an agreement under seal by one of lesser value and the promise is not supported by consideration in the strict sense of the term. *See Central London Property Trust, Ltd.* v. *Hightrees House Ltd.* (1946) 62 T.L.R. 557 — *Denning J.* in that case said "The law has not been standing still since *Jordan* v. *Money* ((1854) 5 H.L. Cas. 185). There has been a series of decisions over the last 50 years which, although said to be cases of estoppel are not really such. They are cases of promises which were intended to create legal relations....they are really promises—promises which were intended to be binding….The Courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them to act inconsistently with them. It is in that sense and that sense only, that the promises give rise to an estoppel similar to that which existed in *Hughes* v. *Metropolitan Railway Company* (1877) 2 App. Cas. 439, 448……and *Salisbury* v. *Gilmore* (1942) 2 K.B. 38, 51."

In the instant case, it is not possible for me to arrive at any other conclusion on the evidence of Dennison and the subsequent acts of the parties but that they agreed that the original contract

should be abrogated; and it does not seem to be necessary to the extinction of one contract by another that the second contract should be capable *per se* of being actively enforced. Plaintiff elected to treat the written contract as at an end by acts which are not consistent with its continuance, but consistent with the new agreement made on the 16th December. 1941. There was re-arrangement of the terms of the original contract by a new agreement upon which the parties acted. There are instances where a rescission may also be implied where there was such a change of circumstances, that the original contract looked at as a whole has been fundamentally invaded.

It is quite impossible, in my opinion, to reconcile the accepted performance by the plaintiff with the written agreement of the 16th April, 1941. Such performance is consistent only with the new agreement of the 16th December, 1941, and does not take it beyond its ambit.

The determining factor is the intention of the parties at the time of the parol arrangement and that intention was subsequently clearly manifested by the acts of the plaintiff himself.

This question is one of fact and depends as I have already said on the acts and conduct of the parties.

The new agreement in this case was expressed in clear language and both pleadable and provable even after the alleged breach of the written contract as mentioned in Mr. Gomes' letter. Plaintiffs' own evidence in effect shows that there was a fundamental change in the fulfilment of the agreement.

Even if I had come to the conclusion that there was no express rescission of the original contract as pleaded, nevertheless the plaintiff I find accepted a variation of its performance, and cannot now complain.

There is a distinction between an alteration in a written contract and a dispensation or variation of performance acceded to by one party at the request of the other, without any binding agreement to that effect, which may be proved by parol evidence as being equivalent to performance, in which case the original contract in writing is performed.

There can be little doubt that the plaintiff was willing to accept and put forward as his claim in Mr. Sharpies' letter the payment of two years rental of the land occupied by Jairam, and had he framed his action in that way he would have been entitled to judgment in the sum of $100 at the most — Jairam's tenancy only called for a payment of $26 per year from him.

Plaintiff I find did reap in April, 1943, 110 bags of padi from the ten beds vacated by Jairam, and as padi was being sold at that time for at least $2 per bag it cannot be said that he has suffered any pecuniary loss.

The plaintiff having failed in his action, there must be judgment in favour of the defendant, with costs.

Judgment for defendant.

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

J. SEWCHAND *v.* J. DA COSTA, P.C. 5014

JOHN SEWCHAND, Appellant (Defendant),

v.

JOHN DA COSTA, P.C. 5014, Respondent (Complainant).

(1948. No. 206. — DEMERARA).

BEFORE FULL COURT: WORLEY, C.J. BOLAND, J., AND JACKSON, J., (Acting).

[1948. MAY 5; JUNE 11.]

Criminal law and procedure—Continuing offence—Over period of time—Period to be defined as precisely as nature of evidence permits—Notice to accused of case alleged against him—To enable him to plead autrefois convict or autrefois acquit.

Criminal law and procedure—Continuing offence—Using unlicensed vehicle—Proof thereof—Evidence of number of similar acts—Showing course of conduct constituting res gesta—Admissible.

Criminal law and procedure—Complaint for offence—Defence of lack of knowledge indicated—Evidence of other similar acts—Admissible—To rebut alleged state of mind.

Criminal law and procedure—Motor vehicle licensed solely for private use—Use as a hire car—Complaint for—Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22), *section* 22*—Defence—Suggestion that passengers conveyed gratis from motives of friendships and benevolence—Evidence of similar acts on other days—Admissible—To prove true relationship between defendant and passengers.*

Although, in the case of a continuing offence, it is permissible to allege and to prove the commission of the offence over a period of time, it is nevertheless incumbent upon the prosecution to define the period as precisely as the nature of the evidence admits. This precision is required in the interests of the accused so as to give him as exact notice as possible of the case alleged against him and also to enable him, if need be, to establish a plea, either then or later, of autrefois convict or autrefois acquit.

The offence of using an unlicensed vehicle may consist of one act done on one occasion, or of a number of acts done on different occasions, and may properly be regarded as a continuing offence which may be proved by evidence of a number of similar acts showing the course of conduct which constitutes the *res gesta.*

Where the defence of lack of knowledge is indicated, it may generally be satisfied by evidence of other similar acts to rebut the alleged state of mind.

A motor vehicle was licensed solely for private use that is to say, as a vehicle not kept for purposes of trade or hire. The owner was charged for using the vehicle on the 18th November, 1947, as a hire car, and evidence was adduced that on that day he picked up and set down passengers at various points along the public road and that he received fares from these passengers, telling him that if any question were asked they were to say that he took no money from them. The only defence indicated was a suggestion that the passengers were being conveyed gratis from motives of friendship and benevolence.

Held that evidence of similar acts on other days was admissible to show the true relationship between the defendant and the passengers.

APPEAL by the defendant John Sewchand from the decision of the Magistrate of the West Demerara Judicial District convicting him of the offence of using an unlicensed motor vehicle contrary to section 22 of the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22).

A. M. Edun, for appellant.

A. C. Brazao, acting Solicitor-General, for respondent.

On the 5th May, 1948, the Court dismissed the appeal with costs, and on the 11th June, 1948, the Chief Justice stated the reasons for the judgment as follows:

The appellant in this matter appeals against a conviction for using during the month of November, 1947, an unlicensed motor vehicle contrary to section 22 of the Motor Vehicles and Road Traffic Ordinance No. 22 of 1940.

The appellant was at all material times the owner of a registered motor vehicle of the type known as a "station-waggon" which was licensed solely for "private use" that is to say, as a vehicle not kept for purposes of trade or for hire. The case for the prosecution was that on several days during the month of November, 1947, he used this vehicle as a hire car, a purpose for which a higher fee is prescribed by the First Schedule to the Ordinance and that he thereby committed an offence under section 19 (2) and section 22 (1) of the Ordinance.

The evidence led in support of the charge consisted of, firstly, four witnesses who proved that in the early hours of the 18th November, 1947, on the Public Road West Demerara appellant picked up and set down passengers at various points along the public road and that he received fares from these passengers, telling them if any question were asked they were to say that he took no money from them.

Secondly, the evidence of other witnesses who deposed that on the 17th, 21st, 22nd and 25th November the same car was observed to be making regular trips up and down the road with many passengers, driven sometimes by the appellant and sometimes by his paid driver, that the appellant or his driver was seen to pick up and drop passengers along the road, some of whom had been seen to hand money to the appellant, and that the car was regularly parked among the hire cars at the Vreed-en-Hoop Stelling where an agent of the appellant used to tout for passengers.

At the close of the case for the prosecution, counsel for the defendant-appellant objected that the charge was laid for more than one offence in contravention of the provisions of subsection (3) of section 8 of the Summary Jurisdiction (Procedure) Ordinance (Chapter 14) and contended that the prosecution should make its election of one particular offence. The Magistrate after consideration called on the appellant to answer in respect of the 18th November but did not amend the charge as he should have done. The only evidence offered for the defence was one witness who was called to contradict the four witnesses who had deposed to having paid fares to the appellant on the 18th and the Magistrate convicted and fined the appellant, who admitted a previous conviction in September, 1947, for the same offence.

The certificate of conviction follows the original complaint and records a conviction in respect of the month of November, 1947. It is clear from the record that this is an error and we therefore amended the conviction by substituting the 18th day of November, 1947. We think it pertinent here to observe that, although in the case of a continuing offence it is permissible to allege and to prove the commission of the offence over a period of time, nevertheless it is incumbent upon the prosecution to define the period as precisely as the nature of the evidence admits.

This precision is required in the interests of the accused so as to give him as exact notice as possible of the case alleged against him and also to enable him, if need be, to establish a plea, either then or later, of *autrefois* convict or *autrefois* acquit. In the instant case the complaint was too widely drawn and on the evidence which the prosecution had they could and should have alleged use "on the 18th day of November, 1947, and on divers days and times thereafter between that day and the 25th day of November, 1947."

The only ground of appeal which merited attention was the allegation that a specific illegality substantially affecting the merits of the case was committed in the course of the proceedings in that it was shewn that the defendant-appellant had committed an offence by calling evidence to prove that he had committed not only that offence but others of a similar character.

Counsel for the appellant contended that every occasion on which a motor-vehicle is used in circumstances which constitute an offence under section 22 of the Motor Vehicles and Road Traffic Ordinance is a separate offence which must be charged separately and that no evidence of similar use on other occasions is admissible unless the charge is for "keeping for use" or "permitting to be kept for use;" and he relied upon the decision in Parker v. Sutherland 1917 (86 L.J.R. K.B. 1052). He also contended that evidence of similar acts is only admissible in cases where the accused's state of mind is in issue and that in the statutory offence charged in this case there is no element of "mens rea."

The decision in Parker v. Sutherland turned upon the question whether on a charge for supplying liquor in contravention of a "No Treating" Order each act of supplying should be regarded as being complete in itself as an offence or whether evidence could be given of a number of separate acts as constituting a continuing offence. The Divisional Court adopted the former view but in so doing was careful to distinguish the two classes of cases. In our opinion that decision has no application to the instant case. The offence of using an unlicensed vehicle may consist of one act done on one occasion or of a number of acts done on different occasions and may properly be regarded as a continuing offence which may be proved by evidence of a number of similar acts shewing the course of conduct which constitutes the *res gesta.* A useful analogy and contrast is afforded by the cases of R. v. Mean 69 J.P. 27 and R. v. Mortimer 74 J.P. Jo 520 referred to in Phipson on Evidence 8th Edition p. 57. Both these cases concerned charges of using premises for the purposes of betting; in the latter case only one act of betting was proved while in the former evidence of acts on days other than that charged was properly admitted as part of the transaction. Another useful comparison is afforded by the cases of R. v. Hill and R. v. Churchman (C.C.A.) 1914 2 K.B.386. Each of the appellants was indicted for knowingly living in part on the earnings of a prostitute; in the case of Hill the indictment specified one particular day while in the case of Churchman the indictment charged a particular day and divers days and times thereafter between that day and a later specified day. In the case of Hill it was objected that the indictment was bad because it alleged the offence on one day only; but the Court of Criminal Appeal held that the indictment laid in that way was

perfectly good and that evidence of similar acts on days prior and subsequent to the alleged date was admissible as explaining the relations of appellant and the woman on that date.

Counsel for the appellant further contended that although the conviction was based upon the evidence relating to the 18th November it was vitiated by the prejudice created in the mind of the Magistrate by inadmissible evidence suggesting other similar acts on other days, and that as there was no question of the state of mind of the appellant, such evidence could never be admissible. This argument we can answer briefly on two grounds: firstly, the evidence led by the prosecution as to the 18th November was so overwhelming that no Court could reasonably have done other than convict and secondly, we do not agree that in this offence the accused's state of mind is irrelevant. Where a statute in creating an offence omits such words as "knowingly" or "wilfully" the effect may be only to alter the burden of proof: see R. v. Bankes (1794) Esp. 144 and Sherras v. De Rutzen (1895) 1 Q.B. 918 at p. 921, consequently it does not follow that the defendant may not prove lack of knowledge defence. Where such a defence is indicated it may generally be anticipated by evidence of other similar acts to rebut the alleged state of mind. It is true that in this case such a defence was not open to the appellant who was himself driving the car on the 18th. The only defence indicated was a suggestion that the passengers were being conveyed *gratis* from motives of friendship and benevolence, and therefore in our view the other evidence was admissible to shew the true relationship between the appellant and the passengers.

For these reasons we dismissed the appeal with costs and confirmed the conviction and sentence. The latter being for a second and most deliberate offence erred on the side of leniency.

Appeal dismissed.

ALBERT BRADSHAW,

Appellant (Defendant).

v.

GERALD FOWLER. P.C. 4786,

Respondent (Complainant).

(1948. No. 212.—DEMERARA) .

BEFORE FULL COURT: WORLEY, C.J.. BOLAND, J. AND JACKSON, J. (Acting).

1948. MAY 4; JUNE 11.

Motor Vehicles and Road Traffic—Major road—Vehicles to stop at approach to—Before entering or crossing—Contravention of such provision—Offence under Road Traffic (*Georgetown*) *Order,* 1946, *paragraph* 2 (2)—*Motor Vehicles and Road Traffic Ordinance,* 1940 (No. 22), *sections* 46 (1), 77 (1) *(xxi).*

Ultra vires—Road Traffic (Georgetown) Order. 1946, *paragraph* 2 (2)—*Within powers conferred by Motor Vehicles and Road Traffic Ordinance,* 1940 (No. 22), *section* 46 (1).

Paragraph 2 (2) of the Road Traffic (Georgetown) Order, 1946 (No. 13) which provides that a vehicle shall stop at the approach to a major road before entering or crossing such road, is within the powers conferred by section 46 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22).

A.BRADSHAW *v.* G. FOWLER, P.C. 4786

APPEAL by the defendant Albert Bradshaw from the decision of a Magistrate of the Georgetown Judicial District convicting him for failing to stop when riding a bicycle at the approach to a major road in Georgetown contrary to paragraph 2 of the Road Traffic (Georgetown) Order, 1946 (No. 13).

P. A. Cummings, for appellant.

A. C. Brazao, acting Solicitor-General, for respondent.

Cur. adv. vult.

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

The appellant appeals against his conviction for failing to stop when riding a bicycle at the approach to a "major road" in Georgetown, contrary to clause 2 (1) and (2) of the Road Traffic (Georgetown) Order No. 13 of 1946. Clause (2) of the Order cited reads: —

"2. (1) The following are hereby classified as major roads—

(a) Water Street.
(b) High Street,
(c) Camp Street.
(d) Lamaha Street.
(e) Middle Street, and
(f) Regent Street.

(2) A vehicle shall stop at the approach to a major road before entering or crossing such road."

The appellant contends that the provisions of sub-clause (2) are ultra vires. The order was made by the Licensing Authority under the Motor Vehicles and Road Traffic Ordinance (No. 22 of 1940) with the approval of the Governor in Council in exercise or purported exercise of powers vested in him by sub-section (1) of section 46 of the said Ordinance which confers upon the authority jurisdiction to make orders for any of the following purposes: —

(a) the classification of roads into major roads and minor roads;
(b) the specification of the routes to be followed by motor or other vehicles;
(c) the prohibition or restriction of the use of specified roads by motor or other vehicles of any specified class or description, generally or on particular occasions or during particular hours;
(d) the prohibition of the driving of vehicles on any specified road otherwise than in a specified direction;
(e) otherwise in relation to the regulation of traffic:

It is evident that sub-clause (1) of clause 2 of the Order was made under the powers conferred by paragraph (a) of the section and that sub-clause (2) could be justified only as an exercise of the power conferred by paragraph (e).

The appellant's contention is that the apparent generality of paragraph (e) is limited by the special subsequent provisions of section 77 (1) (xxi) of the Ordinance which provides that the Governor in Council may make regulations with respect to

> "the precedence of vehicles and pedestrians respectively and generally with respect to the movement of traffic at and in the vicinity of crossings and the erection of traffic signs in connection therewith."

It is contended that there is repugnancy in these two provisions and that therefore the later provision must prevail. In our view no canon of interpretation is here in question because

an examination of the purpose and effect of these two provisions, as disclosed by the wording, shews no repugnancy.

The paragraphs of section 46 (1) are concerned solely with the control of vehicular traffic and the context requires that the word "traffic" in paragraph (e) shall have the same meaning. The object of the section is to restrict and control vehicular traffic on specified roads so as to promote the regular easy flow of traffic and to avoid or reduce the incidence of congestion and collisions between vehicles. This limitation of the nature of the orders which can be made under the section is indicated in the marginal note "Power to restrict use of vehicles on specified roads."

In this Colony marginal notes form part of the statute as enacted and may be referred to as shewing the drift of the section.

It is quite evident that the purpose of specifying some roads as "major roads" is to confer upon vehicles already moving along such roads some degree of precedence over other vehicles intending to enter upon or cross them from a side road, and. if that is conceded, then sub-clause (2) of clause 2 of the Order is a necessary and reasonable exercise of the power conferred by paragraph (e) of the section.

On the other hand the object of paragraph (xxi) of section 77 (1) is to reconcile the conflicting interests of vehicles passing along the roads and foot-passengers wishing to cross them. This is to be done by laying down rules of precedence at road crossings (which may or may not be at a cross road), by providing traffic signs to indicate visually the rules of precedence and by prescribing the manner and order in which vehicles and pedestrians shall approach or pass over such crossings.

It is possible that a regulation made under this paragraph might impose upon vehicles an obligation inconsistent with that imposed by the sub-clause under consideration, and such a conflict might fall to be considered by this Court if and when regulations are made under paragraph (xxi).

For these reasons, we are of opinion that the sub-clause (2) in question is intra vires the powers conferred by section 46 (1) (e) of the Ordinance and that the appellant was rightly convicted. The appeal is dismissed with costs and the conviction and sentence confirmed.

Appeal dismissed

MANGAL PERSAUD, Appellant (Defendant),

v.

ELSIE RAMBARRAN, Respondent (Complainant).

[1947. No. 580.—DEMERARA].

BEFORE FULL COURT: WORLEY. C.J. BOLAND, J. AND JACKSON, J. (Acting).

1948. JANUARY 9, 17.

Bastardy—Evidence of mother—Corroboration—In a material particular—What is—Evidence tending TO make it probable that mother's story is true—Evidence Ordinance, Cap. 25, s.61 (2).

In a complaint for bastardy, there is corroboration of the mother's story where there is evidence which tends to make it probable that her story is true.

Moore v. *Hewitt (*1947) 1 K.B. 831, 838 *applied.*

Appeal by Mangal Persaud from the decision of the Magistrate of the West Demerara Judicial District adjudging him to be the father of the child of the respondent Elsie Rambarran.

C. Lloyd Luckhoo for appellant.

Cur. adv. vult.

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

The appellant appealed against an order of the Magistrate of the West Demerara Judicial District adjudging him to be the putative father of a bastard child born to the respondent on March 18, 1947. The principal ground argued on the appeal was that there was no corroboration of the evidence of the mother in some material particular to the satisfaction of the Court as required by section 61 (2) of the Evidence Ordinance (Chapter 25). It is well settled that to satisfy the requirements of this section there must be evidence which tends to make it probable that the mother's story is true.

Appellant and respondent are both young people living with their parents at the Village of Anna Catherina, West Coast, Demerara. The respondent's evidence was to the effect that she had known the appellant for a few years and they used to speak to each other. On "a Wednesday night in 1946" he told respondent that he had been left $1,000 and would like to marry her. The following morning he met her on the way to the standpipe about four o'clock and they had intercourse, which was repeated on several subsequent occasions when her parents were out. In June 1946 she discovered herself to be pregnant and informed the appellant who again promised to marry her but later said his mother wouldn't agree as they were of different castes. In cross-

examination she said "I only know defendant. Defendant is the first who had anything to do with me……We used to have intercourse at times under our house in the kitchen which is an old one. I bled when defendant first had intercourse with me."

The corroborative evidence was provided by a nurse-midwife who lived in the village arid who said that she worked for both families and knew them well. "I saw familiarity between the applicant and defendant from May, 1946. As a nurse I am about at all hours by day and night. I would see them generally together in the pasture, at the pipe and in the shop near to me." Under cross-examination she said "I have never seen the defendant visiting the girl's home. I would see him with her wherever she went."

One Albert a cousin of the respondent swore "In June 1946 one night at 7 p.m. I was coming towards the public road and I saw the defendant coming from under the applicant's house, jumped a drain and went over the churchyard. I called him but he didn't answer. I saw him also about 4.30 a.m. under the applicant's house. I did not see the applicant. I have before seen them talking on the road, *i.e.,* before June".

This evidence was accepted by the Magistrate who rejected appellant's denials and also the suggestion that the respondent had also associated with other men.

Counsel for the appellant submitted that the evidence of these two witnesses was merely evidence of opportunity and was not sufficient corroboration to satisfy the section. He relied upon the well known case of *Burbury v. Jackson* 1917 (L.R. 1 K.B. 16) but this authority needs to be carefully considered in the light of the decision of the Divisional Court in *Moore v. Hewitt* 1947 (L.R. 1 K.B. 831) where it was pointed out that the head note of *Burbury v. Jackson* goes too far and should be qualified.

In *Moore v. Hewitt* the appellant was the putative father and the respondent the mother of the bastard child: the facts (so far as relevant here) were that on the evidence of the respondent corroborated by other witnesses it was proved that the appellant and respondent visited cinemas, licensed houses and dances together during the material period, that they were in the company of each other at certain hours in the evening during the period in question and that the appellant visited the respondent's home on four or five occasions. No person had ever seen any act of intimacy between them. The respondent stated that she had not had sexual intercourse with any man other than the appellant.

The Divisional Court rejected the appellant's contention that these facts could not amount to corroboration in law and in the course of his judgment Lord Goddard, C.J., said (at p. 838 *et seq.)*

"For many years since I have known anything about the law on this matter, it has been the practice, and very often the only way of giving corroborative evidence in these cases, to prove that the two young people concerned were, perhaps, a courting couple or sweethearts or, at any rate, were associating together on terms, to use the justices' expression, of intimacy and affection. The justices were not using the word "intimacy" in what I may call the newspaper sense, meaning sexual intercourse, but obviously they were satisfied on the evidence before them that these young people were, and had, for a long period of time, been associating together on the closest terms of intimacy and

affection, visiting places of amusement and refreshment, and going to dances together, and being in the company of each other in the evenings and that the appellant visited the girl's home, which means, I suppose, that her parents were allowing the appellant to go there because, as the justices were satisfied, the parties were obviously on courting terms. It should be added that there was no suggestion that the respondent was having an association with any other man, a very important matter in these cases. It was also found by the justices that no act of intimacy had ever been seen by any person, but as Scrutton L. J. pointed out in Thomas v. Jones (L.R. 1921 1 K.B. 22) it is a matter of common knowledge or common sense that it very seldom indeed happens in these cases that any act of sexual intercourse is ever seen.

"It was said that the evidence in this case amounted to nothing more than to proof of opportunity, and Mr. Marshall's main argument was based on the authority of Burbury v. Jackson. The headnote of that case, which in my opinion goes too far, and should be qualified, is this: 'On the hearing of a bastardy summons evidence of mere opportunity is not sufficient corroboration of the evidence of the mother to satisfy s.4 of the Bastardy Laws Amendment Act. 1872.'

The facts in Burbury v. Jackson were very different from the facts in the case before us. It was a case in which the mother and the alleged father were both workers on a farm, where they lived and where they had to be every day. In the course of their ordinary duties they would be in and out of the cowsheds, barns and various other places, and, therefore, said the court, the fact that those two people were together on the farm where their duties obliged them to be could not be taken as corroborating the fact that sexual connexion took place between them.

"So too, in the case of Thomas v. Jones (supra). There the alleged putative father was the employer of the woman, who was his housekeeper, and so, naturally, was living in the house. I can well understand the court saying in those two cases that, in the circumstances, it could not be said that there was evidence of an association from which any adverse inference against the man could be drawn, because the two persons were not associating for any other reason than that they were thrown together in the ordinary natural course of things, in the one case because they were both employed at the same farm, and, in the other case, because the woman was acting as housekeeper to the man.

"In the present case what we have is a young man and a young woman, who, as the justices obviously found, and I must assume were entitled to find on the evidence, were sweethearts. In those circumstances it seems to me that, it being proved by independent evidence that these young people were acting in the way I have mentioned, going about together, associating together at different hours of the day and night, being in each other's company for various periods of time, and so forth, there was evidence proved by other witnesses, which the justices could regard as corroboration. If authority is really required for that view it is amply supported by Dunn v. Chalmers, a decision of the Court of Session, in which it seems to me that particular stress was laid by the Lord President on the fact that the parties were sweethearts. I think it would be going far beyond any case which has ever yet been decided if we were to say that justices were not entitled to take the circumstances which existed in the present case into consideration, more especially when there was no suggestion that the respondent was associating with anyone else, because that shows that she was keeping herself for her man and keeping herself to one man. The parties were associating together in circumstances which might quite naturally lead to their having sexual intercourse with each other, and I do not think it would be possible to hold on the facts found by the justices that there was no evidence which would tend to make it probable—that is the test, tend to make it probable—that the respondent's story was true and that the man, therefore, was the father of the child.

"I should like to add that I think that Mr. Herrick Collins put the proposition for which he contended in a perfectly correct form. His proposition was this where there is evidence that over a long period, including the time of conception, the alleged father has chosen to associate with the mother on terms of close affection, and there is no evidence that the mother was associating with other men, there is material which the justices are entitled to treat as corroboration of the mother's statement. I agree with that proposition."

With those observations we respectfully agree and, applying them to the present case, we are of opinion that the Magistrate came to a decision at which he was entitled to arrive because there was evidence, which, if accepted, could amount to corroboration.

The appeal must therefore be dismissed.

Appeal dismissed

A.PERSAUD *v.* R. SAMMY

AGNES PERSAUD, Appellant (Plaintiff),

v.

ROSALINE SAMMY, Respondent (Defendant).

(1948. No. 100—DEMERARA).

BEFORE FULL COURT: WORLEY, C.J., AND JACKSON, J. (Acting).

[1948. MAY 3; JUNE 11.]

Promissory note—Agreement not to bid at execution sale—Consideration.

Contract—Execution sale—Person agrees to refrain from bidding—Promise by owner of property put up for sale—Consideration.

There is consideration for the making of a promissory note where the person in whose favour the note is made agrees not to bid at an execution sale in which the maker of the note is interested.

At common law an agreement between two or more persons not to bid against each other at auction, is not illegal.

APPEAL by the plaintiff Agnes Persaud from the decision of a Magistrate of the Georgetown Judicial District dismissing a claim against the defendant Rosaline Sammy on a promissory note.

D. P. Debidin. solicitor, for appellant.

Respondent, in person.

Cur. adv. vult.

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

The plaintiff-appellant sued the defendant-respondent for the sum of $40 being instalments due on an overdue promissory note given by the respondent to the appellant and for costs. The Magistrate dismissed the claim and gave judgment for the defendant on the ground that the making of the note in question was illegal and that no consideration passed, and the appeal is against that decision.

The facts are as follows: The appellant leased from the respondent a parcel of land in Georgetown and built herself a house thereon and at the request of respondent expended money on laying down sewerage connections to the house. The respondent promised to reimburse this expenditure to the appellant if and when she gave up her lease. The term of the lease was for five years from 1st January, 1945, with right of renewal, but the appellant surrendered it and the surrender was accepted by the respondent in November, 1946.

On the 4th February, 1947, the respondent's land was put up for sale on parate execution to recover unpaid Municipal rates and taxes. The respondent's purpose in withholding payment of these dues was to obtain a clear title to her property. This is a device commonly adopted in this Colony and at such sales there is generally an understanding that persons other than the owner shall refrain from bidding. The respondent had not repaid to the appellant the cost of the sewerage installation, which was $70, so the appellant's agent attended the sale and, before it started, informed the respondent that he was going to bid on behalf of the appellant unless the $70 was paid. The respondent at first denied

liability but finally on the advice of the Municipal Accountant who was present, the respondent agreed to pay and the appellant's agent agreed to accept $40 in settlement. The sale then took place and the promissory note on which the appellant sues was executed. It was admitted by the respondent that nothing had been paid on the note to date.

At the close of the defence Mr. Burton the Solicitor for the respondent submitted that the promissory note was made "for restraining the agent from bidding and is illegal. Note made in favour of the plaintiff and no consideration passed. Plaintiff no longer had interest in the land."

No authority was cited for these propositions but they were accepted by the learned Magistrate and are given by him as the reasons for his decision, but without any supporting authority.

At the hearing of the appeal, the respondent was not legally represented and could only say that she had been advised that the promissory note was *void* for illegality. It might have been expected that a solicitor who asks for judgment on a purely technical ground wholly devoid of merit would have been prepared to support it with some authority or argument.

There was nothing improper or fraudulent in the bargain made between the appellant's agent and the respondent, and the fact that the appellant had surrendered her lease appears to be wholly irrelevant. The respondent had acquiesced in her land being put up for sale in order to serve her own purpose, namely, to get a title and it was in her interest to exclude other bidders so that she could buy in her own property for the amount of rates and taxes due and the charges of sale. The appellant had a right in common with all the world to bid at the sale and it was in her interest to force the respondent to bid high so that a sum of money would be left in the Registrar's hands, after payment out to the Municipality, which would be susceptible of garnishment for the debt due to her. Apart therefore from the question of the money owing, the appellant's promise to refrain from bidding was consideration for the making of the note.

It is a rule of law that an improper or fraudulent act which is likely to prevent the property put up from realising its fair value and to "damp" the sale will invalidate any purchase by persons guilty of or privy to such acts (see Halsbury's Laws of England 2nd Ed. Vol I. para. 1166 and cases there cited) but that rule has no application to the facts of the case before us.

At common law an agreement between two or more persons not to bid against each other at an auction, even if amounting to what is popularly known as a "knock-out" is not illegal (ibid. See also Rawlings *v.* General Trading Company (C.A.) 1921 1 K.B. 635 and Doolubdass *v.* Ramloll (Py. Co.) 1350 5 Moore's Ind. App. 109 at p. 133). We are therefore completely at a loss to understand on what grounds it could be suggested that such an agreement is illegal if made between a potential bidder and the owner of the property put up for sale and is made in the interests of the owner.

The appeal is allowed with costs and a direction must issue to the Magistrate to strike out the judgment entered and to substitute therefor judgment for the plaintiff in the sum claimed with costs.

Appeal Allowed.

D. O. ROYER *v.* F. S. VIEIRA

D. O. ROYER, Appellant (Defendant),

v.

FRANK STEPHEN VIEIRA, Respondent (Plaintiff).

(1948. No. 248. — DEMERARA) .

Before Full Court: WORLEY, C.J., BOLAND. J., and JACKSON, J. (Acting).

1948. June 11, 12, 25.

Rent restriction—Dwelling-house—Required by landlord for occupation as a dwelling-house—Onus on landlord—To establish that it is so reasonably required—If this not established—Case to be dismissed—If established—Court to be further satisfied—That it is reasonable, after duly balancing hardship that would result to either party, to make order of possession—Rent Restriction Ordinance, 1941 (No. 23), *section* 7 (1) (*e*); *Rent Restriction* (*Amendment*) *Ordinance,* 1947 (No. 13), *section* 8.

Rent restriction—Dwelling-house—Whether reasonably required by landlord for occupation as a dwelling-house—Dwelling-house purchased by landlord after selling another in which he lived—Onus on him—To establish—That he was forced to part with his home with result that he now requires another.

Where the landlord of a dwelling-house to which the Rent Restriction Ordinance, 1941 applies, seeks, on the ground that he requires the dwelling-house for occupation as a dwelling-house, to obtain possession of the dwelling-house, the onus is on the landlord to establish that the dwelling-house is reasonably required by him 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; and the Court must be satisfied that it is reasonable, after duly balancing the hardship that would result to either party, to make the order asked for.

The question whether there is suitable alternative accommodation available to the tenant at the time of the order, and a comparison of the resulting hardship to either landlord or tenant flowing from the grant or refusal of the order of ejectment arises only after the landlord has made out a case that he does reasonably require the premises for his own use and occupation.

Where the owner of a dwelling-house of which he is the occupier sells it and purchases another dwelling-house from which he seeks to eject the tenant on the ground that he requires the dwelling-house as a residence for himself, the burden of establishing that he was forced to part with his home with the result that he now requires another is upon the landlord.

APPEAL by D. O. Royer from the decision of a Magistrate of the Georgetown Judicial District directing him to deliver up, by the 1st May, 1948, to his landlord the respondent Frank Stephen Vieira, possession of the dwelling-house and premises which he was occupying as a monthly tenant at W3/4 of lots 116 and 117 or 39 Cowan Street, Kingston. Georgetown.

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

W. J. Gilchrist, for respondent.

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

This is an appeal from an order made by the learned Magistrate and Rent Assessor of the Georgetown Judicial District

directing the appellant to deliver up by the 1st May, 1948, possession of the dwelling house and premises which he was occupying as a monthly tenant and which are known as the west three-fourths lots numbered as 116 and 117 Cowan Street or as lot 39 Cowan Street in the Kingston District in the city of Georgetown. The order was made on the 26th January 1948, on the hearing of a complaint filed by the Respondent as landlord on the 11th December, 1947, in which it was alleged that the appellant was still in occupation after the expiry of the prescribed legal notice requiring him to quit. The reason given for this notice bearing date 17th September, 1947, was therein stated to be that the Respondent required the said dwelling house as a residence for himself. Respondent's claim to possession was therefore based on the provisions of section 7 (1) (e) of the Rent Restriction Ordinance, 1941, as amended by the Rent Restriction (Amendment) Ordinance, 1947.

According to the evidence led before the learned Magistrate the appellant has been the tenant of these premises for ten years and at the time of the notice was in occupation with his wife and family which included his daughter, two unmarried nieces and a sister.

The building is of two storeys and contains four bedrooms and the usual out offices. The monthly rental is $46.19.

The Respondent had bought the place in December, 1946, but because of certain formalities and technical difficulties transport was not passed in his favour until 1st September, 1947.

Up to a day or two before the respondent's purchase in December, 1946, the respondent was the owner of a dwelling house at No. 92 Middle Street which he had purchased in March, 1944, and which he had continuously occupied as a residence since April, 1944.

On the sale of 92 Middle Street he had obtained from his purchaser the concession that he need not give possession until 1st February, 1947, and on that day he vacated 92 Middle Street and he and his wife went to live at the Londonburg Hotel where they still reside.

As soon as he received transport of the Cowan Street property respondent wrote to the appellant telling him that he wanted the house for a residence for himself and family three of whom were staying at the Londonburg Hotel, and that others were expected very shortly to arrive in the colony from abroad; consequently he was asking the appellant to do his utmost to find other quarters promptly. Two days after that letter he served the formal notice to quit.

It should be mentioned that prior to the sale of his Middle Street property respondent had inspected the Cowan Street house, which was up for sale. He had then, it is admitted told the appellant that he was considering the purchase of the place with a view to living there with his family. There is some conflict in the evidence as to what was said by the appellant when he was so informed. In our view, even if it is true, as the respondent alleges, that the appellant then said that he himself had no intention to buy the property preferring to put his money in the bank and that he would have to get a suitable house elsewhere, appellant's remarks cannot be construed as in any respect waiv-

ing his right to the protection which a tenant is afforded by the Rent Restriction Ordinance. It merely meant that the obtaining of another suitable house by the appellant might become necessary if respondent, his new landlord, should set up a *prima facie* right to eject him for the purpose of himself going into residence.

This Court has in the cases of *McDoom* v. *Fung* decided on 30th August, 1946, and *Jacob & Sons, Ltd.*, v. *Oudkirk and anor* decided on the 28th June, 1947, laid down certain fundamental principles which should govern the determination of claims for possession by landlords for their own occupation either as a dwelling or for their own business. In accordance with these principles it is clear that to enable him to get the order for possession it is on the respondent that the burden falls of establishing that the premises are reasonably required by him 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; and also that the Court must be satisfied that it is reasonable to make the order asked for after duly balancing the hardship that would result to either party.

True the respondent is now suffering from the inconvenience of living with his wife at a hotel and he will not be able to provide in his own home accommodation for certain members of his family on their arrival in the colony. But how did it come about that he is now in that state when he finds himself without a home? It was undoubtedly his own voluntary act of selling 92 Middle Street in December, 1946, which has placed him in that position. In his evidence before the Magistrate the respondent stated: "I sold it because the house I lived in was too small for members of my family whom I was expecting from abroad. It contained three bedrooms, one of which was very small, and was used as a dressing room; at that time my wife and two sons were living with me. My sons suffering from bronchitis and my wife were continually ailing because the house was hemmed in by another house on the north and on the east. I had several burglaries there." But he admitted buying this house in 1944 for $8,300 and he sold it just two years and nine months after in December, 1946, for $13,200 after having spent only $1,000 on it. These circumstances inevitably create a suspicion that it was the inducement of this large profit which caused him to sell without assuring himself beforehand that he would obtain another residence for himself. This was not the first time that he sold at a great profit a residence which he was occupying. For, as he admitted under cross-examination, in 1938 he bought No. 224 South Road for $2,800 and after spending $3,000 in reconditioning it sold it in 1944 for $7,000. It was immediately after that that he bought No. 92 Middle Street. He admits that he was approached to sell No. 92 Middle Street; he himself had not taken any step by advertisement or otherwise to sell it as one would have expected him to do if he found living conditions there were so intolerable and unhealthy. These two successive sales of houses occupied by him as a home, in each case at a great financial profit, give rise to the strong suspicion that the respondent is taking advantage of the inadequacy of housing accommodation in the city to speculate in the buying and selling of dwellings and that by offering

vacant possession to a purchaser he succeeds in reaping handsome profits for himself.

The learned Magistrate in his Reasons for Decision declares that he was not satisfied that the plaintiff was in fact speculating in house property. He accepted respondent's evidence that 92 Middle Street was hot and uncomfortable which had caused his wife being ill with pneumonia and his children with bronchitis. No medical evidence was called by the respondent in support of this. It is true that the appellant had not challenged by cross-examination or otherwise these allegations made by the respondent, but the illness of his family would be a matter peculiarly within the knowledge of the respondent and could hardly be successfully contested by evidence in contradiction coming from appellant. Clearly the burden of establishing that he forced to part with his home with the result that he now requires another is upon the respondent who as landlord of another dwelling seeks to eject the tenant therefrom so as to get necessary accommodation. We are of the opinion that the learned Magistrate did not fully appreciate this, as he would appear from his reasons to have grounded his decision almost wholly upon the issue whether or not alternative accommodation was available for the tenant.

The question whether there is suitable alternative accommodation available to the tenant at the time of the order and a comparison of the resulting hardship to either landlord or tenant flowing from the grant or refusal of the order of ejectment arises only after the landlord has made out a case that he does reasonably require the premises or his own use and occupation.

As to alternative accommodation the learned Magistrate found that the appellant had evinced no great desire to find other accommodation although the respondent had made genuine efforts to assist him by bringing to his notice several houses which he could rent, one of which the learned Magistrate considered suitable and large enough to accommodate appellant's comparatively small family. The learned Magistrate also held the view that appellant was acting unreasonably in refusing to buy a house although possessing the means to do so. Such an attitude on the part of the appellant certainly would be deemed unreasonable if his landlord would be thereby deprived of a home at the property owned by him. But as we remarked above it was the respondent's own act in selling 92 Middle Street which deprived him of a home and his evidence of the unhealthy conditions there as inducing him to sell and go out of possession is not convincing in the light of the profit he made by the transaction and of his previous history as a vendor of his home.

This Court feels strongly that it would be wrong to hold that the respondent is in the position of one who reasonably requires, as against a tenant of long standing like appellant, possession of the Cowan Street property acquired by him in the circumstances disclosed by the evidence. To so hold would be to give encouragement to an owner of his own residence to sell at a profit and on the purchase of another dwelling to plead the necessity to have a home for himself. It seems to us that such a practice on the part of owners would go far to frustrate the purpose of the Rent Restriction Ordinance which aims at giving security

to tenants who pay their rents. It would be no solace to an ejected tenant that there is alternative occupation available to him at suitable rental. He may find himself in the new tenancy again a victim of a similar act by another owner who buys that property.

We wish to be guarded lest we may be taken to be declaring that respondent's act in selling 92 Middle Street and going out of possession is to debar him for all time from claiming possession of a dwelling house which he owns. Perhaps respondent at some later date as against another tenant or even possibly as against the same tenant may succeed in establishing this need for a home, but in the special circumstances of this case, when the tenant is of ten years' standing, and where at the time of the sale of his house the respondent contemplated that after purchasing a house he would apply to eject the tenant therefrom for his own accommodation so soon as he was legally competent to do so, the hardship to the appellant if ejected, we hold, would be out of proportion to that which the respondent would undergo by refusal of the order — a hardship that the respondent, as we have stated, had brought on himself.

For the above reasons the appeal will be allowed with costs. The order for possession made by the learned Magistrate is set aside.

Appeal allowed.

ISSRI PERSAUD, Plaintiff,

v.

CLIFFORD HUGH PARSLEY, Defendant,

(1946. No. 136.—DEMERARA) .

BEFORE JACKSON, J. (Acting).

1947. December 11, 29.

1948. January 2; April 7, 8, 9, 20, 23, 27, 28, 29, 30; June 30.

Libel—Privileged occasion—Letter to district engineer —Accusing overseer of accepting and demanding bribes, and mentioning that other persons were saying that district engineer "was in the know"—Reply to that letter—Written on a privileged occasion.

Libel—Privileged occasion—Malice—Burden of proof of—On plaintiff.

Libel—Privileged occasion—Malice—Sufficiency or otherwise of—Not to be determined until case for defence is closed.

Libel—Privileged occasion—Excessive statement—Malice—Evidence of.

Libel—Publication of—On privileged occasion—Issue for determination—Whether defendant acted from sense of duty, or was actuated by some improper motive.

Libel—Privileged occasion—Malice—Evidence to rebut—Facts which go to prove that defendant honestly believed charge to be true—Evidence—of Admissible—Even though effect is to prove charge to be true—Materials on which defendant based charge—Evidence of—Admissible.

A letter written to the District Engineer accused the overseer of

accepting and demanding bribes, and mentioned that persons other than the writer were saying that the district engineer "was in the know."

Held that a reply to that letter was written on a privileged occasion.

Where a libel is published on a privileged occasion, the onus of proving that the libel was so published with malice is on plaintiff.

Where a libel was published on a privileged occasion, the Court declined to determine the sufficiency or otherwise of evidence tending to show malice until the defence, by election at the close of the case for the plaintiff or after leading evidence, had formally closed its case.

Markbe v. *George Edwards* (*Daly's Theatre*) Ltd., (1928) 1 K.B. 269, C.A.; *Alexander v. Rayson* (1936) 1 K.B. 178, C.A.: and Russell v. *Duke of Norfolk* (1948) 1 A.E.R. 489, applied.

When there is only an excessive statement having reference to the privileged occasion, the only way in which the excess is material is as being evidence of malice. Unless the jury has found that there was malice, the privilege is not taken away when there has been such an excessive statement.

Adam v. *Ward* (1917) A.C. 340, *per* Lord Atkinson, and *Nevill* v. *Fine Arts and General Insurance Company* (1892) 2 Q.B. 170, *per* Lord Esher, M.R. applied.

To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would, in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications.

Laughton v. *Bishop of Sodor and Man* (1872) L.R. 4 P.C. 508, *per* Sir Robert Collier applied.

Where a libel is published on a privileged occasion, the only question for the jury to consider is whether the defendant acted from a sense of duty, or was actuated by some improper motive, and the onus of proving that the defendant was influenced by some improper motive, that is, that he acted maliciously, is on the plaintiff.

Clarke v. *Mollyneaux* (1877) L.R. 3 Q.B.D. 249, *per* Cotton, L.J. applied.

As soon as the Judge has ruled that the occasion is privileged, the defendant may anticipate an effort on the part of the plaintiff to rebut the presumption by any means open to him, and with a view of combating whatever case the plaintiff may endeavour to make to establish express malice; give evidence of any facts which go to prove that he honestly believed that the charge was true notwithstanding that the effect of such evidence is to prove that the charge is true. The defendant may for example give in evidence, as the materials on which he based the charge, statements made to him by third persons even though the plaintiff was not present when such statements were made, and also call such persons to testify as to the statements which they made to him.

Cockayne v. H*odgkinson*, 5 C. & P. 545, *per* Parke. B. and *Thomas* v. Russell (1854) 9 Exch. 765, *per* Pollock, C.B. applied.

ACTION by Issri Persaud against Clifford Hugh Parsley claiming damages for libel alleged to be contained in a letter to one H. Chester bearing date 25th May, 1946, in reply to one from Chester to the defendant under date 20th May, 1946. At the close of the case for the plaintiff, the defendant submitted that there was no case to answer.

A. J. Parkes and *A. M. Edun*, for plaintiff.

E. M. Duke, acting Attorney-General, and *A. C. Brazao*, acting Solicitor-General, for defendant.

Cur. adv. vult.

The ruling of the trial judge was as follows:—

JACKSON, J. (Acting):

At the close of the case for the plaintiff counsel for the defendant submitted that there was no case to answer. He based his argument on two grounds:

That 1. the occasion on which the publication was made was privileged and that there was abundant evidence to support that fact

2. since the occasion was privileged then express malice must be shown, and the plaintiff had not discharged that burden inasmuch as there was no evidence of express malice on the part of the defendant against the plaintiff.

Counsel for the plaintiff replied that assuming the occasion to be privileged it could not afford protection to the alleged libel as it was irrelevant to the purpose of the inquiry by Chester, and further in any event the irrelevant statement is evidence of malice.

Perhaps I may say a word on the question of a submission at the close of plaintiff's case for such submissions are frequently made in these Courts. Generally the practice is before any ruling is made to put counsel for the defence to his election as to whether he would lead evidence or not; the practice is wholesome for it gives a court of appeal an opportunity to decide the whole case if a ruling of no case is not supported, rather than to send the case back for re-trial thus incurring to litigants much unnecessary expense and waste of time. Greene M.R. in the case of Laurie v. Raglan Building Co. 1942 1 K.B. (C.A.) said at p. 155 "After the evidence for the plaintiff had been concluded on the question of liability counsel for the defendants submitted that there was no case for him to answer. It is unfortunate, I think, that the learned judge did not follow the practice which ought to be followed in such cases, as has been quite clearly laid down in this court, of refusing to rule on the submission unless counsel for the defendant said that he was going to call no evidence. That must be regarded as the proper practice to follow." (See also Yuill v. Yuill 1945 61 T.L.R. 176).

There appears to be some suggestion of an exception in defamation cases for Goddard L.C.J, in Parry v. Aluminium Corporation Ltd. 1940 56 T.L.R. at p. 319 expressed himself thus "I do not say that is the right course in every kind of action, because in defamation cases, for instance, I believe there is authority for saying that if it is submitted that there is no evidence of malice the Judge is bound to rule; and also in slander case's if the submission is made that the words are not actionable without proof of special damage and no special damage is alleged. But I think that the old practice, which I believe most Judges adopted is the sound practice because it does prevent the chance of a defendant, unsuccessful in this Court, asking that the case should go back for a new trial to have his evidence heard."

The defence here relied mainly on the cases of Manby v. Witt 1856 18 C.B. 544, Clarke v. Mollyneaux 1877 3 Q.B.D. 237 and in Adam v. Ward 1917 A.C. some observations in the speech of Lord Atkinson at p. 339.

It is not I think open to question that the occasion on which

defendant wrote to Chester was a privileged one: Chester had made a definite complaint against Whyte and the burden of that complaint was that Whyte had demanded from him gifts of money and other things as an earnest of his being given work in the future. On the 20th May. 1946, Chester wrote defendant asking him to implement his promises to give him work, the reply to the letter of the 25th May is the basis of this action. Having regard to the authorities already cited and the case of Cooke v. Wildes 24 L.J. Q.B. 367—and it would be premature for me to discuss them now—I find the allegations against the plaintiff irrelevant and excessive and therefore some evidence of malice. I am fully aware that the burden of proving express malice or malice in fact is on the plaintiff and not on the defendant, and am equally conscious that on these occasions the language employed should not be submitted to too strict a scrutiny. I do not however propose at this stage to go into the sufficiency of that evidence along with other evidence for if the case had been tried by a jury it would not have been meet for me to ask the jury its view of the evidence before proceeding further. I adopt the language of Romer L.J. in the judgment of the Court in Alexander v. Rayson 1936 1 KB. (C.A.) at p. 178 and say I "cannot think it right that the judge of fact should be asked to express any opinion upon the evidence until the evidence is completed. Certainly no one would ever dream of asking a jury at the end of the plaintiff's case to say what verdict they would be prepared to give if the defendant called no evidence, and I fail to see why a judge should be asked such a question in cases where he and not a jury is the judge that has to determine the facts. In such cases I venture to think that the responsibility for not calling rebutting evidence should be upon the other party's counsel and upon no one else." My final assessment of the evidence would be made after the defence is formally closed.

I wish to add that since writing this ruling I have observed that in Russell v. Norfolk (Duke) and others 1948 1 A.E.R. 489, an action for damages for libel, Goddard L.C.J, said "At the close of the plaintiff's case counsel for the defendants submitted that there was no case to go to the jury. Having heard this submission and counsel for the plaintiff in reply, I asked counsel for defendants whether he elected to call evidence."

That is the method I adopt.

Evidence was led for the defence and counsel for the defendant and for the plaintiff made then submissions to the Court.

Cur. adv. vult.

JACKSON, J. (Acting)

The plaintiff brought an action against defendant for libel alleged to be contained in a letter to one H. Chester bearing date 25th May 1946 in reply to one from Chester to defendant under date 20th May 1946. The letters are set out: —

Bagotville, West Bank, Demerara.
20th May, 1946.

The District Engineer,
West Demerara.

Sir,

I beg to ask if it is possible for you to let me know if there

is any likelihood of my being employed and given work in the district of which I have to date waited on you.

2. Since January I have not obtained any employment in the service, especially since bringing to your notice of having to give part of my earnings to the overseer in the district. This I must say without any hesitation that my report to you is not by any way an isolated one; several other such matters was drawn to your attention, I was in conference with you, when you told me that you will go into the matter and will see that some work be given me.

3. I desire to bring to your notice that I have for the past 18 years worked as carpenter, and contractor, with several other overseers and have at no time found myself to give an overseer 50-50 for any work. I have taken your advice to wait on when employment would be given me.

4. I have spoken to Hon. Members of the Council of the state on conditions in which work is presently to be obtained. As I told you that others was also saying that you are in the know with 50-50, this being so it was just a question of patting the dark horse in order to prevent genuine grievance.

5. I shall be much obliged if you will be so good as to let me have an early intimation with your promises which I have patiently awaited with a large family still anxious to see my being employed.

6. Thanking you in advance for an early answer.

Yours respectfully.

Public Works Department,
Vreed-en-Hoop, W.B. Dem.
25th May, 1946.

Mr. H. Chester,
Bagotville.

I have before me your letter of 20th inst., and in reply to inform you that the letter you signed at the instigation of the Storekeeper, making certain allegations against overseer Whyte, was, as you say, not an isolated one, and a careful investigation has proved that they were part of an organised plot to discredit the overseer, and disciplinary action has been taken.

It is unfortunate also that you should have made a statement to the District Commissioner, which he took down, that is very much at variance with the letter you signed.

I do not understand your para: 4, but you are at liberty to tell "Hon. Members of the Council" whatever you like as long as you understand that any slanderous statements you might make will result in prosecution.

C. H. PARSLEY,
District Engineer,
West Demerara.

The innuendo pleaded was that "defendant meant and was understood to mean that the plaintiff was guilty of trickery underhand disloyalty or hypocrisy inasmuch as he schemed and plotted against a fellow employee namely Overseer Whyte and falsely accusing him of some offence whereby he the overseer if guilty could be dismissed."

The defence is in short

(i) The words are not defamatory and were not used in a defamatory sense.
(ii) The occasion was privileged and there was no malice
(iii) The defendant in the circumstances was under a duty to communicate the result of his investigation to Chester.

The plaintiff was a storekeeper in the West Demerara section of the Public Works Department; he was employed and stationed at Vreed-en-Hoop from January 1943, was transferred to Leonora in March 1946 and dismissed in November 1947. Defendant is the District Engineer and was in charge of that section from November 1943 to the present day; Herman Chester is a carpenter contractor who gets odd jobs from the department; Bruce Whyte is an overseer there; he was appointed in 1945; he had acted at one time previously as chief clerk; his substantive post during that acting period was timekeeper. Chester got his jobs from Whyte as overseer.

Plaintiff's story is that on the 24th January, 1946 Herman Chester spoke to one R. F. Haynes a surveyor attached to the West Demerara section of the Public Works Department: the latter took Chester to him plaintiff and asked him to write a complaint for Chester as he had no time to do it himself; plaintiff took down the facts in writing and typed the document of complaint which Chester signed; he gave the document and the carbon copy to Chester but kept the manuscript. The gist of the complaint was that overseer Whyte demanded of Chester certain gifts in kind and in coin with a threat that if he did not comply he would not be given any more work by Whyte. Chester complied in part. Chester had previously complained to Mr. Brandon, Superintendent of Works, who said he reported the matter to defendant soon after the Christmas holidays in December, 1945. Defendant has no recollection of this report; defendant's recollection is that his first intimation was the handing of Chester's complaint to him by plaintiff on the 5th February on defendant's return from Bartica whither he had travelled on or about the 24th January, 1946; on the 6th February plaintiff handed defendant a complaint purporting to come from one L. Massay; the complaint was in plaintiff's handwriting. Massay's complaint included an allegation that Whyte had demanded and received from him and one Howard a contractor who worked along with him a sum of $5.00 each after the end of a fortnight's work; that Whyte had threatened them in the presence of each other that if the money was not forthcoming they would cease to get work.

On the 7th February a pay day, defendant addressed the crowd to the effect that there was a nasty rumour going around and that if any overseer, foreman or contractor demanded bribes of any worker, or that if any worker offered any bribes he would cease to be employed. Defendant appealed to the people to lose no time in informing him if any such case should occur; some time later on the same day plaintiff told defendant that overseer Whyte was exacting bribes from a bullock driver and asked defendant to send for the man; defendant refused saying the man had heard his pronouncement at the pay table and should

himself go and make his report; defendant never requested plaintiff to collect complaints.

There was very bad feeling between plaintiff and Whyte even before the defendant was put in charge of the district in 1943; this relationship did not improve but grew worse; there were many quarrels between plaintiff and Whyte and each made complaints to defendant against the other many times; there were continual bickering; defendant had them up before him on several occasions. Plaintiff alleged that on the 5th October 1944 Whyte requested him to make an entry for nails and building materials, that he refused to do so as he had not seen the materials, Whyte thereafter insulted him and he assaulted Whyte; plaintiff in reporting this incident to defendant said he lost his temper. Plaintiff further alleged that at the time he reported his assault he mentioned to defendant that there was also a transaction in relation to bags where 1000 bags were paid for and only 800 were received by plaintiff. Plaintiff's case is that defendant wrote the letter to Chester because he wished to shield Whyte and that defendant's course of conduct showed malice against plaintiff, that he was determined to let plaintiff suffer so long as by doing that he would exculpate Whyte. Plaintiff referred to specific instances which will receive notice later.

At the trial counsel for the defence did not pursue the contention that the words complained of were not defamatory. He relied mainly on the submission that the occasion was privileged; he emphasised that the defendant owed a duty to Chester to tell him not only that he had made a false complaint against Whyte but also of all the circumstances on which his finding was based; that it was defendant's duty to make a full statement to Chester. It was further submitted at the close of the plaintiff's case that there was no evidence of malice. I gave a ruling along the lines of the practice acknowledged as such by the authorities and declined to determine the sufficiency or otherwise of evidence tending to show malice until the defence by election at that stage or after leading evidence had formally closed its case. (*Markbe v. George Edwards* (*Daly's Theater*) *Ltd and Another* 1928 1 K.B. 269 C.A.; *Alexander v. Rayson* 1936 1 K.B. (C.A.) 178; *Russell v. Norfolk* (*Duke*) *and others* 1948 1 A.E.R. 489). At any rate I did indicate that the language used was in my view excessive and therefore some evidence of malice.

How irrelevant or excessive material relates to a privileged occasion has received judicial attention. In *Adam v. Ward* 1917 A.C. at p. 340 in his judgment *Lord Atkinson* went on to say "What would be the effect of embodying separable foreign and irrelevant defamatory matter in a libel? Would it make the occasion of the publication of the libel no longer privileged to any extent, or would those portions of the libel which would have been within the protection of the privileged occasion, if they had stood alone and constituted the entire libel, still continue to be protected, the irrelevant matter not being privileged at all and furnishing possible evidence that the relevant portion was published with actual malice. In the absence of all guiding authority the latter would, in my opinion, be more consistent with justice and legal principle, and I think it is in law, the true result." *Lord Esher M.R.* in *Nevill v. Fine Arts and General*

Insurance Company. 1892 2 Q.B. at p. 170 in the following words, which found favour with and were adopted by *Lord Dunedin* (*Adam v. Ward*) pronounced on the subject:—"But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice. In none of the cases on the subject, so far as I know, has it been held that the privilege is taken away when there has been such an excessive statement, unless the jury has found that there was malice. I protest against the notion that a judge has a right to say that, if the jury find that the statement is excessive, though they decline to find actual malice, the law infers it. If the law did so, it would often be inferring what is not true. A man may use excessive language and yet have no malice in his mind."

It would be convenient to deal briefly with the evidence on which plaintiff relies in support of proof of malice along with the other evidence before the authorities are invoked for aid as to how far it falls within or short of the standard required. I do not consider it necessary to go into every detail. The first stage would extend to December 1945; the next to the writing of the letter of the 25th May 1946 and after. After the slapping incident in October, 1944 plaintiff's salary of $10.08 a week reduced to $8.64 a week; this reduction lasted for about 17 days after which the salary was restored; in the meantime Whyte was transferred to Georgetown. Plaintiff's salary was increased in September, 1945 from $10.08 to $11.90 a week. It should be obvious to anyone that some disciplinary action was urgently required to be taken after the incident and defendant's statement as to the cause of the reduction I accept and I reject the suggestion that it had any relation to a complaint about bags.

On the 19th December, 1944 defendant recommended plaintiff to be promoted as overseer; he commended him to the Director of Public Works in these terms: — "Issri Persaud is an excellent worker, very intelligent, and interested in everything pertaining to P.W.D. here. I should not like to lose him as storekeeper for which he is paid $10.08 a week, but he would make a very good overseer. I have told him that there are several other people who have prior claims (he has only 3 years' service) but pass on his application as requested and am glad to take this opportunity of acknowledging his good work."

Whyte returned to Vreed-en-hoop as overseer in January or February, 1945. Matters were not improved; according to plaintiff he distrusted Whyte since March or April, 1944, he thought him a dishonest man and not a fit and proper person to be an overseer; he had heard people say defendant was protecting Whyte. Despite the fact that Whyte and plaintiff were not on good terms and complaints had been made by both parties in turn to defendant and which might have caused defendant unnecessary worry, events according to plaintiff's version show that defendant held the scales at least in such a way as not to cause disruption of relationship between him and plaintiff up to the end of 1945; for plaintiff said "In December, 1945 there was very good relationship between me and defendant. I did not get the

office of overseer; Bruce Whyte got the office. Whyte and I were on just the same terms not worse. That was in 1945.

Defendant did not have any spite or ill will against me during 1945."In further testimony he continued that in December, 1945 he had heard people speak of the dishonesty of Whyte; he believed the people were right; he heard Chester, Massay and others say so; he went on "I was not in a position to say it was true; it was only what they said; I couldn't tell you if they were right or wrong, I distrusted Whyte since I found out the bag position." It was against this background plus the personal antipathy plaintiff had for Whyte that events began to move in 1946.

On or about the 5th February defendant received Chester's complaint from plaintiff; on the 6th February he received also from plaintiff Massay's complaint. On the 7th February defendant made the statement at the pay table to which reference has already been made. In view of the fact Whyte had also complained and of the hostile relationship between plaintiff and Whyte and of his investigations defendant decided to separate them. Defendant emphasised that he had no feeling against plaintiff but that his sole object was to separate them in the interest of the department. Why two men so openly opposed to each other and who were carrying on a ceaseless warfare with each other were permitted to work in or about the same office passes my comprehension; a separation was inevitable and I cannot see anything wrong in the transfer of the plaintiff in the circumstances to a similar post at Leonora at the same salary, even though such transfer caused him to forego or lose extra remuneration not attachable to his office.

Notice must be taken of two incidents which flowed from plaintiff’s transfer to Leonora. Plaintiff continued to live at Vreed-en-hoop and travelled to and from his workplace along with the other clerks by one of the Department's lorries. Mr. Pile the overseer under whom he worked and other members of the staff travelled by the same opportunity. In June, 1946 three months after his transfer plaintiff was prevented from using the lorry while the others continued only to be prevented also some time later; plaintiff thereafter received a bicycle allowance of $2.00 a month which was stopped in February, 1947.

It was argued for the plaintiff that the facility for getting to his workplace was removed from him by defendant in pursuance of a feeling of ill will against plaintiff and with the object of providing cover for the misdeeds of Whyte; further it was pressed that the discontinuance of the cycle allowance had the same objective. Both these incidents took place after the 25th May, 1946 when the alleged defamatory letter was written; nevertheless subsequent events may bear such relation to what had preceded them as may assist an investigator in discovering the motive and reason for antecedent acts.

Pile who was called by the plaintiff said under cross-examination "The hours for the store were from 7 a.m. to 4 p.m. and the lorry did not get to Leonora before 8 a.m.;" there is no dispute as to the hours of work; this meant that everyday plaintiff travelled by the lorry he was one hour late for work: it would appear that it was for precisely the same reason of

ensuring that officers got to work on time that the concession of travelling by lorry was withdrawn from the others. Pile also stated "I told defendant in March. 1947 that there was no need for plaintiff to have a bicycle allowance, I did so as he had stopped going to town to buy materials……..The bicycle allowance was stopped after I had been asked for my opinion and had expressed it as I had stated before." Plaintiff's out of pocket expenses for travelling from Vreed-en-hoop to Leonora were later allowed him instead.

A considerable amount of evidence was adduced to show that in or about April, 1944 1,000 empty bags were paid for on an order whereas only 800 bags were received; that Whyte was dishonestly connected with the transaction and that the defendant when the matter was brought to his notice by plaintiff in October, 1944 took no action; defendant denied that plaintiff called his attention to the transaction. Mr. Da Silva's recollection was that when plaintiff reported the assault on Whyte in October, 1944 plaintiff told defendant that he had a previous transaction which he wanted defendant to settle at once; that defendant replied he would look into it. Surely that was a moment when plaintiff was agitated; the burden of his story was that Whyte had insulted him and he had slapped Whyte his senior officer. Defendant was engaged in conversation with Da Silva and any incidental remark about a previous transaction might have passed unnoticed in view of the fact that defendant had decided to look into the matter of the incident. Although great stress was laid upon the suggested improper transaction I am unable to say from a perusal of the documentary evidence and from a consideration of the oral evidence adduced that there was indeed a loss to the department of 200 bags or a payment in respect of that number of bags which should not have been made. For a satisfactory conclusion to be reached here other persons who appeared to have had intimate concern with those transactions would have to be examined.

The words complained of as I have already indicated admit of a defamatory meaning and I have already ruled that the occasion was a privileged one. I had also stated that I thought the language excessive *i.e.* an excessive statement having reference to a privileged occasion and therefore left the question of malice open to the end of the case. The argument of counsel for the defence was that defendant was charged with a duty to make a statement to Chester that the complaint was false and a disclosure of the circumstances on which his finding was based. He cited the case of *Manby v. Witt* 1856 18 *C.B.* 544; there the defendant had dismissed two of his servants the cook and the footman; each of them separately had demanded the reason for dismissal whereupon defendant informed each in the absence of the other that he was dismissed because both of them had robbed him. *Jervis C.J.* held there was no evidence of malice as defendant when he accused the cook of robbing him was obliged to tell her with whom she was charged with having acted and so in the other case he was bound to name his accomplice. The present case is not analogous; Chester wanted to know whether there was any likelihood of his getting employment with the department in the future; he reminded defendant that the latter

had promised to look into his complaint and see that some work was given to him; undoubtedly the reply had to abide the result of the inquiry. I think it would have been in order if defendant had replied that he had found the allegations groundless and that the letter which complainant with the assistance of the storekeeper signed was part of an organised plot to discredit the overseer; the introduction of the words "at the instigation of the storekeeper" taken in conjunction with the allegation makes the statement extravagant for the purposes of Chester's question and the statement is by itself some evidence of malice.

The law is well settled that the onus of proving malice is on the plaintiff, and it is equally settled that the malice must be actual or express malice. The defence submitted that in order for the plaintiff to succeed he must establish actual malice by showing that defendant used the privileged occasion to vent his spite or ill will. I think that puts the proposition too narrowly; it cannot be thus limited for in *Clarke v. Mollyneaux* 1877 3 *Q.B.* at p. 249 *Cotton L.J.* clearly stated the law thus:— "When once the learned judge had laid down that the occasion was privileged, the only question for the jury to consider was whether the defendant acted from a sense of duty or was actuated by some improper motive, and the onus of proving that the defendant was influenced by some improper motive, that is that he acted maliciously was on the plaintiff."

I do not find in any of the incidents referred to in course of the trial or those relied on by the plaintiff that the defendant was actuated by any spite or ill will. The stopping of the travelling by bus and that of the cycle allowance are both satisfactorily explained by plaintiff's own witness Pile; the story about Wilfred arose when defendant was out of the colony and the investigation which followed in March, 1946 was carried out purely on the instructions of the Director of Public Works; as the documentary evidence establishes; reference has already been made to the transaction of 1,000 bags. With respect to the separation of Whyte and plaintiff in 1946 I am of opinion having regard to the evidence, that such action was far too long delayed; this excessive tolerance of conduct which must undermine the discipline of any properly worked department seems to reflect either incompetence or culpable weakness in the departmental administration; it is indeed a serious blemish in the administration.

It would however be creeping into fallacy to assert that these findings on the separate issues put an end to the investigation. The whole conduct of the defendant must be scrutinised both before and after the writing of the offending letter in order to ascertain as far as possible what motivated the expressions employed or whether the words were written with a reckless abandon, the defendant not caring whether they be true or false. The part played by the plaintiff must not be overlooked. In so far as the words are concerned my view is though they might have been more happily selected they are not to be weighed in nice and delicate scales; at least there is authority for saying they should not be subjected to too severe a scrutiny for *Sir Robert Collier* in delivering the judgment of the *Board of the Privy Council* in *Laughton v. The Bishop of Sodor & Man* 1872 L.R. 4 P.C. at p. 508 observed: — "To submit the language of

privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications."

In the instant case Brandon called for the plaintiff said he knew that defendant had investigated Massay's complaint; that he had himself interviewed Howard in respect of that complaint; that he had taken a statement from Howard in the presence of the Chief Clerk, one Fraser. Howard had since died. The statement after being taken was given to defendant. The statement was tendered in cross-examination. Counsel for plaintiff objected, then asked that it be admitted subject to his submitting argument and authority against its admission. Defendant sent for Howard, Howard was ill; he then sent Brandon and Fraser to get a statement from him; they brought it. Howard denied what Massay had said. Massay's complaint is fully set out in. the defence. I have had the benefit of counsel's argument which was based on the following grounds as he put it (i) it is hearsay (ii) it is the statement of deceased person in a form which is not admissible (iii) it is giving evidence of justification which is not admissible. In this class of case I understand the law to be different; *Gatley on Libel* & *Slander* (Second Edition) at p.744 summarised the law in this way "As soon as the Judge has ruled that the occasion is privileged, he (defendant) may anticipate an effort on the part of the plaintiff to rebut the presumption by any means open to him and with a view of combating whatever case the plaintiff may endeavour to make to establish express malice, give evidence of any facts which go to prove that he honestly believed that the charge was true, notwithstanding the effect of such evidence is to prove that the charge is true. The defendant may for example give in evidence, as the materials on which he based the charge, statements made to him by third persons, even though the plaintiff was not present when such statements were made, and also call such persons to testify as to the statements which they made to him." Baron Parke as far back as 1833 in *Cockayne v. Hodgkinson* 5 C. & P. 545 recognised the principle and *Pollock C.B.* in *Thomas v. Russell* 1854 9 Exch. at p. 765 approved that such evidence could be given to prove bona fides and that it was competent for a defendant to prove any communication made to him on which he might form an opinion. The statement was really what Brandon said to defendant, defendant had seen it and it no doubt was one of the factors which helped to influence his opinion; the fact that Howard is dead matters little, what matters is what Brandon told defendant who had been sent by defendant for that purpose. In my view the document was properly admitted.

Defendant stated that he had investigated the complaints made by Chester and Massay; that as a result of his investigations he was of opinion that plaintiff was carrying on his old vendetta against Whyte. It is curious however that Chester never told Brandon he had given Whyte $5.00 whereas in his complaint and in his evidence he said he gave Whyte $5.00; his story to Brandon Was that he was asked for some cash but that he had none, Chester's account differed from plaintiff's as to

the manner how the typing of the complaint was done whether it was from Chester's dictation or from a draft or both and as to the ultimate disposal of the copy; Chester seemed very uncertain about the whole affair; his evidence was imprecise and far from convincing.

The question of fair comment was raised as a defence but was not argued for defendant. There arises no need to discuss it as the course of the whole case turned in other channels. Counsel for plaintiff in his opening contended that the words objected to were irrelevant and in his final address urged very strongly that the cumulative effect of the evidence was that the defendant was guilty of malice. Cases will always occur when words will slip from the pen before they could be bridled and often enough Courts will be called upon to decide whether the author should or should not be penalised; and the courts would at all times look to the state of mind of the defendant if malice is to be proved for in such event defendant's state of mind would be directly in issue. After all the reference to the plaintiff in the letter to Chester is not so alien as to be wholly unconnected with the interest of duty which gave rise to the privilege; plaintiff took an active part in the attempted dethronement of Whyte and his utterances as to his deep rooted opinion of Whyte's probity cannot be overlooked. I accept defendant's evidence that he never bore nor does he bear any feelings of resentment towards plaintiff. If plaintiff's case be put at its highest the facts reveal the assessment to be far more consistent with innocence than with guilty purpose. I find that defendant in publishing the letter of the 25th May, 1946 was not actuated by spite or ill-will or by any improper motive whatsoever; that he was not impelled by any desire to shield Whyte or anyone else, but on the contrary he was prompted mainly by a sense of duty and the composition was his effort in the conscientious exercise of that duty. I hold that at the time of the publication defendant honestly believed the plaintiff's conduct to be such as he described it and there was an absence of that recklessness as would show him to be regardless of the effect of his publication; nor indeed can I find that he was so moved by anger or hatred as to lead him to the excessive expressions.

Plaintiff has failed to establish that defendant was actuated by malice and has therefore not discharged the onus cast upon him. The claim is therefore dismissed and there shall be judgment for the defendant with costs.

Judgment for defendant.

Solicitors: *W. D. Dinally; Vivian C. Dias*

REPORT OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1948

THE WEST INDIAN COURT OF APPEAL

[1948]

AND IN

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

[1948.]

EDITED BY
E. MORTIMER DUKE, LLB., (LOND.),
Barrister-at-Law, Middle Temple ; Solicitor-General, British Guiana.

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