JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1949.

SIR NEWNHAM ARTHUR WORLEY, KT.	— Chief Justice.
JOSEPH ALEXANDER LUCKHOO, K.C.	— First Puisne Judge (From 1st January, 1949 to 30th June, 1949).
ERSKINE RUEUL LA TOURETTE WARD	— Second Puisne Judge. Acted as 1st Puisne Judge from 1st July, to 31st December.
DONALD EDWARD JACKSON	— Acting Second Puisne Judge. (From 1st January to 23rd October).
RICHARD JOSEPH MANNING	— Additional Judge.

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 (1949) L.R.B.G.

LIST OF CASES REPORTED

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CASES

DETERMINED IN THE

Supreme Court of British Guiana.

GEORGE MAYO GONSALVES,

Plaintiff,

v.

T. GEDDES GRANT, LTD.,

Defendants.

1945. No. 471.—DEMERARA

BEFORE LUCKHOO, J.

1948. DECEMBER 1, 2, 3, 6, 7, 8, 9; 1949. JANUARY 6.

Bailors—for reward—destruction of property in possession by fire—failure to protect property from loss or destruction—acquiescence—"estoppel—waiver.

No person is estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or abstain from doing something, by reason of what he had said or done, or omitted to say or do.

Ex parte Adamson, In re *Collier* (1878) L.R. 8 Ch D. 807, 817, C.A. applied.

A plea of estoppel fails if the statement on which it is founded is not sufficiently clear and, unqualified.

Canada and Dominion Sugar Co. Ltd v. *Canadian National* (*West Indies*) *Steamships Ltd.* (1947) A.C. 46.

Estoppel is not a cause of action. It may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.

Estoppel is a rule of evidence which comes into operation: —

(a) if a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or someone on his behalf;

(b) with the intention that the plaintiff should act upon the faith of the statement; and

(c) the plaintiff does act upon the faith of the statement;

Nippon Menkua Kabu Shiki Kaisha v. Dawsons Bank Ltd. 51 LL. L.R. 147, Privy Council.

The facts are fully set out in the judgment.

L. M. F. Cabral, for the plaintiff.
H. C. Humphrys, K.C., and *W. J. Gilchrist,* for the defendants.

Cur. adv. vult.

LUCKHOO, J.:

This case raises for consideration several interesting points of law with respect to the liability of a bailee for the loss or destruction whilst in his possession of an article entrusted to him under a contract to perform repairs thereto where a term of the contract exempts him from liability in certain circumstances, and the duty imposed on him to protect such article from loss or destruction where such a term either does not cover the particular event causing loss, or in the absence of such a term.

The nature of the claim of the plaintiff is threefold — (a) the failure of the defendants to carry out an oral agreement alleged to have been entered between him and them on the 29th day of October, 1944, whereby the defendants for valuable consideration agreed to over-haul, repair and repaint the plaintiff's Ford V8 Motor Car No. 4757 and deliver it to the plaintiff before Xmas 1944, the time for such service and delivery being extended by him to mid-January, 1945, and further and finally extended to the 8th day of February, 1945; (b) the wrongful detention of the said car by the defendants after their failure to complete the work to be done until it was destroyed by fire whilst in their possession on the 23rd day of February, 1945; and (c) as bailees for reward that they failed to take due or proper care in keeping and|or preserving it from damage or destruction by the said fire.

The defendants whilst admitting that the motor car was delivered and entrusted to them on the 29th day of October, 1944, denied the terms of the agreement as alleged by the plaintiff. In their defence they pleaded that on the 21st day of November, 1944, the plaintiff signed a repair order form of the defendants for certain repairs and renovation to be done to his car but with no specific time for the performance by them of such work, or any date fixed for the re-delivery of the car. They further pleaded that their agreement was qualified by a notice on the repair order form which clearly stipulated that they were not to be responsible for loss or damage due to fire, accidental or otherwise, in which case they contend that they should be under no liability for loss or damage due to such a fire. They admit that after repairs and repainting had been done to the car which was ready to be delivered on the 24th February, 1945, the plaintiff having been informed of this fact on the 21st day of February, a fire occurred on the 23rd February, not on their premises but which however spread to theirs and destroyed the plaintiff's car. In the circumstances they contend that the notice precludes the plaintiff from recovering the value of the car destroyed and further as bailees they did not fail to take due or proper care of the said car the loss of which was not caused by any negligence on act or default of them or their servants. They counter-claimed for the sum of $539.02 as an amount due and owing by the plain-

tiff in respect of the work done and performed by them and others to the car, and the value of parts supplied. This counterclaim the plaintiff resists on the ground of a vital breach and repudiation of the agreement alleged by him.

These shortly were the main issues raised on the pleadings.

The plaintiff is a surgeon dentist and has been practising his profession for the past 13 years in the town of New Amsterdam, and at Leeds, No. 63 and Skeldon on the Corentyne Coast of the County of Berbice which are respectively 33, 39 and 47 miles from New Amsterdam where the plaintiff's main surgery is situate. His visits to his branch surgeries or offices were at least once per month to each place. In March 1941, the plaintiff, purchased a second-hand motor car No. 4757 a Ford V 8 from Booker Bros. for the sum of $750:— and spent a further sum of $300:— for repairs. This car he used in the course of his professional business on the Corentyne as well as for social purposes. Apart from hire-cars and motor buses which ply between New Amsterdam and Skeldon there are no other means of transport between these two places. In the year 1944, the plaintiff's car covered 400 to 500 miles per month.

It would appear that on Saturday the 28th day of October, 1944, the plaintiff and one Ernest Fraser, a mechanic, left Rosignol for Georgetown, and on the way the car gave trouble. In consequence they stopped for the night at Triumph Village, nine miles from Georgetown. On the following day the oar was driven to the premises of the defendants at 46 Water Street, Georgetown.

The defendants carry on the business of agents for the sale of Ford V 8 cars, motor parts and accessories and at all material times undertook repairs to motor vehicles. In charge of their repair shop was one Arnold Randolph Sills a mechanic of 25 years experience who occupied the position of foreman for five years of the repair shop until its destruction by fire.

Not finding Arnold Sills there, the plaintiff sought him out at his (Sills') home and together they went to 46 Water Street, when after some discussion between them the car was pushed into the repair shop for the purpose of being repaired. It has not been contested by the defendants that Sills was their foreman and as such was authorised to enter into contracts on their behalf for repairs and renovation to motor vehicles and to fix amounts and the times for the performance of such work.

What therefore was the contract entered into for the over-hauling, repairs and repainting of the car?

The plaintiff's version is that he asked Sills to examine the car and to say what it would cost for repairs. That Sills did so but told him he could not then give an estimate as he had first to dismantle the car which would take him three days. Sills, however, told him that it would cost about $350:— and perhaps a little less. He (plaintiff) then enquired within what time he would get delivery as it would be inconvenient for him to be without a car for long in view of his practice as a dentist, and that Sills told him he would have the car for Xmas. In answer

to Mr. Humphrys plaintiff admitted that the car needed substantial repairs and Sills told him he had to make a detail examination.

Ernest Fraser a motor mechanic of New Amsterdam who drove the car from Rosignol on the Saturday and spoke about the coils giving trouble said he told Sills what was wrong after which the plaintiff mentioned that he wanted the defendants to do a complete over-haul and spray paint the car. The plaintiff then enquired the cost and that Sills after examining the car mentioned about $350:—after which plaintiff stated he wanted the car as early as possible, before Xmas, whereupon Sills answered "he would try". Part of Fraser's examination in chief was taken before the luncheon adjournment of the Court on the second day of hearing and at the resumption this witness in further answer to counsel for the plaintiff deposed that the plaintiff told Sills he did not want him to try, he must be sure, and Sills then said he is sure to finish the car before Xmas.

Sills' version of what transpired that Sunday is as follows: — "The doctor said he wanted the car to be overhauled and to be put in perfect order. I said I would not check the car today being Sunday but will do so the following day and would let him know by letter what was to be done to the car and roughly the cost. I did nothing to the car. I did not examine it. We pushed it into the shop and closed the premises. The doctor did not name any definite day when he wanted the car. I did not give him an estimate as to what the car would cost and when he could obtain delivery." "Monday I examined the car and got a welder in to give an approximate idea as to what it would cost."

In order to determine whether any definite time had been fixed for the repairs and re-delivery of the car to the plaintiff, and bearing in mind that the onus is on him to satisfy me as to terms of the contract on which he relies, it will be necessary to examine the acts and conduct of Sills prior to the repair order form which the plaintiff signed at the defendants' premises on the 21st November, 1944.

On Monday the 30th October, Sills dismantled the car and began to execute repairs to the engine. He got in touch with a welder one Man-Son-Hing early in November and obtained an estimate for welding. The next thing Sills did was to write to the plaintiff the letter dated 16th November 1944, Exhibit G.M.G.l. In that letter Sills mentioned that he had found the chassis and body to be in a very bad state and asked the plaintiff, to come to Georgetown to see the condition himself before repairs were effected. Ha mentioned that he had already over-hauled the engine and would like to get on with the remainder of the work. He gave the estimate for the whole job save for the brakes which, he asked plaintiff to obtain from the mechanic in Berbice (refering no doubt to Walter Fraser).

After examining the evidence of the plaintiff and Fraser and that of Sills and the steps he took I have come to the conclusion that the plaintiff entrusted his car with the defendants for the purposes aforesaid, and that after a cursory examination of it by

Sills he gave a rough estimate of the cost, not binding, until he was able to dismantle the car examine it carefully and receive an estimate for welding. Plaintiff who was anxious to get the work done as early as possible as he had to use the car in his profession did ask Sills if it were possible for him to get delivery before Xmas, but that Sills' answers were he would try, he would do his best and give him the car repaired as early as he could.

On the receipt of the letter from Sills, plaintiff came to Georgetown and signed the repair order form Exhibit G.M.G. 2 undertaking to pay the sum of $371:—for overhauling engine (then already done) and steering, welding and spraying body. There was no charge yet for overhauling brakes. It would appear that the mechanic in Berbice had some time previous to the 29th October taken down the rear brakes and Sills had asked for the parts in his letter of the 16th November.

When he signed the repair order form plaintiff stated that Sills told him with the cost of the brakes added to the estimate as shown in Exhibit G.M.G. 2 the whole job would cost not more than $400:— The car had been sent to the welder on the 10th November apparently for the purpose of being examined and the cost of welding estimated. From the record produced by the defendants they received back the car, after welding had been done, on the 18th December. On the 20th December when the plaintiff returned to Georgetown as he said to obtain delivery of the car completely overhauled, repaired and painted as originally promised he observed from its condition that it could not have been finished for delivery before Xmas. He said he then remonstrated with Sills and told him he had let him down as he would not get the car as he (Sills) had promised, and the inconvenience he would suffer, that Sills made excuses and mentioned the defendants had many things to do, but they will let him have the car positively by the middle of January, 1945.

Was a specific time for the delivery of the car completely overhauled, repaired and painted fixed on that occasion?

It is clear from the evidence that the engine had already been overhauled, and welding done by Man-Son-Hing. Could Sills have promised delivery by mid-January? There again I have to consider his version of what occurred on the 20th December and his acts and conduct in relation to the alleged fixed time for delivery. This is what Sills said.

"When the plaintiff came a few days before Xmas he did not express any disappointment about the car not being ready for delivery before Xmas. The doctor might have asked me when he would get delivery of his car when he came about Xmas time." Sills admitted in cross-examination that towards the latter part of December he began to send messages to the plaintiff by several persons from New Amsterdam being anxious to convey to the plaintiff that the balance of work to be done was progressing.

Weighing carefully the evidence of the two different versions, and closely observing the demeanour of the witnesses as they gave their testimony on this point, I have come to the conclusion that Sills did promise re-delivery to the plaintiff of the car in its

finished state by mid-January. I do not accept the evidence of Sills that it was not possible to have the work completed by that time in view of the disclosures contained in the working sheet produced by him Exhibit A.R.S.l. It would be hard for me to reconcile his evidence that no time had been fixed with his anxiety to inform the plaintiff by several messages of the progress of the work and to repress any further remonstrances from him. This view is strengthened by the return to Georgetown on the 13th January, of the plaintiff to the premises of the defendants. There he found that not much more had been done to the car since his last visit, 24 days previously. He deposed to the fact that he had a quarrel with Sills. He told Sills in no mistaken terms of his disappointment. Sills he said asked him not to be vexed as the whole truth of the matter was that many cars had been coming into the garage to be put in order for examination for certificates of fitness by the police for the New Year, and that was the reason why he had not finished the car as he had promised on the second occasion.

However, it would appear that plaintiff then waived his right to the performance of the contract by mid-January for on certain calculations he alleged being made by Sills on that visit and the promise that he would definitely have the car at the end of the first week in February, he was content to let the matter rest.

On the 7th February, Sills realising that it was not possible for the car to be ready for delivery by the end of the first week (which does not necessarily mean the first Saturday of the month) either sent or from information supplied by him his principals (the defendants) sent a telegram to the plaintiff couched as follows: — "Car still painting will notify when ready."

In view of this message the plaintiff stated he postponed his visit to Georgetown in order to give the defendants an opportunity to complete the painting. On the 13th February, he travelled to Georgetown to find on his arrival that his car was only then being sand-papered preliminary to being painted. He did not find Sills but saw a workman one France who referred him to someone in the office who in turn told him he (plaintiff) must see Sills. Plaintiff attempted to get in touch with Sills but did not see him, and stated he was prepared to take away his car just as it was had it not been for the fact that the gasolene tank and other parts were on the floor of the work shop. Returning to New Amsterdam he endeavoured to speak to Sills over the telephone but without success. As a result of this, on or about the 15th February, he wrote Sills informing him that he was very disgusted and asked for delivery of his car at once, as he (plaintiff) intended to make arrangements otherwise to have his car finished. He also wrote that he was prepared to pay the company (defendants) for all the work they had done up to that point, and that he expected a very urgent reply from him. Plaintiff denied that he had any conversation with Sills after the letter of the 15th February. Sills did not tell him that the car was being polished and would be ready for delivery on the 24th February.

Sills admitted that a telegram was sent by the defendants on the 7th February, but in fact no actual painting had begun. He denied the receipt of a letter of the 15th February, but admitted that he sent several messages to the plaintiff by persons from Berbice so that plaintiff may be made aware as to the progress of the work on the car. This he did up to the afternoon of the 23rd February.

After anxiously examining and weighing the evidence of these two witnesses I have come to the conclusion that the testimony of the plaintiff is the more reliable and 1 accept it.

Sills was most concerned after his failure to deliver the car at the end of the first week in February and endeavoured to appease, which he did for a time, plaintiff's anger as a result of the failure by the defendants to carry out the terms of their agreement. Sills' evidence is not reconcilable and compatible with his general conduct. He or his principals conveyed a false impression on the 7th February that the car was being painted when as a matter of fact it had not yet been sandpapered. Ordinarily there would be no necessity for this misrepresentation.

There can be no dispute that the burden is on the plaintiff to satisfy me where no time was originally fixed for the performance of the contract that he who insists upon some change must prove such a term. This however does not prevent both parties from mutually agreeing to fix a time not originally agreed upon.

In applying my mind to the consideration of this point I guarded against the possibility of any evidence which might have been manufactured to create a superstructure of belief founded on the telegram of the 7th February as indicative of a time limit for the performance of the contract.

I realised that subject to the points raised by Mr. Humphrys' arguments as to estoppel by acquiescence and waiver, the plaintiff's claim in the main must succeed or fail on this issue.

On numerous occasions judges have mentioned the desirability of the precise terms of a contract being reduced into writing, for their time has unreasonably been engaged in ferreting out terms which could easily have been so reduced. It is only just that he who alleges something of a vital nature should have the entire burden thrown upon him to establish it. Not only have I in this case guarded against the possibility of any deception, but have held the brakes as tightly as possible lest I should fall in the reverse gear.

Apart from the respective testimony of the plaintiff and Sills there were abundant natural circumstances, not created, which in my view warrant me in finding as I have done on this point.

Sills knew the plaintiff used the car in his profession and wished to have the same repaired and repainted as early as possible. He actually began repairs on the engine on the 30th October before even submitting a written estimate. He completely over-hauled the engine in his desire to help the plaintiff and to save time. Principally for getting delivery of his car plaintiff came to Georgetown on three occasions. He was most anxious to obtain same as not only had he to abandon his regular monthly visits to his offices on the Corentyne, but car hire for that purpose was expensive.

Mr. Cabral in his address pointed out that had no time subsequent to the signing of the repair order form by the plaintiff been fixed, there would have been no necessity to send such an urgent means of communication on the 7th February of which the material fact was untrue; and he laid stress on the words *"will notify you when ready"* — connoting thereby a postponement of some fixed limit. Further, Sills' solicitude to placate the plaintiff by his many messages was an involuntary revelation that he had failed to observe an important term to which he had agreed. Finally, confirmation of plaintiff's testimony that at some stage time was of the essence of the contract could be found in plaintiff's letter of the 26th February 1945 to the defendants soon after the fire in which he alleged defendants made excuse for their non-performance. In my view there could hardly have been any time for invention of this fact by the plaintiff. He may or may not have known that motor repair shops are busy in the month of January in each year as was admitted by Sills. He also soon after, in March, applied to the Postmaster General for a certified copy of the telegram of the 7th February.

Mr. Humphrys strenuously contended that time not having been originally made of the essence of the contract by the express stipulation of the contracting parties, one must, in weighing the probabilities that the parties had subsequently agreed to a fixed time, look at the amount of work which had to be done on the car and other circumstances from which such a conclusion should be drawn.

I need not reiterate the facts as I have found them to be but, they all, in my opinion, tend in the direction in support of the plaintiff's testimony. No doubt what remained to be done on the 20th December when the plaintiff alleged that the defendants agreed to deliver the car by mid-January is of importance although by no means the only relevant fact. That Sills was most anxious to have conveyed to the plaintiff the progress of the work on the car, the desirability of the plaintiff to have early delivery of the car for use in his profession are equally relevant facts.

Learned counsel for the defendants urged in a very forceful address that after the 8th February the plaintiff could no longer rely on that date as the time for performance of the contract as he permitted the defendants to retain and perform work on the car. Under what circumstances did plaintiff permit such work to be done? It is clear from the wording of the telegram and the ordinary meaning it would convey to anyone that painting was in progress and he will be notified when the car was ready for delivery. Not having heard from the defendants for six days plaintiff journeyed to Georgetown and discovered that the statement on which he acted was false and misleading. If this is a reasonable interpretation of his behaviour and I can find no escape from it then the submission of counsel for the defendants that it amounted to one of leave and licence would be in the teeth of the authority of *Dobson anor.* v. *Espie* 2 H. & N. p. 79 where it was held that leave and licence cannot be pleaded to a breach of contract. It will be necessary for the defendants to show exoneration or discharge to free them from liability.

Has the plaintiff so conducted himself as to justify the defendants in believing that he had consented to a nullification of the term of the oral agreement as to time and to substitute a reasonable time within which they were to complete the spray painting of the car?

I should not have been sorry if I could have put this construction on the acts of the parties in view of the fact that the fire which consumed the premises of the defendants and several cars therein was the result of a fire which had its origin in premises some distance away through no fault whatever of the defendants; but I am unable to do so. There was nothing in the conduct of the plaintiff from which I could justifiably conclude that the last agreement as to time was no longer to have validity. All that could be urged is that the plaintiff by his conduct was willing to allow a few days more after the 7th February in order that the defendants should complete the spray painting of his car and such willingness was based on a representation of the defendants that painting had actually begun on the car. In the circumstances I am clearly of opinion and so find that the plaintiff at no time gave any ground for the view that he had consented to any delay after the 7th February to have his car delivered to him.

After the case for the defendants was closed plaintiff's counsel applied for and was granted an amendment to paragraph 8 of the Statement of Claim the material part of which reads "The defendants however failed to complete the said work or return the car by the 8th day of February, 1945, and repudiated the aforesaid agreement by their said conduct which repudiation was accepted by the plaintiff". This plaintiff's counsel urged was necessitated by the evidence of the plaintiff after he was recalled at the instance of counsel for the defendants, who in their amended defence after denying such repudiation pleaded that by permitting his car to remain in their possession and by permitting further work to be done on the car the plaintiff acquiesced in and condoned the said repudiation and is consequently estopped from complaining against them in respect thereof or claiming damages resulting therefrom.

This amendment gave the right to the defendants to argue the doctrine of estoppel based on acquiescence; and waiver although not pleaded crept within the framework of their counsel's submissions.

Mr. Humphrys contended that when, on the 13th day of February, plaintiff discovered the true position he should have demanded delivery of the car and not to allow it to remain on the premises of the defendants for further work to be done on it, in which case he must be taken to have acquiesced in the retention by the defendants of the car for the purpose of completing the work.

Plaintiff's counsel's answer was there could be no acquiescence, for whilst it is true that plaintiff was not actually refused delivery of the car he was unsuccessful in getting in touch with Sills, and with the wheels off, gasolene tank and other parts on the floor of the repair shop, it was not possible for him to drive the car out of the premises.

If I believe the evidence of the plaintiff as to what occurred on his visit on the 13th February, and that he did write to Sills on the 15th February in terms already stated it would be against the well-known principle on which the plea of acquiescence could be established.

Acquiescence it is true need not be manifested by any positive act, the question is whether there is sufficient evidence to show quiescence under such circumstances that assent may be reasonably inferred from it. If under a mistaken belief the plaintiff was induced by some misrepresentation of the defendants to allow his car to remain after the 7th February the doctrine of acquiescence cannot apply.

The plaintiff's evidence that he sent the letter of the 15th February in my opinion finds corroboration in the evidence of Gavin Kennard at present occupying the post of Government Marketing Officer in Georgetown, and in 1945 of Government Agricultural Superintendent in New Amsterdam. He said that Sills, who admitted speaking to him on the 22nd February, showed him a letter which he (Sills) had received from the plaintiff and in which he (plaintiff) had complained that he had been put off from time to time (referring to the delivery of the car). That he had demanded immediate delivery as he wanted the job completed elsewhere. Sills did not admit the receipt of any such letter and counsel for the defendants urged upon me to consider whether, if such letter had been sent, the plaintiff would not have made reference to it in his letter of the 26th February. But plaintiff's remissness in this respect can hardly outweigh the positive testimony of Kennard which I accept, and against whose integrity nothing was urged. Sills' silence in not replying to that letter of the 15th February is consistent with his messages to the plaintiff up to the day of the fire in his anxiety to make amends.

I can find nothing in the conduct of the plaintiff which could reasonably have induced the defendants to believe that he was no longer relying upon his agreement as to time, and in the words of *Spencer—Bower* on Estoppel by Representation at p.214 "that he definitely intended to adopt one course and definitely to reject or relinquish the other, and in that belief the other party is misled and alters his position to his detriment. He could not properly resort afterwards to the course which he has thus deliberately declared his intention of rejecting."

It is sometimes said that a person may be estopped if by words, or by conduct or inaction he represents to the other party litigant his intention to adopt one of two alternative positions, with the result that the latter is thereby encouraged to persevere in a line of conduct which he otherwise would not have taken.

And in the case of *Ex parte Adamson In re Collie* (1878) 8 Ch. D. 807 L.J. James at p. 817 said

> "Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or abstain from doing something, by reason of what he had said or done, or omitted to say or do."

But the plea of estoppel would fail if the statement on which

it is founded is not sufficiently clear and unqualified.

The defendants have relied on the fact that the plaintiff after the receipt by him of the telegram of the 7th February permitted further work to be done on the car and is consequently estopped from asserting that there was a breach of the contract.

For such a plea to prevail it must be shown that both parties acted on a statement which was true, sufficiently clear in its meaning and unambiguous.

A very recent and interesting case is that of *"Canada and Dominion Sugar Co. Ltd."* and *"Canadian National (West Indies) Steamships Ltd."* (1947) A.C. 46 where the nature of estoppel was considered. It was an appeal from a judgment of the Supreme Court of Canada. In the action out of which this appeal arose the appellants, as buyers under a c.i.f. contract and as assignees of the bill of lading, claimed damages for breach of contract of carriage of 1,150 tons — 10,350 bags — of Demerara raw cane sugar from Georgetown, British Guiana, to Montreal on the respondents' steamship Colborne, which sailed on June 14, 1938. It was stated for the appellants that at the time of loading many of the bags of sugar were wet and stained, and) that when the sugar reached Montreal about thirty per cent. — 3,105 bags — were wet and damaged. The bill of lading stated that the sugar was "received in apparent good order and condition." In the margin of the bill there were inserted the words "signed under guarantee to produce ship's clean receipt." Clause 27 of the bill of lading provided that “In cases where “the clean bills of lading are signed, subject to mate's receipt, consignee “and|or consignor to be bound by any notations and|or exceptions on such “mate's receipt as though the notations and exceptions had been placed on “the bill of lading itself, it being recognized that clean bills of lading have “been surrendered before the exceptions (if any) were known, in order to “facilitate the business of the shipper or other party directly interested in the “goods.”

The ship's receipt contained the words "many bags stained, torn and re-sewn." The appellants claimed, inter alia, that the bill of lading was a "clean" bill, and that the respondents were estopped from saying that the sugar was shipped in other than apparent good order and conditions. The respondents contended, inter alia, that the bill was not "clean," being signed "under guarantee to produce ship's clean receipt;" that they were not estopped from proving that the sugar was damaged before shipment and that they delivered it in the same condition as that in which they had received it.

The trial judge (Cannon J) held that the appellants were entitled to the damages proceeded for. On appeal, the Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Kellock and Estey JJ.), holding that the respondents were not estopped from showing the true condition of the goods on shipment, reversed the decision of the trial judge and dismissed the action.

Lord Wright in delivering the judgment of the Board and dealing with the plea of estoppel said —

> "A question now of estoppel must be decided on ordinary common law principles of construction and of what is reasonable,

> without fine distinctions or technicalities. On that basis the language of the bill of lading, ready fairly, and as a whole, is not, for reasons which their Lordships have already here given, such as to found an estoppel. Their Lordships in so deciding are not in any way weakening the rule that a ship-owner who issues a clean bill of lading is bound by the statement in it that the goods are shipped in good or in apparent good order and condition: if the statement turns out to be untrue the ship-owner is estopped from alleging its falsity as against a purchaser who relies on the statement at its face value and acts on it to his detriment. This is a rule which may be applied any day in the case of c.i.f. contracts. To cast doubts on it would be to weaken the whole course of dealing between businessmen in regard to bills of lading in their character of documents of title used in connection with overseas shipments of goods. It is true that the unqualified statement is only one step in the establishment of the estoppel. Estoppel is a complex legal notion, involving a combination of several essential elements, the statement to be acted, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as indeed, it may be so described. But the whole concept is more correctly viewed as a substantive rule of law. The purchaser or other transferee must have acted on it to his detriment, as, for instance, he did in this case when he took up the documents and paid for them. It is also true that he cannot be said to rely on the statement if he knew that it was false: he must reasonably believe it to be true and therefore act on it. Estoppel is different from contract both in its nature and consequences. But the relationship between the parties must also be such that the imputed truth of the statement is a necessary step in the constitution of the cause of action. But the whole case of estoppel fails if the statement is not sufficiently clear and unqualified. That, in their Lordships' judgment, is the position in this case."

and quoting *Bowen L.J.* in *Low* v. *Bouverie* (1891) 3 Ch, 82 where that learned Lord Justice in deciding against the estoppel there pleaded said —

> "Now an estoppel, that is to say, the language upon which an estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed."

What did the plaintiff understand by the words "Car still painting will notify when ready?" He told the Court what he understood it to mean, and I cannot say his construction was in any way unreasonable.

There is a well-known classical statement as to estoppel in *Pickard* v. *Sears* 6 Ad & Ell. 469 at p. 474, the dictum there of Lord Denman C.J. "But the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." This passage was cited and approved by *Parke B.* in *Freeman* v. *Cooke* 2 Ex. 654.

There is a very clear and admirable statement of the law concerning this difficult rule of evidence to be found in the case

of *Nippon Menkwa Kabu Shiki Kaisha* v. *Dawsons Bank Ltd.* 51 L1. L.R. 147—The judgment of the Privy Council in that case delivered by *Lord Russell* of Killowen contains this passage

> "Estoppel is not a cause of action. It may…….assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action or…….by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action."
>
> "It is a rule of evidence which comes into operation if (a) statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf; (b) with the intention that the plaintiff should act upon the faith of the statement; and
>
> "(c) the plaintiff does act upon the faith of the statement."

There are thus three conditions necessary to bring the rule of estoppel into play. The only difference in the instant case is that the plea has been raised by the defendants and that the rule can be applied conversely.

I have gone, perhaps, at too much length into the consideration of the question of estoppel but great stress was laid upon this aspect of the case by counsel for the defendants, and I have come to the conclusion that such a plea cannot prevail.

Now as to the question of waiver counsel for the defendants submitted that even if at some period after the 20th December time for the completion of the work was agreed upon there was a waiver by the plaintiff of such a right by his conduct.

I agree that conduct of a party entitled to insist on time as of the essence of the contract, such as allowing work to be continued without an express reservation after such time was past may operate as an implied waiver of his right.

"Waiver" in my view is created by contract.

In the 1911 edition of Addison on Contracts p. 171 "A Contract……..may, *before breach,* be waived and abandoned by a new agreement". But a party always has the option to waive a condition or stipulation made in his own favour. If so, it does not require consideration. It is only a waiver of one of its terms. Where, however, parties who make a contract decide to modify it by a subsequent agreement Courts have held that there must be a sufficient consideration to give it contractual force. It amounts to this that waiver of some sorts of rights requires consideration, and in other sorts it does not.

I have referred to the distinction to be drawn between these two different incidents of waiver because of the statements pressed upon me by Mr. Cabral that "waiver before breach must be by mutual consent" and "waiver is in substance a substituted agreement."

It is sometimes said that the doctrine of "waiver" has a remarkable versatility. Cases relating to clauses in contracts: limiting times for performance afford the best field for the study of alteration of contracts by waiver. A mere extension of time is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time.

For the defendants to succeed in this submission that there

was a waiver as to time they must show a substitution of some other period, or a reasonable time, or an elimination altogether of the time limitation, and they must show that both the plaintiff and they agreed to the same alteration.

"A waiver of a stipulation in an agreement must to be effectual, be made intentionally, and with knowledge of the circumstances": see *The Earl of Darnby* v. *The Proprietors etc., of the London, Chatham* & *Dover Rly.* (1867) L.R. 2 H.L. 43, 60.

Default as to time may however be waived by the conduct of the other party, as by acts recognising the contract as subsisting. Delay is not waiver, inaction is not waiver, though it may be evidence of waiver.

Defendants have relied on the fact that after the receipt of the telegram plaintiff did nothing but allowed the defendants to continue the painting of the car which shows some assent by him. As I have already remarked such assent proceeded entirely upon a foundation of an erroneous fact.

The question is whether the plaintiff had waived the condition as to time and manifested by his language or conduct, an intention or willingness to waive the condition and rely upon the completion of the car and for delivery to him at the discretion of the defendants. I am unable to find that he did. It is quite clear that after his visit to Georgetown on the 13th February, plaintiff's conduct as disclosed by the evidence negatived any waiver on his part, and it should be noted that the doctrine of waiver seems applicable only during the currency of the contract.

By paragraph 6 of their defence the defendants have raised the question as to their liability in case of loss or damage by fire accidental or otherwise. They rely upon the notice on the repair order form which was signed by the plaintiff on the 21st day of November, 1944. That notice reads

"Particulars of Repairs
Notice — Fire
Not responsible for loss or damage due to fire, accidental or otherwise"

They contended that the acceptance by them of the car was subject to the condition that they should be under no liability.

The common law imposes upon bailees of goods definite and well-known liabilities for the protection of owners.

In *Halsbury's Laws* of England 2nd Edition Vol. 1 at page 724, the definition of bailment taken from Bacon's abridgment is as follows: —

> "A bailment properly so called, is a delivery of personal chattels in trust, on a contract express or implied, that the trust shall be duly executed, and the chattels re-delivered in either their original or an altered form, as soon as the time or use for, or condition on which they are bailed, shall have clasped or been performed."

The custodian may however limit or relieve himself from his common law liability by special conditions in the contract. But there must be words which make it clear that the parties intended that there should be such an exemption. It is a question of fact, very often, as to how far that condition has been made a term of the contract, and whether it has been sufficiently brought to the notice of the person entering into the contract.

The first question I have to decide is whether the notice printed in red was on the repair order form when plaintiff signed his name to it on the 21st November. The plaintiff said he did not notice it at the time but would not say definitely it was not there, but believed if it were there he would not have forgotten. Sills is quite positive that the notice was on the repair order form, and he related the practice which the defendants adopted after they received from the printers those order forms in stamping on them the notice in red ink throughout in one book at a time. I have carefully examined all the exhibits on which a notice of this kind was placed and I have come to the conclusion that when the plaintiff signed Exhibit G.M.G.2 on the 21st November, the notice in red print was on the order form.

The second question is how far that notice was made a term of the contract? These forms seemed to have been used for other purposes, e.g., obtaining a receipt for goods delivered—see Exhibit J.E.F.2, and not in every case as a term of any contract; and questions have often arisen whether a particular term has in fact been sufficiently brought to the attention of the bailor so that when he signed a document containing such a term he must be deemed to have accepted and be bound by that term.

If a person having such notice accepts the offer of service, he cannot be heard to deny that he knew the offer to be qualified.

What construction therefore should be placed on that notice in exhibit G.M.G.2.? In construing an exemption term certain general rules may be applied: one of them is that the particular term must be considered in relation to the contract in question. The contract was to effect repairs. Could the term mean loss or damage from fire howsoever caused or limited to fire in effecting the actual repairs? In the process of repairing, a fire may occur accidentally or even by negligence of a workman—that is accidental or otherwise.

What would a reasonable man understand the notice to mean? Was it not for the defendants to call attention to the full effect of the notice if it meant what the defendants contend it means. Apt words should be used to express the intention. Otherwise their liability as bailees may still remain and cannot be removed by subtle implications or ambiguous words. As was said in the case of L. *& N.W. Rly. Co.* v. *Neilson* (1922) 2 A.C. 263 at p. 273 per Lord Atkinson

> "When a special provision such as that relied upon in this case is introduced into a contract such as that into which the parties in this case have entered, it must be held in the absence of language indicating the contrary, to refer the *subject matter* of the contract and that alone."
>
> "There is a large and varied class of cases where the legal duty cannot be laid down a period or without examining the special circumstances of the situation. The facts of each particular case have to be interpreted in the light of the nature of the contract between the parties, and not on mere general principles which have been fashioned by Judges from time to time, for no such general principles can adequately provide for all the concrete details which might be encountered as each particular case is presented before a tribunal. The whole of the circumstances in the particular case and the conduct of the parties in relation thereto have to be examined"

see *Hood* v. Anchor *Line* (1918) A.C. 840.

The question now is not whether the plaintiff actually saw or read the notice for I am of opinion he did. But whether the notice was sufficiently explicit to convey to his mind that under any circumstances in case his car was destroyed by fire the defendants were to be exonerated, and that he deliberately took the risk in such circumstances in placing his car in the possession of the defendants. This is a question of fact. I must look at the situation of the parties also. I cannot find this issue of fact in favour of the defendants.

Assuming however that the exemption from liability on the order form could extend to loss or damage by fire howsoever caused, it must be co-terminate with the currency of the contract, but as soon as there has been a breach the protection would end; so that to obtain relief from liability for the damage which the plaintiff admittedly sustained, the burden is on the defendants to show that it was due to loss by fire during the currency of the contract.

To use the language in the case of *Shaw* & *Co.* v. *Symmons* & *Sons* (1917) 1 K.B. 799 it is not necessary in this case to decide what are the exact limits of its application. It probably is as I have said intended to exempt the defendant from any liability if the fire occurred during the repairs and in relation thereto, but I am clearly of opinion that it has no application to the facts as I have found them in the present case where the breach of contract had been committed before the fire occurred.

See also the case of *Bontex Knitting Works Ltd.* v. *St. John's Garage* (1943) 2 A.E.R. 690, where the defendants were not protected by the exception clause because it was only intended to protect them in the due execution of the contract. To put it in another way, you cannot rely on the condition which was only intended to protect you if you carried out the contract in the way (in the instant case within the time) in which you had contracted to do it. *Lilley* v. *Donbleday* (1881) 7 Q.B.D. 510 enunciates this principle.

What were the obligations undertaken by the defendants to fulfil? They were obliged not only to perform the work, but to take reasonable and prudent care of the car entrusted to them, and to restore it to the plaintiff at the expiration of the period for which it was entrusted to them.

If this is so, then they cannot by their own act or default defeat the obligations which they have undertaken to fulfil. To quote Pothier "the debtor corporis certi is freed from his obligations when the thing has perished neither by his act, nor his neglect and *before* he is in default."

During the hearing certain cases dealing with frustration. were cited perhaps upon an analogy that the duty to perform depended upon the continued existence of a state of things, but it has never been held that a person is entitled to take advantage of circumstances as a frustration of the contract after a breach by him of his agreement.

Having found that the defendants have committed a breach of their agreement with the plaintiff in respect of the failure to deliver to him his motor car on the 8th February, 1945, the plain-

tiff would be entitled to recover damages as the destruction of the car actually occurred whilst their wrongful act was in operation and in force.

Mr. Humphrys in the course of his address ventured to suggest that even if there was a breach of contract by the defendants, the plaintiff having allowed the car to remain on the defendants' premises without taking steps to remove it converted what was originally a bailment for reward into a mere gratuitous deposit, and the misfortune of the loss must fall on the plaintiff. Apart from the fact that no such gratuitous bailment could be inferred, plaintiff could do no more than he did to obtain delivery, and the retention of the car by the defendants was solely their act, and at their risk in a desire to remedy a breach which had already occurred.

It is unnecessary for me in view of the above findings to deal with the third limb of the action — negligence. But it may be useful to indicate that a bailee must take all proper care in case an emergency arises in the absence of an exemption clause which would exonerate a bailee in a case of negligence, when dealing with a bailment for reward. From the very nature of the transaction the bailor is entitled to rely upon the case and skill of his bailee. In *Brabant* & *Co.* v. *King* (1895) A.C. 632

> "that obligation included not only the duty of taking all reasonable precautions to obviate the particular risks involved, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred."

A very recent case that of *Stansbie* v. *Troman* (1948) 1 A.E.R. 599 poses the three questions which have to be asked. Whether or not there was any duty owed by the defendant to the plain-tiff; whether there had been any breach of that duty; and whether the damage had resulted from that breach.

The duty must be within the scope of the contractual relationship existing between the parties. The contractual relationship of bailor and bailees did impose a duty on the defendants to take reasonable care to safeguard the car whilst in their custody.

Had I to decide the question of negligence I would have had to ask myself, did the defendants act reasonably whilst the fire was spreading to adjoining buildings? Was the danger of fire spreading to their own building foreseeable? I would have had to consider the arrangements for storing cars and other motor vehicles within the defendants' premises, the position of the plaintiff's car in the paint shop 24 x 15 feet when the alarm of fire was given, whether it was prudent for the defendants to have a car jacked up with no wheels on in the doorway between the paint shop and, the repair shop. These are findings which happily I am not called upon to make, but a brief description of the premises would not be out of place to signify the heavy onus which rested on the defendants.

The premises of the defendants were situated on the western side of Water Street. There was a front or show room department immediately reached on entering through the door from Water Street. At the back of the show room was the motor sales parts department behind which was the repair shop separated

from the show room by means of an expanding metal screen. To gain entrance to the repair shop one had to pass through a wire mesh door on the southern side of the screen. This door was the only means of entrance to and exit from the shop, and was wide enough to accommodate small buses. There was a large door to the south of the show room leading from a passage way between the defendants' premises and the 5 and 10 cents store to the south. There was also what was known as a paint shop to the north of the repair shop separated one from the other by a wooden wall with a wire mesh door which one entered it from the repair shop. That door was about 10 to 12 feet in width and 10 feet in height.

It is now left for me to assess the amount of damages to which the plaintiff is entitled by reason of the failure of the defendants to fulfil the terms of their contract and re-deliver the car to the plaintiff.

The counter-claim of the defendants for the sum of $539.02 alleged to be due and owing by the plaintiff in respect of work done and performed by them and others to the said car must fail in view of my finding that they committed a breach of their agreement. That breach furnishes a defence to the counterclaim, but in considering the amount of damages which I should award the plaintiff I have to take into account that the value of the car at the time of its destruction was considerably enhanced by reason of the work done and performed on it.

The plaintiff in his Statement of Claim has placed the value of the car (less cost of over-hauling, repairs and painting) at $1,550:— This car the plaintiff purchased from Booker Bros. in March 1941 for the sum of $750:— He spent $300 on it after purchase and had been using it up to the time he handed it in to the defendants on the 29th October, 1944. In that year he said it did about 400 to 500 miles per month using the same both professionally and socially. Plaintiff admitted that the car needed substantial repairs. He placed the value of his car when completely over-hauled and painted at not less than $1,800:— Ernest Fraser a motor mechanic of New Amsterdam fixed the value of the car when it was handed over to the defendants at $1,500: — Sills the foreman mechanic of the defendants said that he would place the value of the car after examination by him on the 30th October at $500:— to $550:— and after repairs he would say it was worth $1,250:— to $1,300:— Giving the best consideration to all these estimates of value on the one hand slightly exaggerated and the other equally minimised I fix the value at $1,480: — at the date of the breach when it had not yet been spray-painted, and also at the time when plaintiff demanded its delivery offering to pay the defendants for whatever work had been done to it.

Where judgment cannot be for a return of the car, on account of its destruction it will be absolute for its value and damages, and where damages are the natural and provable consequences of a breach of contract, it is no objection to their recovery that the breach itself was wholly unintentional and unforeseen.

The plaintiff has included in his particulars of damage the sum of $380:— for care hire for 91/2 months. This sum in my view he is not entitled to recover, for where special circumstances

connected with a contract may cause special damage if it is broken, mere knowledge of such special circumstances by, or notice duly given to one party will not render him liable for the special damage, unless it can be inferred that he consented to become liable for such special damage. This inference I am unable to draw there being no evidence which would warrant me doing so.

The rule in *Fletcher* v. *Tayleur* (1885) 17 C.B. 29 that damages for failure to deliver a chattel should invariably be the? average profit made by the use of a chattel is only applicable to the case of articles whose profit consisted in their own use and would be inapplicable to the great majority of cases.

In the words of the judgment of *Hallet* J. in *Foaminol Laboratories Ltd.* v. *British Artid Plastics Ltd.* (1941) 2 A.E.R. 393 at p. 400, the plaintiff has to overcome two difficulties. In the first place, he must prove with sufficient certainty the occurrence of the pecuniary loss, and, in the second place, he must prove, that such pecuniary loss was within the contemplation of the defaulting party at the time when the contract was made. Otherwise it is not recoverable, having regard to the law respecting remoteness of damage. The plaintiff has failed to overcome these two difficulties.

It would not be a fair inference as against the defendants to say that, when they made the contract, to repair, renovate and spray paint the plaintiff's car, they undertook the responsibility for expenditure for car hire by the plaintiff in case of any breach by them. I do not think that I ought to impute to them such a. responsibility. It does seem to be an example of the doctrine of remoteness. The claim to recover this sum of $380:— would be too remote. That would provide an obstacle to this part of the claim, even if, the existence of such loss and its quantification had been sufficiently established by evidence.

The plaintiff has also claimed the sum of $270:— as general damages. This claim is only sustainable under one of the rules in *Hadley* v. *Baxendale* (1854) 23 L.J. Ex. 179 and 9 Exch. 341 where it could be established that the amount claimed was the reasonable and provable consequences of the defendants' breach. Such general damages, if any, in my opinion, would be very; nominal and I do not feel disposed to make any award under this head.

Having come to the conclusion that at the date of the breach plaintiff's car was worth $1,480:— and giving credit for the value of the work done on the car which has brought about the enhancement of its value, the plaintiff in my view is entitled to recover from the defendants the sum of $1,010.98 for which I enter judgment in his favour, with costs. The counter-claim as I have already indicated stands dismissed.

Judgment for plaintiff.

SALIKRAM,

Appellant (Defendant),

v.

BREHASPATI,

Respondent (Complainant).

[1949. No. 95.—DEMERARA]

BEFORE FULL COURT: WORLEY, C.J., MANNING J. (ACTING).

1949. JUNE 2, 29.

Husband and wife—Proceedings by wife against husband for desertion and for maintenance—No appearance of defendant at hearing before Magistrate because not notified by his solicitor of the date of hearing—Order for desertion and maintenance made ex parte—Whether proceedings before Magistrate were civil or criminal—Whether procedure to set aside order is by application for new trial or by appeal.

An application by a wife against her husband for a maintenance order under section 41 of the Summary Jurisdiction (Magistrates) Ordinance (Chapter 9) is a civil not a criminal proceeding although section 41, subsection (5) enacts that all applications shall be made in accordance with the Summary Jurisdiction (Procedure) Ordinance, Chapter 14, but there is no provision in Chapter 9 or in the Summary Jurisdiction (Procedure) Ordinance, Chapter 14, to empower a Magistrate to re-hear a matter which has been heard and determined *ex parte.* When therefore an ex parte order is made by a magistrate against a husband, an appeal against the decision is the appropriate remedy.

Appeal by the defendant against an order made against him ex parte for the maintenance of his wife.

E. W. Adams, for the appellant.

Sugrim Singh, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

The appellant and respondent in this matter are husband and wife and the appellant appeals from an order made ex parte

by the Court below adjudging him guilty of desertion with consequential orders for the payment of money for the maintenance of the respondent and of the minor child of the marriage, for costs and for custody of the minor. The substantial ground of appeal is that owing to the default or omission of his solicitor or the solicitor's clerk the appellant was not notified of the fixture of the respondent's complaint for hearing on the 15th January, 1949. He was therefore not present in person or by solicitor and has been deprived of the opportunity of presenting his reply to the complaint.

Jurisdiction to entertain complaints and to make orders for the protection and maintenance of married women is conferred on Magistrates by section 41 of the Summary Jurisdiction (Magistrates) Ordinance (Chapter 9). It is quite clear that proceedings under this section are not in any sense criminal or brought for the purpose of punishing a husband, but are brought to enforce a civil claim for money due from him by a person he is bound to support. The essentially civil nature of these proceedings is not affected by the provision in subsection (5) that all applications under the section shall be made in accordance with the Summary Jurisdiction (Procedure) Ordinance: that is merely a matter of procedure. It is true that later proceedings for the same purpose may be criminal under Part IV of the Summary Jurisdiction (Procedure) Ordinance but those proceedings are, strictly speaking, for disobedience of the Court's order and not for the purpose of vindicating a wife's rights. If the order be obeyed there is no possibility of the proceedings under section 41 of Chapter 9 leading to punishment. The distinction has been clearly recognised in England where a right of appeal against an order to pay maintenance lies to the Probate Division but an appeal from the warrant of a magistrate committing the husband to prison for nonpayment of sums due under such an order lies by way of case stated to the Kings Bench Division: see Manders v. Manders (1897 1 Q.B. 474) and Ruther v. Ruther (1903 2 K.B. 270). In this Colony the distinction is obscured by the fact that in either of these cases an appeal would lie to this Court under the Summary Jurisdiction (Appeals) Ordinance.

The reason for referring to this aspect of the matter is that the normal procedure where it is desired to have set aside an order made ex parte in civil matters is to make application to the Court which made the order: see, for instance, the Proviso to section 20 of the Summary Jurisdiction (Petty Debt) Ordinance (Chapter 15). There is no similar provision contained in section 41 of Chapter 9. The jurisdiction to vary or discharge an order conferred by sub-section (4) is only exercisable on cause being shewn upon fresh evidence to the satisfaction of the Court, and it is, at least, doubtful upon the authorities whether such jurisdiction could be exercised upon the application of a party who was at the time of the hearing in possession of all the material relevant evidence upon which he intends to rely but was for some cause or other absent at the time of the hearing.

Sections 13(1) (a), 25(1) and 31(3) of the Summary Jurisdiction (Procedure) Ordinance empower a Magistrate to adjudicate upon a complaint in the absence of a defendant, but the

Ordinance makes no provision for the re-hearing of a matter which has been heard and determined ex parte.

Subsection (7) of section 41 of Chapter 9 confers a right of appeal from any order of a magistrate under the section. This Court must therefore entertain the appeal even though it -is embarrassed by not being in a position to assess the merits or demerits of the appellant's reasons for his absence from the trial. In the circumstances, the matter must be reheard but the respondent should not be put to expense by reason of the appellant's default. The Order of this Court will be that upon payment by the appellant to the respondent of the sum of $1.20 for her costs in the Court below and of the costs of this appeal, the order of the Magistrate be set aside and the cause be referred to the Magistrate or to any other Magistrate having jurisdiction in the appropriate Judicial District to re-hear and determine it.

Appeal allowed

OSCAR R. KEILER,

Appellant (Defendant),

v.

MILLICENT BRAITHWAITE,

Respondent (Plaintiff).

[1949. No. 217.—DEMERARA]

BEFORE FULL COURT: WORLEY, C.J., MANNING, J. (ACTING).

1949. JUNE 3, 29.

Claim framed in detinue—evidence disclosing trespass—no amendment applied for—judgment for plaintiff—power of Magistrate to amend although no application made—Sec. 59 *Summary Jurisdiction* (*Petty Debt*) *Ordinance*, (*Chapter* 15)*—power of Appellate Court to make any order which Magistrate ought to have made or any other order for disposal of a case which justice requires—Summary Jurisdiction* (*Appeals*) *Ordinance*, (*Chapter* 16).

A civil plaint founded in detinue was filed in the Magistrate's Court. At the hearing no evidence of a demand was given and the real controversy in the case was the ownership of the property. The Magistrate accepted the evidence of the plaintiff and finding trespass awarded damages without amending the plaint.

Held: The first part of Section 59 of the Summary Jurisdiction (Petty Debt) Ordinance (Chapter 15) gave the Magistrate a discretion to amend and he should have done so without application to found the claim in trespass, and since under section 28 (a) Chapter 16, the Appel-

late Court has power to make any order which the Magistrate ought to have made, the appeal would be dismissed.

Appeal by the defendant from a decision of the Magistrate of the East Demerara Judicial District.

John Carter, for the appellant.

F. R. Jacob, for the respondent.

Cur. adv. vult.

The Judgment of the Court was as follows: —

In this case the Court below found that the appellant had removed a pig and its litter from the respondent's possession and in spite of her protest. It also found that the pig and litter were the property of the respondent, and awarded her $37 damages.

On appeal Mr. Carter, for the appellant, referred to the plaint which alleged that the pigs were wrongfully and illegally detained by the appellant in spite of repeated demands for their return. The respondent's claim was therefore framed in detinue; but as no demand was proved, she had failed to prove an essential ingredient and the Court below should have non-suited her.

A perusal of the record shows, and it is admitted by Mr. Carter, that the real issue was the ownership of the pigs. The appellant admitted that he removed them from the possession of the respondent and sought to justify his action on the ground that they were his property. He gave evidence of ownership and called a witness to support his claim but the Court below found against him on this issue.

Sect. 59 of the Summary Jurisdiction (Petty Debt) Ordinance (Chapter 15 provides that a Magistrate may at all times amend all defects and errors in any proceeding in his court upon such terms as he thinks just; and in sub-section (2), that all amendments necessary for the purpose of determining the real question in controversy between the parties shall be so made, if duly applied for. The first part of the section gives a discretion to the magistrate; the second part requires him to amend when application is made in an appropriate case.

The learned Magistrate here found trespass where detinue had been alleged, and awarded damages. Under the section quoted above he had power to amend the plaint, so as to found the claim on trespass. The respondent had made an obvious error in framing her plaint. From what has been said as to the one issue on which the case was fought, no prejudice could have been caused to the appellant by such an amendment.

Under sect. 28 (a) of the Summary Jurisdiction (Appeals) Ordinance. (Chapter 16) this Court has power to make any order which the magistrate ought to have made, or under paragraph (c) of the same section may make any other order for disposal of the case which justice requires.

At the trial before the Magistrate the case was fought on the basis of the real question in controversy, namely, the ownership of the pigs. This was purely a question of fact and no ground has been shewn for disturbing the finding of the Magistrate on that. The appellant has been in no way prejudiced by the Magistrate's omission to amend the plaint. If, as we are asked to do

we were to substitute an order of non-suit or to order a re-hearing, the result would be merely to delay justice and put the parties to greater expense.

The appeal is therefore dismissed and the judgment of the Court below affirmed. The appellant must pay to the respondent her costs of this appeal.

Appeal dismissed.

Solicitors: *E. D. Clarke,* for appellant.

MRS. JAMES HUGH,
Appellant (Defendant),

v.

VERNON BAPTISTE, Police Constable, No. 5088,
Respondent (Complainant).

[1949. No. 140.—DEMERARA]

BEFORE FULL COURT: WORLEY, C.J., AND MANNING J. (ACTING).

1949. JUNE 2, 29.

Control of Prices Order 1947*—two price controlled articles purchased—total price paid greater than maximum selling price of the two articles no evidence of over-charge on each article—one complaint preferred—*See. 8 (3) *Summary Jurisdiction* (*Procedure*) *Ordinance, Cap.* 14*—Complaint not bad for duplicity—appeal dismissed.*

The appellant sold to the respondent two price controlled articles. No itemised bill was rendered and the respondent did not know how much he was charged for each article but he calculated the controlled selling price of each article and discovered that the total sum paid by him was in excess of the maximum permitted selling price of the two articles. He was charged and convicted in one complaint for selling controlled articles above the maximum selling price. It was contended on appeal that the conviction was bad for duplicity.

Held: The conviction was not bad for duplicity.

Appeal by the defendant who was convicted by the Magistrate for the West Demerara Judicial District.

C. L. Luckhoo, for the appellant.

E. Mortimer Duke, Solicitor-General, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

On the 10th July 1948 the respondent entered the retail shop of the appellant and ordered 2 lbs. of extra flour and 1 lb. of split peas, both price-controlled articles under the Control of Prices Order, 1947. The goods were supplied and respondent tendered in payment a 48c. piece. He received 15c. change. It is important

to note that there was one order and one payment. No itemized bill was rendered and the appellant did not state, and was not asked, the respective prices charged for the flour and split peas. The respondent made a calculation in accordance with the prices set out in list A of the First Schedule to the Control of Prices Order, 1947, and discovered that he had been over-charged. He preferred a complaint against the appellant, as a result of which she was convicted of "having sold 2 lbs. of extra flour and 1 lb. of split peas, price controlled articles, for 33c, a price exceeding the maximum retail selling price as prescribed in the Order."

She appeals against her conviction on the ground that the charge alleged two offences contrary to the provisions of section 8 (3) of the Summary Jurisdiction (Procedure) Ordinance (Chapter 14) and was consequently bad for duplicity. Her counsel admitted that the total price charged for the flour and split peas exceeded the maximum retail selling prices permitted under the Order for the relevant quantities of those articles.

The offence or offences charged are created by paragraph 12 (1) of the Order, which reads as follows: —

> "No person shall sell any price controlled article at a price exceeding the maximum price prescribed by this Order."

Under section 2 (1) (b) of the Interpretation Ordinance, (Chapter 5) "article" must include "articles" there being no contrary intention apparent in the Order; but Mr. Luckhoo's argument is that if it is sought to allege and prove the sale of more than one article in one charge for one offence, the articles must be all of the same kind. List A of the First Schedule sets out thirty-six different articles, e.g. sugar, butter, flour, beef, pork, rice, tea, herrings, sardines, etc. The prices are fixed at so much a pound, or so much an ounce, or so much a tin, according to the nature of the article. There is, for instance, a price for a tin of herrings, and a different price for a tin of sardines. The argument is that if six tins of herrings are sold, i.e. six articles, then a consequential complaint would be for one offence only; but if one tin of herrings and one tin of sardines are sold, they could not be charged together in one complaint, even though there was only one order and one sale at the same time and place. Further, different maximum prices are prescribed for different brands of tinned herrings or sardines, therefore the logical conclusion of the argument must be that only tins of the same brand can be included in one complaint and one charge. We cannot find in the language of paragraph 12(1) any warrant for this argument.

The authority cited against the proposition is Kite v. Brown 1940 (109 L.J. K.B., 963). In that case a retailer had sold 1/2 lb. butter and 1/2 lb. bacon to a person and had failed to detach and retain the necessary coupons. He was charged for supplying rationed food, to wit, 1/2 lb. butter and 1/2 lb. bacon for household consumption without a coupon, contrary to the Rationing Order, 1939 and was convicted. On appeal it was held that the conviction was not bad for duplicity.

It is of interest to analyse the relevant legislation. The Rationing Order, 1939, was made under Regulation 55 of the De-

fence (General) Regulations, 1939. Regulation 3 of the Order prescribed bacon, butter, meat, and sugar as rationed foods, and offences were created by two regulations, namely: —

"2. Except under the authority of the Minister or under or in accordance with the provisions of this Order…….a person shall not supply any rationed food for household consumption." and

"7. Except where the Minister shall otherwise authorise, no person may obtain any rationed food for household consumption unless the following conditions are complied with……..

(c) the appropriate coupon or coupons representing the amount of food obtained must be detached and retained by the retailer."

In dismissing the appeal Viscount Caldecote, L.C.J., said "the offence.....alleged is that of having supplied rationed food for household consumption. The particularisation of the rationed food seems to me in no way to affect the information. It is quite true that half a pound of butter and half a pound of bacon are mentioned; and there might have been an offence charged by alleging the supply of half a pound of butter or half a pound of bacon. But the offence seems to me to be rightly charged here as the supply of rationed food. The fact that two different articles of rationed food were supplied at the same time in no wise makes the information bad for duplicity—the case to which we were referred of R. v. Hammick; Murdoch, Ex parte, under the very different language of the Food Hoarding Order, 1917, does not affect the opinion I have formed." Hawke and Humphreys, J.J. agreed.

The principle to be deduced from this authority is as follows: An offence is created with respect to the supply of rationed food. Rationed food is defined by prescribing various kinds of foods to be included. If an offence is committed at the same time and place with respect to different kinds of rationed food, it is not necessary to have as many different charges as there are kinds of food involved in the infringement. One charge suffices, i.e. the supply of rationed food contrary to law; and if two or more kinds of food are mentioned in the charge there is no duplicity. When it is remembered that on the supply of butter a coupon had to be detached and retained, and another coupon had to be detached and retained on the supply of bacon, this decision is of importance in setting limits to the scope of arguments as to duplicity.

There is no reason why the same principle should not be applied to cases under paragraph 12(1) of the Control of Prices Order, 1947. The offence is selling price-controlled articles. A price-controlled article is defined as any article or thing the maximum price of which is for the time being controlled and, for the purposes of this case, means any of the articles set out in the First Schedule. The appellant was convicted of selling price-controlled articles at a price exceeding the maximum; and to use the words of Viscount Caldecote, the fact that two different articles were supplied at the same time and mentioned in the information "in no wise makes the information bad for duplicity,"

In opposition to this authority Mr. Luckhoo relied on the authority of Rex. v. Hammick: Murdoch ex parte 1918 (84 L.J, Rep. 846). In that case the information against Murdoch was that he, between specified dates, did unlawfully acquire various articles of food, to wit, sugar, tea, flour, milk, tongues etc., so that the quantity in his possession at any one time exceeded the quantity ordinarily required for use and consumption in his household contrary to the Food Hoarding Order 1917 art. 1. At the hearing evidence was given of the acquisition and possession by Murdoch of considerable quantities of various food stuffs and he was eventually convicted of having unlawfully acquired various articles of food to wit, sugar and flour, so that the quantity in his possession at any one time exceeded the quantity ordinarily required for use and consumption in his household.

Art. 1 of the Food Hoarding Order 1917 provided "(a)....no person shall....acquire any article of food so that the quantity of such article in his possession or under his control at any one time exceeds the quantity required for ordinary use and consumption in his household or establishment."

In quashing the conviction Darling J. said —

> "The Food Hoarding Order does not say that a person cannot have more food than he requires for ordinary use and consumption in his household. The order refers to separate articles of food and says that a person must not acquire any particular article of food so that the quantity of any such article in his possession at any one time exceeds the quantity ordinarily required for use and consumption in his household…
>
> In this case it seems to me that the Justices have convicted the applicant of two offences.
>
> Both offences are included in one conviction and the Justices have imposed one penalty in respect of the two offences."

Bray and Salter J.J. agreed.

In Kite v. Brown cited above, Viscount Caldecote pointed out the difference between the language used in the Food Hoarding Order 1917 and that of the Rationing Order 1939. There is likewise an obvious distinction between an order prohibiting the possession of an excessive quantity of separate articles of food and an order prohibiting the sale at a price exceeding the prescribed maximum of price-controlled articles in general.

During the course of his argument Mr. Luckhoo referred to the fact that there was no proof that the maximum price of the flour had been exceeded, or that the maximum price of the split peas had been exceeded. This is undoubtedly so. But once it has been decided that two or more articles, sold at the same time and place and in the course of one transaction, may be included in the same complaint, the total price charged is the only consideration. If on calculation, that exceeds the maximum, the offence of selling price-controlled articles at a price exceeding the maximum has been proved.

The evil of duplicity is that a person has to plead to, and defend himself against, more than one accusation at the same time.

charged with selling articles at an excessive price, and, if she had a It is obvious that this did not occur in the present case; the appellant was defence, she could not have been embarrassed in presenting it.

The appeal is therefore dismissed with costs and the conviction and sentence affirmed.

Appeal dismissed.

C. A. M. SHARPLES,

Appellant (Plaintiff).

v.

E. A. LAWRENCE,

Respondent (Defendant).

[1949. No. 120.—DEMERARA]

BEFORE FULL COURT: WORLEY, C.J., MANNING J. (ACTING).

1949. JUNE 2, 3, 29.

Possession of premises—Rent Restriction Ordinance 1941*—Dismissal of application on failure to establish the specific breach of obligation of the tenancy relied on at the hearing before the magistrate—Other grounds for possession though disclosed in the evidence before magistrate not advanced by complainant in support of application—Appeal against dismissal by magistrate.*

In an action for recovery of premises a landlord is not confined to the breach or breaches of the contract of tenancy specified in the notice which determines the tenancy but is entitled to rely upon any and every cause of action available to him.

But the court is not charged with the duty of seeking out and, giving relief for a breach of the obligations of the tenancy not urged by the landlord himself.

Where the landlord relies on a specific breach and advances no argument in respect of other breaches disclosed before the Magistrate he will not on appeal against an order of dismissal be allowed to rely on those other breaches.

Appeal by the plaintiff from a decision of a magistrate of the Georgetown Judicial District.

J. O. F. Haynes, for the appellant.

C.Lloyd Luckhoo, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

This appeal was dismissed with costs on the 3rd June, 1949, the Court stating that written reasons for the decision would be furnished at a later date.

The appellant, (plaintiff in the Court below) claimed from the respondent (defendant) possession of the upper flat of a two-

storey building in Georgetown on the ground that the respondent has committed a breach of the obligations of the tenancy by using the premises otherwise than as a dwelling house. The appellant served on the respondent a notice which expired on 1st December, 1948, and the respondent having failed to deliver up possession by the due date, the appellant applied to the Court below for an order of possession. In the notice the reason given by the appellant-landlord for requiring possession was that stated above.

The position then was that in his notice and in his plaint the appellant was resting his case for obtaining an order upon the breach of an obligation of the tenancy, other than due payment of rent, as provided in section 7 (1) (b) of the Rent Restriction Ordinance 1941 as re-enacted by section 8 of the Rent Restriction (Amendment) Ordinance 1947 (No. 13 of 1947).

The learned Magistrate found that the respondent rented the premises, lived therein and used them both as a dwelling-house and as a place of business, the main use being as a dwelling house. He also found that there was no obligation expressed or implied that the respondent should not use the premises partly for business and that consequently the respondent had not broken any obligation of the tenancy. He accordingly refused the application and gave judgment for the respondent. There was evidence on which the learned Magistrate could reasonably reach these findings and we are not prepared to disturb them.

Counsel for the appellant has however contended that the facts as found by the Magistrate disclosed other grounds on which an application for possession might have been made under paragraph (c) of section 7 (1) and that the Magistrate should have taken these into consideration. These facts are that after the respondent took possession, he erected a partition in the gallery in spite of the appellant's objection and that the appellant refused the respondent permission to construct a sink or to make a hole in the wall to carry away the waste water resulting from the operations of the hair-dressing business. There are no sewerage connections in the gallery and as the result of the use of a pail to receive waste water, the eastern wall of the premises and the floor are kept in a state of dampness. The bannister has been damaged by the number of persons using the stairs or steps in connection with the business. The appellant also alleged that other damage had been done; that he suffered annoyance from the excessive number of persons frequenting the premises and that he had been prevented from completing necessary repairs.

It is, of course, good law that in an action for possession, a landlord is not confined to the breach or breaches of the contract of tenancy specified in the notice which determines the tenancy but is entitled to rely upon any and every cause of action available to him: see Gassit v. Ramdeholl (Appeal No. 661|1948 — 21.1.49). But, nevertheless, it is still incumbent upon the landlord to elect upon which breach or breaches he will found his case. Whether the action be at common law or one coming within the restrictions imposed by section 7 of the Rent Restriction Ordinance, there is no warrant for the suggestion that the Court is charged with the duty of seeking out and giving relief

for a breach of the obligations of the tenancy upon which the landlord himself has not founded.

In the Court below at the close of the appellant-plaintiff's case, the solicitor for the respondent-defendant submitted that there was no case for him to answer as the landlord had failed to show that there was any obligation imposed on the tenant as regards the use of the premises. The appellant's solicitor replied to this submission, and the Magistrate adjourned the hearing for the production of authorities. At the resumed hearing the appellant's solicitor again confined his submissions to this one point. It was open to him at that stage, if he wished to do so, to present to the Court any additional or alternative grounds for claiming possession disclosed by the evidence. He did not do so but preferred to rest his case upon one ground which failed.

Appeal dismissed.

WILLIAM ADOLPHUS STEPHENSON,

Plaintiff,

v.

THE LOCAL GOVERNMENT BOARD and THE VILLAGE COUNCIL OF THE BUXTON AND FRIENDSHIP VILLAGE DISTRICT,

Defendants.

[1948. No. 12.—DEMERARA]

BEFORE MANNING J. (ACTING).

1949. JUNE 16, 17, JULY 1.

Master and servant—wrongful dismissal—Local Government Ordinance 1945.

The plaintiff was appointed village overseer by the second defendant subject to the approval of the Local Government Board. The Board terminated the appointment at the end of the six months probationary period but reversed its decision on representations being made by the defendants. Nearly two years after, the Board dismissed the overseer without notice but paid him a month's salary in lieu of notice.

The plaintiff claimed that he was employed by the second defendants and not by the Local Government Board and sought a declara-tion that he was still village overseer.

The first defendants relied on section 19 of the Local Government Ordinance.

Held: Section 19 of the Ordinance relates to cases in which the Board considers it expedient to deprive the local authority of all or any of its powers and could not therefore be invoked as a defence.

There was no contract between plaintiff and first defendants nor did, the second defendants dismiss him so the alternative claim for wrongful dismissal could not lie.

But the legal result of the pleaded facts was that the Board, the first defendants, had committed a tort causing damage to the plaintiff. Judgment for plaintiff in sum of $500.

S. L. vanB. Stafford, K.C., for the plaintiff.

E. M. Duke, Solicitor-General, for the defendants.

Cur. adv. vult.

MANNING, J. (Acting). On January 1st, 1945 the plaintiff was appointed overseer by the Village Council of the Buxton and Friendship Village District, hereinafter referred to as the Council. The appointment was made under section 68 of the Local Government Ordinance, Chapter 84, and in accordance with its provisions the Chairman of the Council communicated the plaintiff's name as having been so appointed to the Local Government Board, hereinafter referred to as the Board. The appointment was subject to the approval of the Board. The necessary approval was given, and is embodied in the minutes of the Council meeting held on March 6th, 1945.

2. The appointment was on 6 month's probation in the first instance. In the minutes of the Council meeting held on 7th August, 1945, it is recorded that the plaintiff's appointment had been confirmed by the Board, but the relevant communication from the Board has not been produced. However this may be, the plaintiff's appointment continued as if his probationary period had terminated.

3. On the 31st October, 1945, the Board (See Ex. WAS 14) intimated to the Council that it had decided to dispense with the services of the plaintiff as from 30th November, 1945. The Council successfully protested against this decision; and the Board decided that the plaintiff "should be retained in office until 30th June, 1946, by which date the question of the permanent retention of his services will be considered." When the 30th June, 1946 arrived, the question seems to have been overlooked by the Board, and the plaintiff's services continued to be retained with the approval of the Council and the acquiescence of the Board.

4. Meanwhile, in December, 1945, the Local Government Ordinance, Chapter 84, had been repealed. A new Ordinance, hereinafter called the Ordinance, was enacted in its place, No. 14 of 1945. Under the provisions of section 222 (3) of the Ordinance, the appointment of the plaintiff continued as if it had been made by the Council under section 84(1).

5. On July 23rd, 1947, the Board wrote to the plaintiff conveying its decision to terminate his services as overseer as from July 31st, 1947, and forwarding a cheque for one month's salary in lieu of notice.

6. It will be remembered that the Board had come to a similar decision on October 31st, 1945, but had re-considered it after a protest by the Council. No opportunity had therefore arisen to challenge its decision on that occasion. In this action the decision of the Board, as conveyed in the letter of 23rd July, 1947, is challenged as being something entirely outside the powers granted to the Board under the Ordinance.

7. Mr. Stafford for the plaintiff, points out that the plaintiff is appointed by the Council, subject to the approval of the Board (section 84 (1)). The whole tenor of section 84 is to the effect that the overseer is an officer of the Council, not an officer of the Board, i.e. the relation of employer and employee exists between the Council and the overseer; it does not exist between the Board and the overseer. Dismissal is provided for in section 85 (4); "no overseer shall be dismissed by the local authority except with the prior approval of the Board."

Under section 20(2) (b) the Board has power to remove an overseer from his office but only "for good cause." "Good cause" has not been pleaded by the Board; the section is therefore not available as a defence. This being the case, it is the Council only that may dismiss the plaintiff. So far from having dismissed him, it was dissatisfied with the action of the Board and wished to retain the services of the plaintiff as overseer. The result must be, says Mr. Stafford that the plaintiff has never been dismissed; he has never ceased to be overseer to the Council, and he seeks a declaration accordingly, having made the Board and the Council defendants in the action.

8. In its defence the Board disclaims any reliance on its power to remove the plaintiff under section 20 (2) of the Ordinance, already referred to, and set out later. Its defence is firstly, that its authority to dismiss the plaintiff is provided for in section 19 of the Ordinance. This section is as follows: —

"The Board shall have and may exercise in any village or country district any or all of the powers of a local authority whenever it appears expedient so to do, and may exercise any or all of those powers in any of those districts, whether there is, or is not, a local authority thereof."

The Solicitor-General who argued this question on its behalf, referred also to section 85(4), impliedly conferring on a local authority the power to dismiss an overseer but only with the approval of the Board. The material part of the section has been set out above.

9. Secondly, the Board says that it had power to terminate the services of the plaintiff under the terms of the plaintiff's appointment. Paragraph 3(2) of the Defence was: —

"It was a term of the plaintiff's appointment that the plaintiff's service might be at any time determined by either the plaintiff or the defendants giving one calendar month's notice to the other of them to determine the said appointment."

This is pleaded as if it were an express terms, but no such term has been proved. It is clear, however, what is meant; viz: — that there was an implied term to the above effect between the Council and the plaintiff, and that under section 19 the Board is entitled to the benefit of this implied term.

10. The argument of the Solicitor-General was that the Council had power to dismiss the overseer, whether for good cause, or without good cause with notice; and that under section 19 this power may be exercised by the Board whenever it appears to be expedient. He did not address to me any argument as to how this construction of section 19 is to be reconciled with section 20(2)

(b). Under this latter sub-section the Board has power to remove an overseer, but only for good cause. If section 19 gives the Board the power to dismiss an overseer under the ordinary law of master and servant, it is strange that it was thought necessary in section 20 (2) (b) to provide a power of removing him from office and to effectively limit that power by confining it to cases where "good cause" for such removal could be shown to exist.

11. This argument leads to an interesting question of construction. I have already referred to section 20, the section immediately following section 19. It is as follows: —

> 20(1) Subject to the provisions of this Ordinance and of the by-laws, the Board shall have the superintendence of all village and country districts in the colony, and shall have and exercise general powers of supervision, inspection and control over the several local authorities and the officers and servants thereof,
>
> (2) In the exercise of those general powers the Board may
>
> (a) review the order or decision of any village council or country authority, and by resolution declare such order or decision to be invalid in which case the order or decision shall ipso facto be void, and may substitute for the order or decision any order or decision which it deems proper, and any order or decision so substituted shall have the same force and effect in all respects as if it had been made by the village council or country authority.
>
> (b) for good cause remove from office the chairman or any member of a country authority, or any overseer or other officer of a village council or country authority, and in his stead appoint a chairman, member, overseer or other officer, as the case may be
>
> (3) An overseer or other officer removed from his office as aforesaid shall not be entitled to any damages or payment of salary or other emolument in lieu of notice of termination of his engagement.

12. The scope of the two sections can be explained without any stigmata of inconsistency or superfluity. Section 20 relates to a general power of superintendence, with special powers of supervision, inspection and control over local authorities and their officers and servants. These powers include the quashing of its own orders; and power to remove from office members of country authorities as distinct from members of village councils; and power to remove from office any officer of a local authority. If these powers are scrutinised it will be seen that they are all powers which may be exercised by the Board at any of its meetings; they do not necessitate the presence of the Board or its officers in the locus of the village or country district. On the other hand, section 19 clearly relates to cases in which the Board considers it expedient to deprive the local authority of all or any of its powers. It then proceeds to exercise the powers of the local authority through officers under its own control. It acts in place of the local authority, the latter being functions officio as regards the powers taken over by the

Board. That this construction of section 19 is right is clear from the words "in any village or country district", and from the concluding words "in any of those districts, whether there is or is not a local authority thereof." The use of the word "remove" in section 20(2) (b) is also significant, when compared with the use of the words "dismissed by the local authority" in section 85 (4). This shows that the legislature recognised that the relation of employer and employee does not ordinarily exist between the Board and an overseer. If the Board steps in under section 19 and acts in place of the Council, then the relation of employer and employee exists, and the right of the Board to dismiss an overseer will depend on the ordinary law. In this case the Board had not acted under section 19. Its only power as regards the plaintiff was under section 20, i.e. to remove him from his office for good cause.

13. Section 19 cannot therefore be invoked as a defence, but I do not think the consequences as stated by Mr. Stafford follow. The Board had power to remove the overseer, and it did remove him. His removal must therefore be taken as a fact. As soon as the Board's decision was challenged, it had to show "good cause". Being unable to do this, it sheltered itself under an interpretation of section 19 which has been found to be incorrect. This, however, cannot affect the fact that it has removed the overseer from his office.

14. As an alternative claim to the declaration asked for the plaintiff claimed damages for wrongful dismissal. He cannot claim such damages from the Council because the Council did not dismiss him. Nor can he claim them from the Board, because there was no contract between him and the Board; the relation of employer and employee did not exist. In Lever Bros. Ltd. v. Bell, 1931, 1 K.B. 357, Scrutton L.J. said "The practice of the Courts is to consider and deal with the legal result of pleaded facts, although the particular legal result is not stated in the pleading." Here the legal result is that the Board has committed a tort, an illegal act causing damage to the plaintiff. I assess the damages at $500.

15. There is a further claim by the plaintiff against the Council for arrears of salary. He was appointed at a salary of $600 per annum. The estimates for 1947 showed that a salary of $720 was provided for the overseer. The plaintiff says that this was tantamount to a promise to pay him an increased salary of $720 per annum. This is not so. It frequently happens that sums are provided ill estimates greater than those actually required. There evidently was a surmise that the plaintiff might be granted an increase salary during the year but there is no evidence that this was ever considered. This claim fails.

16. There will be judgment for the Council with costs. There will be judgment for the plaintiff against the Board for $500 and costs.

Judgment for plaintiff against first-named defendant; judgment for second-named defendant.

Solicitors: *Ivan G. Zitman; Vivian C. Dias.*

B. BACCHUS *v.* S. FORRESTER AND ANR
BISMILLAH BACCHUS,

Appellant,

v.

SHEILA FORRESTER,

Respondent,

[1949. No. 224.—DEMERARA]

BISMILLAH BACCHUS,

Appellant,

v.

BASIL HAZLEWOOD,

Respondent,

[1949. No. 225.—DEMERARA.]

BEFORE MANNING, J. (ACTING), IN CHAMBERS.

1949. JUNE 20; JULY 8.

Rent Restriction Ordinance 1941—*Premises erected in* 1948—*Rent Assessment by Rent Assessor.*

Where an old building is pulled down and re-erected, that is not either an improvement to a building or a structural alteration to a building and a Rent Assessor is thereby precluded from adding to the standard rent any sum for improvements or alteration.

Although a Rent Assessor may, by sub-section 1A of Section 4B of the Rent Restriction Ordinance 1941, as amended by Ordinance 3 of 1948, have regard to all the circumstances of the case, to ascertain and certify the standard rent of premises first let subsequent to the 8th March, 1941, yet he is bound to take a building and its rooms as he finds them and assess the standard rent at what he considers fair in the circumstances. The cost of erecting a building is not necessarily a circumstance to be taken into account.

Appeals by Bismillah Bacchus from the decisions of the Rent Assessor, Georgetown.

J. Edward de Freitas, Solicitor, for the appellant.

Respondents in person.

Cur. adv. vult.

MANNING, J. (Acting): These two appeals to me in Chambers from decisions of the Rent Assessor relate to two rooms on the same premises at 170 Barr Street,Kitty. Forrester paid $11 a month rent for her room, and Hazlewood $15 for his. On application to the rent assessor their maximum rents were fixed at $6.90 and $8.29 respectively per month.

2. The landlord has appealed in each case and Mr. J. E. de Freitas, on her behalf, urged that the rent assessor had failed to take into account the amount she had expended on the premises.

He referred me to section 6(1) (a) of the Rent Restriction Ordinance, which prescribes that the rent assessor may, in fixing the maximum rent, add to the standard rent an amount, to be assessed by him and set out in his certificate, not exceeding eight per centum of any expenditure on improvements or structural alterations. Mr. de Freitas said the rent assessor did not assess or set out in his certificate any amount under this head.

3. A perusal of the Ordinance and of the applications in these two cases shows that this provision is not applicable. The applications were made under section 4 B (1) of the Ordinance, inserted by section 5 of Ordinance 13 of 1947. Later by Ordinance 30 of 1948, section 4, a new sub-section, I A, was inserted between sub-sections 1 and 2 of section 4 B. Sub-section 1 A relates to premises erected after March 8th 1941, and authorises the rent assessor to certify the standard rent at a less amount than the rent at which the premises were first let. The premises in the present cases were erected in 1948. The building is new; and the relevant rooms were let to the respondents at the respective rates set out above. Since they have been let there have been no improvements or structural alterations. The landlord had pulled down an old building and erected the present one in its place. This was not either an improvement to a building, or a structural alteration to a building. The rent assessor had to assess a fair rent as the standard rent; but, in fixing the maximum rent, he was precluded on the facts from adding any amount for improvements or structural alterations.

4. Mr. de Freitas urged that, apart from this, the rent assessor was bound by sub-section 1 A of section 4 B to have regard to all the circumstances of the case. One of these circumstances was the amount the landlord had expended in erecting the new building and this circumstance the rent assessor refused to take into consideration. I do not think that the certificate should be interfered with on this ground. The cost of erecting a building depends to a large extent on business skill and constant supervision; where one man may spend $7,000, another might have completed at a cost of $5,000 or $6,000. The rent assessor has to take a building and its rooms as he finds them and assess the standard rent at what he considers fair in the circumstances. It would not be fair it tenants had to bear the burden of a disproportionate rent because premises had been erected in an extravagant or wasteful manner.

5. The appeals will be dismissed. Both respondents appeared in person they are entitled to any costs incurred by them in attending the hearing of the appeals.

Appeals dismissed.

RE—MANGAL SINGH, (Deceased)

Re—MANGAL SINGH, (deceased).

[1949. No. 387.—DEMERARA]

BEFORE WORLEY, C.J.

1949. AUGUST 8, 16, 22 AND 29.

Grant of lands in perpetuity for certain trusts—whether charitable purpose—relief and education of the poor—advancement of religion —non Christian.

Ex parte application on the part of the executors of an estate for directions on and construction as to whether a certain bequest was a good, charitable bequest. The bequest was for the assistance and education of the poor and for the propagation of the Hindu religion. The main point for determination was whether a gift for the advancement of a non Christian religion could be regarded as charitable.

Held: The gift satisfied all the conditions which attach to a valid charitable purpose.

Carlos Gomes, for the applicants.

Cur. adv. vult.

WORLEY, C.J.: This is an exparte application on the part of the executors of the estate of Mangal Singh, deceased, for directions on and construction of a number of clauses in the will of their teastator but the only part of the application which I am now considering is the following, namely, whether the gift contained in Clause 5 of the will is a good charitable gift.

Clause 5 directs that a named property "be received and placed under the trusteeship of Ramsaroop Maraj trustee of the Albouystown Hindu Religious Society or his successors in office for the purpose of managing same," and, after directions for the management and maintenance of the property, further directs "that of the monies received from the rents collected the sum of $1.00 a month is to be given to each of the following, namely: —

1. The trustees of the Hindu Temple at lot 88 New Road, Vreed-en-Hoop,
2. The trustees of the La Penitence Hindu Temple,
3. The trustees of the Albouystown Hindu Temple,
4. The trustees of the Hindu Temple at Barr Street, Kitty, and
5. To the Sanatan Dharam Salha.

There are further directions that the balance of the rent is to be accumulated to effect improvements in the said property and after all improvements have been effected the rents are to be dealt with as before directed, share and share alike, between the aforesaid temples and the Maha Sabha to assist in their upkeep. Lastly there is a direction that should the Trustee of the Hindu Religious Society, Albouystown, Georgetown, be unable to carry on the said duties for any reason, his power shall be trans-

ferred to or assumed by the Public Trustee of British Guiana or any other person or persons that the Government shall deem fit and proper to appoint.

It is agreed, and I have accordingly declared, that the reference to the Albouystown Hindu Religious Society is intended as a reference to the Hindu Religious Society incorporated by Ordinance No. 12 of 1943 and that the reference to the Sanatan Dharam Salha is intended to refer to the British Guiana Sanatan Dharma Maha Sabha, a society registered under the Friendly Societies Ordinance, Chapter 214.

A grant of lands in perpetuity for a trust such as is expressed in this Clause can only be supported on the ground that it is for a charitable purpose (see Yeap Cheah Neo v. Ong Cheng Neo 1875 LR. 6 P.C. 381 at p. 394) and the law as to charities in this Colony is contained in section 9 of the Civil Law of British Guiana Ordinance, (Chapter 7) which provides as follows: —

"The law as to charities shall be the common law of England provided that

(a) no bequest or gift, whether testamentary or otherwise, shall be held void by reason only that it is for a superstitious use or purpose; and

(b) by "charities" shall be ordinarily understood charity within the meaning, purview, and interpretation of the preamble to the Act of the forty-third year of Queen Elizabeth, chapter four as preserved by section thirteen of the Mortmain and Charitable Uses Act, 1888."

The evidence before me of the objects and purposes of the above-named Societies and Temples consists of a statutory declaration made by responsible officials of those Societies and Temples in which they say that the objects are

(a) to promote the Hindu religion in the Colony of British Guiana i.e. the doctrines contained in the Vedas, namely, the Hindu Gospel which teaches the creation of man and the world by one God, who is a spiritual Being, for the purpose, of knowing, loving and serving Him, and to love one's neighbour as oneself for God's sake; and

(b) to assist and educate the poor of the Colony.

The relief and education of the poor is a recognized charitable purpose within the meaning of the Act of Elizabeth and is not confined to the poor of any particular religion, (see Halsbury Laws of England, Second Edition Vol. 4, para. 148 p. 113).

The "advancement of religion" is also a charitable purpose under the Act and these words have been interpreted as meaning the promotion of spiritual teaching in a wide sense and the maintenance of the doctrines on which it rests and of the observances that serve to promote and manifest it (see Keren Kayemesth Le Jisroel Ltd. v. Inland Revenue Commissioners, (1931) 2 K.B. 465 C.A. per Lord Hanworth M.R. at p. 477). But, as Lord Parker of Waddington said in Bowman v. Secular Society Ltd. (1917) A.C. 406 at p 448 (a case which I shall consider in more detail later), "trusts for the purposes of religion have always been recognized in equity as good charitable trusts, but so far as I am aware there

is no express authority dealing with the question what constitutes religion for the purpose of this rule." In Tyssen's Charitable Bequests 2nd Edition p. 95 it is said

> "By virtue of the relieving Acts and subsequent decisions of the Courts, gifts for the propagation of any religious faith are permissible and charitable gifts, but a gift which is subversive of all religion or morality is contrary to public policy and void,"

The examples which follow this statement are, however, with the exception of one which refers to Jews, examples of charities for the promotion of various forms of Christianity and, further, it has frequently been said that Christianity is part of the law of England: further consideration is therefore required before it can be confidently asserted that the principles thus expressed can be applied to gifts for the promotion of a non-Christian religion.

The problem is simplified by the application of the first proviso to section 9 of the Civil Law Ordinance. That Ordinance came into force on the 1st January 1917, that is to say, before the House of Lords had decided in Bourne & anor v. Keane & ors (1919) A.C. 815 that a bequest of personal estate for masses for the dead is not void as a gift to superstitious uses at common law. The proviso was, therefore probably intended principally to avoid the opinion then held that the saying or singing of obits or the ceremony called the mass was superstitious, but, as Lord Birkenhead L.C. was careful to point out (at p. 860), the House was not deciding that the were now no superstitious uses, or that no gift for any religious purpose, whether Roman Catholic or other could be invalid. However the words of the proviso are wide enough to cover all superstitious uses or purposes and the effect of the proviso is as stated in Dalton's Civil Law of British Guiana 1921 at p. 67:—"a bequest is not void in British Guiana, if it is merely for a 'superstitious' use and does not contravene the law in any other respect for example, does not contravene the law against perpetuities or is not contrary to public policy". I therefore do not propose to concern myself further with this aspect of the question.

If it were true that "Christianity is parcel of the law of England" it would be difficult to see how a gift for the advancement of any other religion than the Christian religion could be held to be charitable, but in the case of Bowman v. Secular Society Ltd. (Supra) the House of Lords overruled all previous cases in which this maxim had been enunciated as a principle of law. In that case a testator bequeathed certain property upon trust to the respondent corporation whose main object was "to promote ……..the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action." The question before the House was whether the gift to the respondent society was a gift for an illegal purpose, and the appellant's case was that a society for the subversion of Christianity is illegal and is incapable of enforcing a bequest to it. It was argued for the appellant that Christianity is and has always been regarded by the Courts of England as the basis on which the whole of the English law, so far as it has an ethical side, rests and any

movement for the subversion of Christianity has always been held to be illegal. The respondent replied that Christianity is not part of the law of England in the sense that denial of the truth of Christianity constitutes a legal offence: that would be giving to the common law Courts a wider jurisdiction than even the Ecclesiastical Courts professed to exercise for their jurisdiction in that regard was confined to persons who were brought up as Christians and to cases of obstinate heresy. Their Lordships held that, assuming that the principal object of the Society involved a denial of Christianity, it was not criminal inasmuch as the propagation of the anti-Christian doctrines, apart from scurrility or profanity, would not constitute the offence of blasphemy and that the bequest was valid.

Lord Parker of Waddington, after stating the general principle of the recognition of trusts for the purposes of religion cited above and referring to the position prior to and after the Reformation, and to the subsequent penal statutes which enforced uniformity with the established church and imposed penalties on the exercise of any other form of religion, whether Christian or otherwise, said: —

> "As long as these statutes remained in force no trusts for the purposes of any other religion than the Christian religion, or of any form of Christianity other than the Anglican, were enforceable, because it was clearly against public policy to promote a religion or form of religion the exercise of which was penalised by statute. The fact that no such trust was enforceable does not show that it was not a trust for the purposes of religion within the meaning of the rule."

It is convenient to note here that the Acts of Uniformity and the other penal statutes which the learned Lord had in mind have never been in force in this Colony.

Lord Parker then goes on to refer to the relief given at various times by statute to Protestant Dissenters, Roman Catholics and Unitarians (who deny the doctrine of the Trinity and some of whom dispute the Divine authority of the Old and New Testament) and then said: —

> "If there is any doctrine vital to Protestant Christianity it would appear to be that of the Divine authority of the Scriptures, and yet in the case of trusts for the religion of Unitarians no distinction has been drawn between those who do and who do not hold this doctrine. It would seem to follow that a trust for the purpose of any kind of monotheistic theism would be a good, charitable trust and that is not illegal or contrary to public policy to deny the authority of the Old or New Testament."

He further points out at p. 450 that the case of De Costa v. De Paz (2 Swanst 487) seems to show that the Jewish religion is within the equitable rule and that, apart from the statutory penalties, there was never any inconsistency with public policy in enforcing a trust for the benefit of the Jewish religion. In Isaac v. Gompertz 1786 (7 Ves. 61) Lord Thurlow held that a trust for the maintenance of a Jewish synagogue was charitable, but the mode of disposition was such that it could not take effect as the law then stood and directed an application to the Crown with a view to cy pres application.

Lord Parker also cited the decision of Rommily M.R. in Para v. Clegg (29 Beav. 589) as showing that Lord Rommily could not have thought that there was anything against public policy in advocating deism or (a fortiori) any form of monotheism.

Although he had no doubt that the object of the society was anti-Christian he adopted the words of Coleridge J. in Shore v. Wilson (9 C1. & F. 355, 539)

> "There is nothing unlawful at common law in reverently doubting or denying doctrines parcel of Christianity however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far one might depart from it in believing or teaching without offending the law. The only safe, and, as it seems to me, practical rule, is that which I have pointed at, and. which depends on the sobriety and reverence and seriousness with which the teaching, or believing, however erroneous, are maintained".

The argument that Christianity is part and parcel of the law of England found favour with Lord Finlay L.C. but was rejected by Lord Sumner in the following passage (p. 464).

> "with all respect for the great names of the lawyers who have used it, the phrase "Christianity is part of the law of England", is really not law: it is rhetoric.....Ours is, and always has been, a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities, and its sanctions even in courts of conscience, are material and not spiritual."

He then goes on to consider the law of blasphemy and concludes by propounding the proposition that the attitude of the law both civil and criminal towards all religions depends fundamentally on the safety of the State and not on the doctrines or metaphysics of those who profess them, and then concludes: —

> "If these considerations are right.....it is not necessary to consider whether or why any given body was relieved by the law at one time or frowned on in another, or to analyse creeds and tenets. Christian and other, in which I can profess no competence."

Lord Buckmaster (p. 475) cited Harrison v. Evans 1767 (2 Burn's Ecc. Law 207, 218) in which Lord Mansfield defined the common law in these terms: —

> "There never was a single instance, from the Saxon times down to our own, in which a man was ever punished for erroneous opinions concerning rites or modes of worship, but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions."

and Lord Buckmaster then concludes (at p. 477): —

> "If the holding of opinion be not contrary to the common law, I cannot see why its expression should be unlawful, provided such expression be kept within proper limits of order, reverence and decency. If this be so, a society to propagate such opinions, if properly conducted, is not an illegal society."

Lord Dunedin concurred with Lord Buckmaster's views.

I may also refer to the words of Palles C.B. in O'Hanlon v.

Logue (1906) 1 I.R. 247 quoted by Lord Atkinson in Bourne v. Keane (supra) at p. 881.

> "All this shows the true reason why the common law held the gifts pious. It was because they were gifts to God: gifts which provided for the worship of God. Even had the common law acknowledged more religions than one, it would have held pious any gift making provision for the worship of God irrespective of the particular acknowledged religion according to which worship was to be offered, provided only such religion were recognised as lawful."

I venture to summarize these statements of the common law as follows: — a gift is charitable if it be for the promotion of the spiritual teaching of any monotheistic religion, or for the maintenance of the doctrines and observances of any such religion; provided that the expression of these be kept within proper limits of order, reverence and decency, and provided further that the teachings of such religion do not constitute a danger to the State or otherwise run counter to public policy. This second limitation is, as Lord Sumner pointed out, a question of the times and a question of fact.

In the recent case of Gilmour v. Coats and others (1949) 1 AII E.R. (H.L.) 848, the tolerance or neutrality of the law towards varied forms of religion is again made manifest. Lord du Parcq said (at p. 858)

> "It must be remembered that the law of England recognises as proper objects of charitable endowment at least all those varied forms in which the Christian religion is professed and practised.

And Lord Reid said, at p. 862: —

> "The law of England has always shewed favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practise a religion, but, where a particular belief is accepted by one religion and rejected by another, the law can neither accept nor reject it. The law must accept the position that it is right that different religions should each be supported, irrespective of whether or not all its beliefs are true".

But, though the tolerance of the law towards religious beliefs is now almost universal, yet it is still the law that not all gifts for religious purposes are charitable. If the purpose of the gift lacks the element of public benefit (which is a matter for the Court to determine) it will not be charitable and, if it creates a perpetuity, will be invalid (Gilmour v. Coats and ors. supra).

The evidence before me shows that the propagation of the Hindu religion, as described in the statutory declaration filed, as one of the purposes of the four named temples and the Sanatan Dharma Maha Sabha, satisfies all the conditions which attach to a valid charitable purpose. As I have already said, their other object; the assistance and education of the poor is a charitable purpose irrespective of the question of religion.

For these reasons I declare the gift to be a good charitable gift.

W. BISNAUTH *v.* A. WAHAB AND ORS.

WILLIAM BISNAUTH,

Appellant (Defendant),

v.

ABDOOL WAHAB, Police Constable No. 5336,

Respondent (Complainant).

And between: —

WILLIAM BISNAUTH,

Appellant (Defendant),

v.

MANIRAM MATTAI, Police Constable No. 5332,

Respondent (Complainant).

[1949. No. 223.—DEMERARA]

BEFORE FULL COURT: WORLEY, C.J., WARD, J., MANNING, J. (ACTING).

1949. JULY 1; AUGUST 30.

Section 22 (1) *Motor Vehicles and Road Traffic Ordinance* 1940—*Distinction between hired car and a motor bus.*

The appellant was the driver of a motor vehicle which was licensed as a hired car. On two separate occasions on one day he took passengers who were charged to pay at the rate of separate and distinct fares for their respective places in the car. At no time did he carry more than seven passengers—the number permitted to be carried in a hired car under section 2 of the Ordinance.

Held: The appellant was not using his vehicle as a hired car but as a vehicle carrying passengers for hire or reward.

Appeal from a decision of the Magistrate of the West Demerara Judicial District convicting the appellant for using an unlicensed motor vehicle contrary to section 22 (1) of the Motor Vehicle and Road Traffic Ordinance No. 22 of 1940.

F. Ramprashad, for the appellant.

E. Mortimer Duke, Solicitor-General, for the respondents.

Cur. adv. vult.

The judgment of the Court was as follows: —

The defendant, William Bisnauth, was charged under section 19 sub-section (2) of the Motor Vehicles and Road Traffic Ordinance 1940 with using an unlicensed motor vehicle contrary to section 22 of the same Ordinance. Sub-section (2) of section 19 of the Motor Vehicles and Road Traffic Ordinance 1940 provides that "where a licence has been taken out as for a motor vehicle to be used solely for a certain purpose and the vehicle is at any time during the period for which the licence is in force used for some other purpose, the person so using the vehicle shall, if the fee chargeable in respect of a licence for a vehicle used for that

purpose is higher than the fee chargeable in respect of the licence held by him, be deemed to be guilty of an offence under section 22 of this Ordinance." It appears from the evidence and from the document Exhibit "A" put in by the witness Maniram Mattai that the motor vehicle H6819 was licensed as a hired car, the licensing fee for which is substantially less than the licence for a motor bus.

A hired car is defined in section 2 of the Ordinance as a "motor car used or intended to be used for carrying not more than seven passengers for hire or reward under a contract express or implied for the use of the vehicle as a whole for a fixed or agreed rate or sum." The evidence of the Police constables, which was not challenged except as to the identity of the appellant, is to the effect that on two separate occasions on the 24th day of December 1948 the appellant took passengers who were charged to pay at the rate of separate and distinct fares for their respective places in the car along the West Coast, Demerara Public Road. On one of the journeys he also carried a bicycle and two bicycle frames for which he charged the passenger an additional fare. It was further proved that the appellant appreciated the distinction between a hired car and a motor bus, for he asked the passengers to say, if the police stopped the car, that they had hired the taxi to go to Leonora.

It was contended by the appellant's counsel that, provided the appellant did not carry more than seven passengers—the number permitted to be carried in a hired car—,he was using the vehicle in a different manner, but not for a different purpose from that for which it was licensed. We cannot accept this as a valid distinction. The essential feature of a contract for the hiring of a hired car is that the vehicle is hired as a whole. The antithesis is between a particular and definite private hiring of the vehicle as a whole and the taking up or picking up of passengers. It is of course possible that a number of passengers may agree to hire a motor vehicle by a single contract and apportion the sum charged among themselves according to the respective distances they are travelling. But as soon as the individual passengers are charged separate fares the vehicle ceases to be used as a hired car and becomes a vehicle carrying passengers for hire or reward at separate fares. The appellant was, in our opinion, guilty of the exact mischief against which the Ordinance provides, and the appeal is dismissed with costs.

Appeal dismissed.

J. R. RALPH *v.* C. RALPH.

JAMES RODNEY RALPH,
Appellant (Defendant),

v.

CHRISTINA RALPH,
Respondent (Complainant).

[1949. No. III—DEMERARA.]

Before Full Court: WORLEY, C.J., WARD, J. MANNING, J. (Acting).

1949. July 1; August 30.

Section 4 (1) *Summary Jurisdiction* (*Magistrates*) *Ordinance—Complaint filed by wife against husband for desertion—When wife is justified in leaving matrimonial home—When adultery or reasonable inference of adultery by husband is such justification—constructive desertion—Subsequent refusal by wife to resume cohabitation when justifiable—Evidence of husband's means as necessary basis for quantum of order for maintenance—an order for non-cohabitation when a proper remedy...*

In an application by a wife in the Magistrate's Court for an order for maintenance under section 4 (1) of the Summary Jurisdiction (Magistrates) Ordinance, Chapter 9, on the ground that her husband had deserted her, the Magistrate accepted the wife's evidence and found that the husband was guilty of constructive desertion because he was carrying on an adulterous association with the owner of the house in which he and his wife lived although afterwards the husband had requested the wife to resume cohabitation. The Magistrate without hearing evidence as to husband's means made an order for maintenance and also an order that the wife was not bound to cohabit with him.

Held: (1) There was no evidence to support the Magistrate's finding of fact and the order made must be set aside, and even if the circumstances had been such as could have justified the wife going away from the matrimonial home, she was not entitled to refuse resumption of cohabitation when the husband was sincerely repentant and there was no ground for the belief of the continuance of his adultery. Her refusal in such circumstances not only would terminate the husband's deserting but render her guilty of deserting him.

(2) An order that a wife is not bound to cohabit should not be made when the complaint is grounded only on desertion.

APPEAL by defendant from a decision of the Magistrate of the Georgetown Judicial District. The facts are fully set out in the judgment.

C. L. Luckhoo, for appellant.

J. Carter, for respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

This is an appeal by a husband against whom the Magistrate has made a finding of desertion. The case was one in which the respondent-wife left the matrimonial home on the 7th of April, 1946 and asserts that she had a reasonable ground for so doing, and further asserts that she has reasonable grounds for refusing

the appellant's subsequent offers of reconciliation and that these are not bona fide. The question is whether it is possible or right for us to interfere with the final conclusion of the magistrate that the appellant-husband constructively deserted the respondent and that the wife was justified in refraining from further cohabitation with him. The case presented by the wife in substance was that her husband had committed adultery and thereby justified her in withdrawing from cohabitation.

In this Colony adultery per se is not, as in England since the Matrimonial Causes Act, 1937, a ground upon which a wife can apply for an order or orders under section 4 (1) of the Summary Jurisdiction (Magistrates) Ordinance, Chapter 9. But a wife, whose husband is carrying on an adulterous intercourse with another woman, is not bound to remain in cohabitation with him, whether the adulterous intercourse is carried on in the matrimonial home or elsewhere. She may offer to remain with her husband provided he will give up the connexion complained of and if he refuses to do so she may withdraw from cohabitation. The husband in such a case, must be taken to intend the consequences of his acts and his conduct constitutes desertion (Sickert v. Sickert 1899 P. 278).

Further, in such a case the true issue is not whether the husband has in fact committed adultery but whether he has so conducted himself as to lead any reasonable person to believe, until he gives some explanation, that he has committed adultery. A spouse becoming aware of the facts and honestly drawing that inference and leaving the other spouse on that ground, ought not to be held to have left without reasonable cause (Glenister v. Glenister 1945 1 A.E.R. 513).

"So long as the belief is reasonably and properly held the husband's conduct and their respective rights in relation to cross-charges of desertion are regulated by the existence of the belief, though there may come a moment beyond which that is no longer possible." (per Lord Merriman P in Everitt v. Everitt 1949 1 A.E.R. 908 at p. 913).

But if the spouse who has been "deserted" in such circumstances unjustifiably refuses to resume cohabitation such refusal not merely terminates the desertion but also reverses the process and this applies to a case, like the one now before us, of constructive desertion terminable by appropriate repentance and appropriate assurance of amendment of such a kind, according to the individual circumstances, as the aggrieved spouse is not justified in refusing. To that of course, must be added the qualification that in each case the question whether the refusal is justified or unjustified must be determined on its own merits, (see Everitt v. Everitt (supra) at p. 916, summarising the judgment in Thomas v. Thomas 1924 P. 194).

The two questions therefore which the learned magistrate had to pose to himself in this case were: —

(1) Did the respondent reasonably and properly believe that the appellant had committed adultery and leave him on that ground; and

(2) Was the respondent justified in her refusal to resume cohabitation?

The parties were married in 1943 and there are two children of the marriage born in 1944 and 1945. In 1944 they went to live in a house of one Christina Maloney, with whom the respondent had lived before her marriage. The living part of the house consists of one bed-room and a hall or sitting room. The case presented by the respondent, which the learned magistrate accepted, was that some time in March 1946 she slept in the bedroom with the infant child, and the appellant and Maloney slept in the hall. She questioned the appellant about his conduct and he said nothing had happened. The respondent then asked the appellant to get another house where they could be by themselves but the appellant said he could get no other place. About six weeks later, there was a quarrel between the respondent and Maloney after which the respondent packed up her things and left taking the children. The appellant is aged 43; Maloney is aged 54 and is living apart from her husband. Appellant denied that he had slept outside in the sitting room with Maloney or had misconducted himself with her and asserted that the cause of the trouble between him and his wife was that she was angry and stopped preparing his meals because he rebuked her for leaving undone work which he had left her to do. He admitted that the respondent had complained of his being too friendly with Mrs. Maloney about six weeks before she left, and asked him to get another house. In 1947 when the respondent had to go to hospital, she handed the children back to her husband, in whose custody they still are, and she has visited the children regularly. Appellant said that he regarded Maloney as an adopted mother. He continued to live at her place until the hearing of the complaint in this case, when he moved to a room which he has rented. Maloney continues to cook his meals and the woman in whose house he now lives looks after the children for him.

There was no evidence to support the respondent's allegation of adultery and that allegation amounted to nothing more than the statement that because her husband and Mrs. Maloney slept one night in the hall or sitting room of the house there was misconduct between them. In Fairman v. Fairman 1949 1 A.E.R. 938 Lord Merriman P. pointed out that the situation of a landlady and a lodger is such that an opportunity to commit adultery is thereby afforded, but that a great deal more than such evidence of opportunity is necessary to convict a woman who, for perfectly valid business reasons and because she has been deserted by her husband, takes people of the opposite sex to live in her house. Although this Court has not had the advantage of seeing and hearing the witnesses, we feel that the learned magistrate should, in the circumstances of this case, have hesitated before accepting the bare word of the respondent on so grave an accusation. The respondent is the cousin and god-daughter of Maloney with whom she had lived before her marriage and from whose house she was married. The wife is a young woman aged about 30 and there is a considerable disparity of age between the appellant and Maloney.

As to the second question, the appellant continued to support his wife until December, 1947, and swore that he ceased to do so as he was then building a house and his wife told him she did not

want any money: she was then working as a domestic servant. About this time, it appears that the respondent applied for a maintenance order and that acting on the magistrate's advice the appellant rented a house and offered to resume cohabitation with her. The respondent refused on the ground that the house was not habitable. That summons was eventually struck out for default of appearance.

The appellant has not yet completed the house which he is building but during the pendency of this summons he has removed from Maloney's house to another which he has rented, and has offered to take her back.

The respondent countered this offer by alleging that while living in Maloney's house the appellant had beaten her with a stick and has since threatened her and that she was afraid to return to him. Her evidence on the point was not corroborated and was denied by the appellant. On this point, the learned magistrate says "I could not believe that the defendant was bona fide in his offer to resume cohabitation, as his conduct concerning this was inconsistent with bona fides. Had he been really desirous of healing the breach with his wife he could and would have spoken to her and offered her resumption long before November 1948. I believe that the offer made was made by him not with the idea of inducing his wife to return but to escape the consequences of his own desertion, and I accepted the wife's evidence of having been threatened by him in the circumstances." This finding is, of course, dependent on and coloured by the learned magistrate's finding that the wife had just cause to leave her husband on account of his adulterous association with Maloney, a finding which, as we have said, was in our view scarcely possible on the evidence.

The allegation of threats also appears inconsistent with the respondent's own evidence that she took the children to her husband and since then had been to him on several occasions to know what he intended to do, and that she was willing to return if he got a house.

There are two other objections to the order appealed against: firstly the learned magistrate had before him no evidence as to the appellant's means on which he could base an order for the quanturn of maintenance and secondly he has inserted into the order a non-cohabitation clause. In Harriman v. Harriman 1909 P. 123 the Court of Appeal expressed the opinion that when the ground of an application under the Summary Jurisdiction Acts is desertion, a non-cohabitation clause is not an appropriate remedy and should not be inserted in the Order: see also MacKenzie v. MacKenzie 1940 P. at p. 87 and Beard v. Beard 1946 174 L.R. at p. 67. The separation order has the effect in all respects of a decree of judicial separation and is inappropriate for the reason that a husband, who has been found guilty of desertion but who is repentant and gives appropriate assurance of amendment of life of such a kind as the aggrieved spouse would not be justified in refusing on the merits, ought not to be met with an order which relieves the wife of the duty of cohabitation. As Hodson J. pointed out in Beard v. Beard (supra) the order prevents the husband

from returning if he wishes, and so perpetuates a state of affairs which it is the policy of the law to avoid.

Finally, we observe that in the Court below the solicitor for the appellant cited the cause of Lodge v. Lodge 1890 (15 P.D. 159). It is therefore appropriate to remark that in Everitt v. Everitt (supra) that case was directly over-ruled by the Court of Appeal.

In all the circumstances we think that this Order must be set aside. The appeal is allowed: each party will bear their own costs.

Appeal allowed.

M. F. COLLINS, District Commissioner,
Appellant (Complainant),

v.

BALKARRAN,
Respondent (Defendant),

[1949: No. 257—Demerara]

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

1949, June 29; August 30.

APPEAL—selling rum without being the holder of a licence—Intoxicating Liquor Licensing Ordinance. Cap. 107*—No evidence adduced by prosecution that premises not licensed—dismissal of charge—appeal allowed—prosecution need not prove absence of lawful authority—Section 9 Summary Jurisdiction* (*Procedure*) *Ordinance, Cap.* 14.

The respondent was acquitted in the Magistrate's Court on a charge of selling rum without being the holder of a licence as required by section 41 (1) the Intoxicating Liquor Licensing Ordinance, Cap. 107, because the prosecution did not lead some evidence that the premises in which the rum was sold were not licensed. On appeal.

Held: It was not a necessary part of the case for the prosecution to assert or prove a negative.

Cases referred to: Long v. Bissoondial (1922) L.R.B.G. 151, R. v. Oliver (1944) 2 A.E.R. 800, R. v. Turner (1816) 5 M. & S. 206; R. v. Scott 86 J. P. 89, R. v. Sorrel] (1946) 174 L.T. 148, Williams v. Russell (1933) 149 L.T. 190; Buckman v. Button (1944) 2 A.E.R. 82.

E. MORTIMER DUKE, *Solicitor-General,* for the appellant.

R. H. LUCKHOO,. for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

In this case the defendant was charged under Section 41 (1) of the Intoxicating Liquor Licensing Ordinance (Chapter 107) with selling rum without being the holder of an appropriate licence. The Magistrate dismissed the complaint at the close of the

case for the prosecution on the ground that it was necessary for the prosecution to lead some evidence showing that the premises in which the rum was sold were not licensed. This appeal comes before this Court on the ground that the Magistrate was wrong in this finding.

The appeal was very carefully argued by the Solicitor-General for the appellant and by Mr. R. H. Luckhoo for the respondent. It would appear from the authorities cited by the Solicitor-General, and in particular the judgment of DeFreitas J. in the case of Long v. Bissoondial (1922) L.R.B.G. 151 that it has been held repeatedly in the local courts that, where an ordinance requires that, in order to do a specific act, a person must first obtain a licence or other lawful authority, and it is proved by evidence that the person did the specified act, it is for that person to prove that he has obtained the licence. Unless we are satisfied that those decisions are clearly wrong, we should consider it our duty to follow them.

But this also appears to be the clear effect of recent decisions in the English Courts. The authorities are set out in the judgment of Viscount Caldecote in R. v. Oliver (1944) 2 A.E.R. 800 and it is unnecessary to recite them here. The headnote expresses the rule in terms similar to those used by Bayley J. in the case of R. v. Turner (1816) 5 M. & S. 206: "I have always understood it to be a general rule that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other party, the party within whose knowledge it lies and who asserts the affirmative, is to prove it and not he who asserts the negative."

It is Mr. Luckhoo's contention, however, that the fact in issue is not peculiarly within the knowledge of the defendant viz: — whether he had obtained a licence. Under the provisions of section 35 of the Ordinance the Commissary is required to keep a register of all premises in respect of which licences have been granted and the names of the holders for the time being of those licences, and it would therefore be within his knowledge whether the premises in question were licensed. This fact could be proved by the appellant from his own knowledge or search or by the production, in conformity with the provisions of Section 38 of the Ordinance, of a certificate signed by the Chief Commissary. He contends therefore that the rule as to negative averments does not apply since it is grounded on the reason stated by Swift J. in R. v. Scott 86 J.P. 89 that "it might otherwise be difficult or impossible for the prosecution satisfactorily to prove whether the defendant held an appropriate licence." He further cited in support the case of R. v. Sorrell (1946) 174 L.T. 148. In that case the defendant was charged under a Consumer Rationing (Consolidation) Order with acquiring rationed goods without surrendering the appropriate number of coupons. The Criminal Court of Appeal held that although it was not incumbent on the prosecution to prove that there was in fact no surrender of coupons, it must however give some *prima facie* evidence on which the jury would be entitled to find as a fact that there was no surrender. A careful distinction was however drawn between cases

in which the prohibition is absolute unless lawful authority be shewn, and cases in which the statute requires a person to do some act, the failure to do which will make his action unlawful. In this case R. v. Oliver was referred to with approval. The rule has been stated without qualification by Talbot J. in Williams v. Russell (1933) 149 L.T. 190. "On the principle laid down in R. v. Turner and numerous other cases, where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it, and the prosecution need not prove the absence of lawful authority."

But whether the rule is absolute or not this case is in our opinion concluded in favour of the appellant by the provisions of Section 9 of the Summary Jurisdiction (Procedure) Ordinance, (Chapter 14), which is identical in terms with Section 39 (2) of the Summary Jurisdiction Acts 1879: "Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the ordinance, order, byelaw, regulation, or other document, creating the offence, may be proved by the defendant but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant." In Buckman v. Button (1944) 2 A.E.R. 82, in which the identical point raised in this appeal was decided, Charles J. said: "It is for the defendant to call evidence to shew that he had that excuse or exemption which the law had given him. In the instant case, it seems to us that it was not a necessary part of the case for the prosecution to assert or prove a negative. The prosecution had a complete case when proof had been given that there had been a sale of rum by the respondent, unless and until the respondent could escape the prohibition contained in Section 41(1) by proving the facts which were necessary to his case.

The appeal is therefore allowed with costs and the case remitted to the Magistrate with a direction to hear the evidence for the defence if any and to give such judgment on all the evidence as he thinks fit.

Appeal allowed.

G. SINGH *v.* W. GORDON,

GEORGE SINGH,
Appellant (Defendant),

v.

WILLIAM GORDON, Police Constable No. 4594,
Respondent (Complainant).

[1949. No. 254—Demerara.]

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

1949. June 29 and August 30.

Defence Regulations—Control of Prices Order 1947*—Control of Prices* (*Amendment No.* 5) *Order* 1947*—Reference in latter to Gazette Notice—No Gazette published on date mentioned—Gazette not tendered in evidence—conviction—upheld—Judicial notice to be taken of Control of Prices Orders.*

APPEAL from the decision of a magistrate convicting the appellant of selling twelve pints of Brown A rice, a price controlled article, at a price exceeding the prescribed maximum retail selling price. The Price Control Orders were tendered in which reference was made to an official gazette notice. By inadvertence the wrong date of the Gazette was referred to as no Gazette was published on the date mentioned. The Gazette was not tendered in evidence.

Held: By the Evidence Ordinance, Section 26 judicial notice may be taken of subsidiary legislation and Price Control Orders are subsidiary legislation.

Chung-a-Thom and Harold Mendonca v. Ross 1940 (1941) (B.G.L.R. 30) applied.

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

E. MORTIMER DUKE, *Solicitor-General*, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

The appellant was convicted of selling twelve pints of Brown A rice, a price-controlled article, at a price exceeding the prescribed maximum retail selling price, contrary to paragraph 12 (1) of the Control of Prices Order, 1947, as amended by the Control of Prices (Amendment No. 5) Order 1947, made in pursuance of Regulation 44 of the Defence Regulations, 1939, and thereby committed an offence punishable under Regulation 69 of the said Regulations. The prosecution proved the actual sale, tendered *in* evidence certified copies of the two Orders referred to in the charge and then called expert evidence to shew that the rice sold when analysed and graded was of the quality sold by the Rice Marketing Board as Brown A. This evidence was given by a Rice Grading Inspector, employed by the Rice Marketing Board. Neither the competency of the witness nor the opinion deposed to by him was challenged in cross-examination.

The appellant called no evidence but relied unsuccessfully on a submission of law, that the case for the prosecution had not been fully proved. That is also the main ground of the numerous grounds of appeal.

The specific grades and prescribed maximum prices for rice are set out in item 28 of List A to the First Schedule to the Principal Order, to which was added a footnote that the grades specified are those fixed by the British Guiana Rice Marketing Board in a Gazette Notification published on 30th September 1943. The amending order above referred to substitute a revised schedule of grades and prescribed prices and also substituted for the reference in the footnote to the Gazette Notification of 1943, a reference to the "British Guiana Rice Marketing Board Notice No. 545 published in the Gazette of the 18th May, 1945." There was, in fact, no Gazette published on 18th May 1945, the correct reference being to Notice No. 545 published in the Gazette of the 18th May 1946.

On this it was argued for the appellant: —

(a) that it was incumbent on the prosecution to tender in evidence the Gazette notification referred to in the footnote; and that, by reason of the omission to do so, the case was not fully proved and should have been dismissed; and

(b) that the Amending Order having referred to a nonexistent Gazette Notification there had not been due publication of the specified grades of rice as required by Regulation No. 74 of the Defence Regulations 1939.

We think that both these contentions are misconceived. As to the former, in the case of Chung-a-Thom and Harold Mendonca v. Ross 1940 (1941 B.G.L.R. 30) the Full Court held that it was proper to take judicial notice of the Defence Regulations and that proof of orders made under those regulations was "a mere formality". In Duffin v. Markham (1918) 88 L.J. K.B. 581 Darling J. described the objection that no proof had been offered of an Order made under the Defence of the Realm Regulations as "a mere technical triviality."

In our view these Orders are part of the subsidiary legislation of the Colony of which judicial notice may be taken and therefore no evidence of them is required (Evidence Ordinance section 26). This is the effect of Regulation 2 (4) of the Defence Regulations 1939 (which provides that the Interpretation Ordinance shall apply to the Regulations and to all Orders and rules made thereunder, as it applies to an Ordinance), when read with section 13 of the Interpretation Ordinance and section 26 of the Evidence Ordinance. Section 25 of this latter Ordinance, paragraphs (iv) (v) and (xv) also make provision for judicial notice to be taken of the existence and contents of the *Official Gazette.*

No doubt it is convenient practice in cases involving consideration of orders or schedules which are frequently amended for the prosecution to produce in Court a copy of the order or orders applicable to the case before the Court, but unless the Court, in exercise of its discretion under section 26 of the Evi-

dence Ordinance, requires the production of those orders, it is not incumbent on the prosecution to produce them.

We think it unnecessary to refer to the cases cited by Counsel for the appellant since none of them related to the publication of subsidiary legislation in an Official *Gazette.*

The second contention is based upon a misreading of Regulation 74 which provides that when an Order is made the authority making it shall give notice of its effect in such manner as he thinks necessary, (i.e. by newspaper advertisement, posters or otherwise) so as to bring it to the notice of the person affected thereby.

Regulation 74 has nothing to do with the due making and bringing into force of an Order, which is effected by its publication in the Gazette. Both the Amendment No. 5 Order 1946 and the Rice Marketing Board Notice No. 545 were in fact duly published in the Gazette and the only question therefore that can arise is whether the Amending Order is in any way invalidated by the mistake made in the date of publication of the Notice. We think it is not and that the mistake is plainly a clerical error which may be read as amended: see Maxwell on the Interpretation of Statutes 8th Ed. p. 221 and the cases cited at note (q). The reference in the footnote to the Notice was merely informative. Brown A was a quality which had been specified by the Rice Marketing Board since 1943 and there is no suggestion that the appellant was in any way misled or prejudiced by the error in the date. The production of the Notice No. 545 would have been a mere formality for it would still have been necessary for the prosecution to prove by expert evidence that the rice which formed the subject matter of the complaint correspond to the description of Grade Brown A as fixed by the Rice Marketing Board. That evidence was given unchallenged and was accepted by the Magistrate.

The appeal is therefore dismissed with costs and the conviction and sentence confirmed.

Appeal dismissed.

I. A. BAIRD *v.* A. BAIRD.

ISAAC ALFRED BAIRD,

Appellant (Opponent),

v.

ALFRED BAIRD,

Respondent.

[1949. No. 91.— DEMERARA]

BEFORE WORLEY, C.J.

1949. MAY 31; JUNE 1, 10; SEPTEMBER 6.

Mining (*Consolidation*) *Ordinance* (*Cap.* 175)—*Regulations appeal jurisdiction.*

The appellant filed an objection pursuant to Regulations 50 and 21 of the Mining Regulations 1921 to the entry of an intended transfer by the respondent of his right, title and interest in and to a certain claim licence. The grounds of objection were that the claim licence and claim were the bona fide property of the appellant; alternatively that the respondent was holding the said claim licence and claim in trust for the appellant.

The officer appointed to hear the dispute, after hearing evidence and argument, held that the respondent was the lawful locater of the claim in the dispute. On appeal.

Held: The jurisdiction to settle disputes under the Mining Regulations does not include disputes which involve latent or potent questions of trusts, fraud-legal or equitable—agency, or partnership (except so far as these may be expressly provided for in the Regulations) or other matters within the ordinary domain of law or equity. The officer had no jurisdiction to hear and determine the dispute and his order was null and void.

Appeal by the opponent from the decision of the Officer appointed by the Commissioner of Lands and Mines in exercise of his authority under Regulation 81 of the Mining Regulations, 1931 to hear a dispute arising under the Regulations.

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

P. A. Cummings, for the respondent.

Cur. adv. vult.

WORLEY, C.J. — This is an appeal brought under section 89 of the Mining (Consolidation) Ordinance (Chapter 175) from the decision of an officer appointed by the Commissioner of Lands and Mines in exercise of his authority under Regulation 81 of the Mining Regulations, 1931 to hear a dispute arising under the Regulations. The dispute in question was an objection filed by the appellant, in pursuance of Regulations 50 and 21, to the entry of an intended transfer by the respondent of his right, title and interest in and to Claim Licence No. C 6191 for Claim Rising Sun, situate on the left bank of the river Baramita, left bank Essequibo River. The grounds of objection were that the said claim licence and claim are the bona fide property of the appellant; alternatively, that the respondent was holding the said claim licence and

claim in trust for the appellant and that the latter had never authorised the transfer to the intended transferee or any other person. The respondent by his answer denied these allegations and asserted that the right, title and interest in the said claim were vested in him by the issue to him of the said claim licence. The officer appointed (whom I shall hereafter refer to as the Officer) after hearing evidence and argument held that the respondent was the lawful locator of the claim in dispute. He accordingly rejected the opposition but made no order as to costs. The grounds of appeal allege that the Officer appointed erred both in law and fact.

In setting out the issues in the dispute it will be necessary for me to refer to the history and circumstances of the matter but I shall do so as briefly as possible and shall seek to avoid any expression of opinion on disputed facts, since it may come to pass as the result of this judgment that these matters will have to be determined by another tribunal.

The appellant and respondent are father and son, their full names being, respectively Isaac Alfred Baird and Wesley Alfred Baird. The appellant has for about 20 years prospected for and mined gold and diamonds in the North West District of Essequibo, and the respondent started to work with him about the year 1931. It is a matter of dispute how long this collaboration lasted and what was the exact business relationship between them at different times particularly during the year 1939, but it is mutually admitted that they quarrelled in 1942 and have not since been reconciled.

The present dispute begins with the grant of a prospecting licence under Regulation 3, No. 28747 to "Alfred Baird of 331, Cummings Street, Georgetown." The licence was dated 16th January, 1939 and remained in force until the 15th January, 1940. Both parties claimed to have applied, each on his own account, for this licence, but the Officer thought "it quite possible that they called together at the Lands and Mines Department and were both present when the licence was issued." He further held that they subsequently travelled together to the North-West District.

On the 22nd February, 1939, the respondent, acting under the authority of this licence, located the claim Rising Sun, in the presence of Sydney Hinds and Edward Reid, two employees of the appellant, and a notice of location was filed on 6th April, 1939. The notice is expressed to be "on behalf of Alfred Baird" and is signed "Alfred Baird". On the same day, "Alfred Baird" applied for a licence to mine for gold on this claim. The appellant claimed to have signed both these documents: the respondent admitted that the appellant signed the notice of location but claimed to have signed the application for licence. He admitted that appellant had paid the fees but claimed that this was done on his behalf. In pursuance of the application Claim Licence No. C 6191 was granted on the 22nd November, 1939 to "Alfred Baird" in respect of claim Rising Sun. The licence was delivered to the appellant who alleges that it remained in his possession until he gave it to his solicitor in connection with a proposed transfer. Both parties claim to have paid the annual rent of $5.

The claim has never been worked and it is, I think, agreed that its only proved value is in its position lying athwart lands worked or claimed by the Axel Johnson Company. Round about 1944, the Company, through their solicitor, opened negotiations with appellant for the purchase of the claim and the appellant then caused a letter to be sent to the respondent requesting a transfer: the exact terms of the letter are not before me as the letter was not put in evidence but it is clear that the appellant was making a claim to ownership and that the respondent countered by asserting his ownership. The negotiations fell through

The appellant subsequently applied for and obtained, without opposition from the respondent, claim licence No. C 9747 in respect of the same area but he has since surrendered this.

The dispute appears to have been in abeyance until the respondent made the present application to transfer claim licence C 6191 to one William Soloman. He admitted under cross-examination that the proposed transfer was only a sale in form and that he was retaining an interest in the claim, and the appellant alleges that it is merely a colourable transaction and is fraudulent.

Such being the circumstances and nature of the dispute, I think it should have been evident to the Officer, as well as to the advocates of the parties, that the case was one which the Officer had no jurisdiction to entertain. Unfortunately both advocates put before him conflicting and fallacious arguments on the question of jurisdiction. So far as my researches have gone, reported decisions of Courts of this Colony all support the same view of the jurisdiction conferred by the Mining Regulations, as enacted from time to time.

The earliest is the decision of Chalmers C.J. in the appeal of Winter v. Farnum & Co. recorded in the Minutes of the Court of Review for the 26th February, 1892 at page 135. This appears to be the first reported case under the Gold Mining Regulations appended to Ordinance No. 4 of 1887. The substantial questions raised in the dispute were allegations of encroachment, and the learned Chief Justice held (at page 145) that findings relating to matters of occupation, the lawfulness of which was to be tested under reference to the provisions of the Regulations, were within the jurisdiction of the Commissioner acting as Government Officer under Regulation 52. The appeal was decided upon grounds which are here irrelevant, but the learned Chief Justice then proceeded to discuss the jurisdiction of the Commissioner to enquire into a latent question of partnership which had been raised. His remarks on this point were obiter but they are of importance because they were approved in a later case. Regulation 52 which he was considering provided that "Where any dispute arises as to what land is or is not lawfully occupied or has not been lawfully located, the question shall be decided by a Government Officer", and he was of opinion that "lawfully" here was used in the sense of compliance with the provisions of the Ordinance and Regulations, because (page 159)

> " ..... it is not to be supposed that the Legislature would have devolved on the Government Officer such a jurisdiction as he would have to exercise if the word 'lawfully' were interpreted, not

in the sense of compliance with the Ordinance and Regulations, but in the wide sense, which is the alternative of the compliance with the general body of the law. For example, if the occupant of the concession alleged that he occupied it in virtue of the will of the deceased grantee, and if there were a dispute as to the validity of the will or the particular effect of the clause of devise, it would be outside of his jurisdiction if the Government Officer were to decide such question. Or to take another example, suppose that the Administrator General were to claim to occupy a concession impugning the lawfulness of the occupancy of the person professing to occupy under a deed of sale on the ground that it was a fraudulent transfer under the Insolvency laws, that would not be such a question as to lawful occupancy which the Government Officer would entertain. He would rightly examine whether there had been a transfer of the previous holders interest to the present occupant as under Rule 64, leaving latent questions to be enquired into by the tribunals appropriate for such questions".

The next case is Farnum at al —v— Neilson et al 1892 (L.R.B.G. (N.S.) Vol. II 109) which is a Full Court decision. The petitioners sought an interdict prohibiting the Reporters from working certain placer claims, et cetera, or doing acts connected with an agreement of partnership alleged in the Petition and for the appointment of a Receiver.

The Reporters submitted by way of exception that the power conferred by Rule 51 of the Gold Mining Regulations upon a Government Officer to cause all work to cease when necessary for the protection of the interests of individuals, gave all the protection necessary pending proceedings to establish the rights of parties concerning any claim. The petitioners replied that the Government Officer could only act where the dispute was such that he could take cognizance of its merits. This view was adopted by the Court in the following passage in the judgment, delivered by Chalmers C.J. (page 111):

"We all think that Rule 51. founded on, must be read with reference to the subject matter of the Regulations, and that so read it gives a Government Officer power of stopping work on account of disputes of a nature such as to be within his substantive jurisdiction, but that it does not extend to enable him to interfere upon the allegation of a dispute, into the merits of which he could make no inquiry. He could interfere if the dispute was leading to a breach of the peace, but that is a different matter and not alleged here. The rule is one of a series under the heading provisions for the determination of disputes. What disputes? We get the answer from the Rules themselves under the heading. They are disputes as to location and occupation, not as to matters of contract or other matters within the ordinary domain of law. The dispute in the present case is as to an alleged contract of partnership in which the Government, Officer has no jurisdiction".

The next case was Menzies v. Marshall Syndicate, decided by Sir Henry Bovell C.J. (L.J. 31. 10. 1902 Judgments Appellate 1899 — 02 p. 186). It was an appeal from the acting Commissioner of Lands and Mines on a complaint heard and determined under Part VIII of the Mining Regulations 1899 — 1901. The respondents to the appeal were the complainants before the Commissioner and alleged that, as the result of a fraudulent conspiracy between certain of their servants and a servant of the appellant,

location boards bearing the respondent's name were replaced by boards bearing the appellant's name on a number of claims which had been duly located by the respondents, and that the fraud did not come to their knowledge in time for them to oppose the granting of claim licences to the appellant: the complaint prayed that the Governor would not grant claim licences to the appellant, or, if such licences had been granted, would revoke them and grant licences to the complainants.

The appellant by his answer denied the facts and fraud averred and further contended that the complaint disclosed no cause of action within the Court's jurisdiction: that the respondents had failed to enter any opposition to the grant of licences, and that they, not having complied with the Regulations in respect of the claim, no licence could be granted to them.

These and other objections were overruled by the Commissioner, who held that the case came within Regulation 134 (which was in the same terms as the Regulation 52 quoted above); and further held, after taking evidence, that all the disputed claims were duly located for the respondents by their servants and that the appellant obtained claim licences for them through fraud. From this decision the appellant appealed, on the ground (among others) that the Court had no jurisdiction to try the case, and, in allowing the appeal on this ground, Bovell C.J., said

> "It is, I think, clear that the respondents did not claim that under the Regulations alone, and solely by virtue of compliance with them, they were at the date of their complaint either entitled to occupy or to be deemed to have lawfully located the lands to which the case relates,—but at most they claimed that in the absence of fraud on the part of the appellant, they would or might have complied fully with the Regulations, and have been entitled to occupy the lands, or to be deemed to have lawfully located them, notwithstanding the claim licences held by the appellant, the granting of which they would or might have opposed if there had been no fraud. The case (in other words) was not one in which a decision was required simply as to the complainants' compliance or noncompliance with the Mining law, and as to their rights arising from such compliance or non-compliance as against the appellant, but was one in which relief was sought on equitable grounds, on the ground of alleged fraud on the part of the appellant. None of the provisions of the existing law, in my opinion, confer on the Commissioner jurisdiction to hear and determine such cases. His jurisdiction depends on the Mining Regulations, 1899-1901, which are made under a power given to "the Governor and Court of Policy by section 27 of the Mining Ordinance, 1887, as amended by section 5 of Ordinance No. 12 of 1895, and section 25 of Ordinance 15 of 1896. That enactment prescribes that penalties for breaches of the Regulations made thereunder shall be recoverable under the Summary Jurisdiction Ordinances, and therefore any jurisdiction conferred on the Commissioner or any other Government Officer under the Regulations must be not ,a criminal or quasi-criminal jurisdiction, but of a purely civil nature, and like ail other civil jurisdictions, it authorises its possessor to inquire into and settle such questions, and such questions only, arising between different parties, as come within his jurisdiction, or (in other words) as he is empowered to hear and determine.
>
> The classes of cases and questions (other than cases of 'jumping claims') in and over which the Commissioner has jurisdiction are

specified in Regulation 134 and it is contended that the present case comes within the class therein mentioned of 'disputes as to what land is or is not lawfully occupied or has or has not been lawfully located'. As the Regulations are made under and for the purpose of the Mining Ordinance, the disputes referred to must all, in my opinion, be disputes arising under the Mining Law and prima facie the Commissioner would have no jurisdiction as to any disputes which arise from, or the determination of which depends on, or involves, any matter outside of the Regulations. It follows from this that the class of disputes just mentioned is limited to disputes in which a claimant seeks to prove that by virtue of compliance with the Mining Law and without proof of any other facts he at the date of his complaint (a) is lawfully in occupation of or entitled to occupy certain lands which another party also claims to occupy under the same law: or (b) must be held to have lawfully located certain lands which another party claims to have located under the same provisions, and that such class therefore does not include a case like the present wherein it is sought to annul on the ground of fraud, certain acts done by the appellant under the Regulations and on the same ground to excuse the respondents from strict compliance with some of the Regulations. This conclusion is fortified by the facts that Regulation 134 which is of the nature of an enactment conferring jurisdiction on a special tribunal and therefore must be strictly construed (Dicta of Best, J. Kite and Lane's case, 1 B. & C. 101; Fortes-cue, J. in Pierce v Hopper, 1 Str. 260; Keating, J., L.R., 7 Ex., 296), does not expressly confer a more extensive jurisdiction than the one already mentioned and that the existence of such jurisdiction is not necessarily to be implied, there being (as in the present case, where relief is sought on the ground of fraud) other remedies known to the law, of which a complainant may avail himself, and is also supported by the decision of Chalmers, C.J. (Winter v Farnum & Co., L.R., B.G., vol. II, N.S., Rev. Cases 15) as to the jurisdiction conferred by Regulation 52 of the Mining Regulations, 1887, which is in the same terms as the provisions already mentioned in Regulation 134 of the Amended Mining Regulations, 1899.

The first reason for appeal must, therefore, in my opinion, prevail, and the order of the Acting Commissioner be declared to be null and void".

In Burgess v. Reid 1906 (General and Insolvency 1904 — 1906 102) the Court of Appeal confirmed a decision of the Chief Justice Sir Henry Bovell, dismissing an appeal from a decision of the Commissioner of Lands and Mines, who had refused to hear a complaint on the ground that a. question of fraud was involved. The Court held (obiter) that the Commissioner's jurisdiction only extends to cases in which compliance or non-compliance with the Mining Regulations are the points in issue.

In Vinton v Andrew 29. 11. 1913 (Judgments 1913 L.J.) Earnshaw J. said that the Warden dealt with "disputes" not actions or suits.

In these cases there is a strong and unbroken line of authority which establishes that the jurisdiction to settle dispute under the Mining Regulations does not include disputes which involve latent or patent questions of trust, fraud, whether legal or equitable, agency or partnership (except so far as these may be expressly provided for in the Regulations) or other matters within the ordinary domain of law or equity. I find that the right to oppose a transfer was given to any person claiming to have "a right, title or

interest" at least as early as the Amended Mining Regulations 1890 (*Official Gazette* 13th July 1890 p. 105) and that the regulations relevant to the hearing of disputes have not been substantially changed. The authorities cited are therefore still binding in the absence of any statutory change. Mr. Stafford has argued that such a change was effected by the enactment of the Civil Law Ordinance in 1916 but in my view that statute had no effect whatever on the jurisdiction conferred by the Mining Regulations.

I think Mr. Cummings' argument was equally unsound. He contended, both at the hearing and on the appeal that the Officer was only concerned to find out, by the strict letter of the Regulations, which of the parties obtained the prospecting licence and or the claim licence and to decide accordingly, no matter what evidence there might be of trust, agency or fraud.

I would first observe that even if this contention were sound, it would not serve to support the decision in the instant case. A claim can only be lawfully located by a person who has obtained a prospecting licence or by some person duly authorised thereunder as prescribed in Regulation 6. "Obtained" here is to be construed as securing the grant of and the title to the privileges conferred by the prospecting licence, but there is no clear finding in the decision as to which of the parties applied for and obtained the licence. The finding that the respondent had physical possession of the licence at the time he located and used it for such purpose is inconclusive.

But I can find nothing in the Regulations which compels the Officer to make himself an instrument of fraud and deceit or to brush aside an opposition based on grounds which he is not competent to decide. In such a case his proper course is to decline jurisdiction and, if the case so require, suspend action on the application until the opposer has had reasonable opportunity to institute proceedings in a court of competent jurisdiction to enforce his claim or establish his right, title or interest. Such proceedings would normally include an application for an interim injunction to restrain the applicant from proceeding with the transfer until the determination of the action.

The issues and facts in the case were not simple ad straight forward and it is evident that the Officer gave them the best consideration he could but for the reasons set out above, I hold that he had no jurisdiction to hear and determine this dispute and declare his order null and void. The formal order of the Court will include liberty to either party to apply in order that any necessary consequential directions may be given.

Each party must bear his own costs of the proceedings before the Officer but the respondent must pay the appellant his taxed costs of this appeal.

Finally, I declare to express my hope that when next the Mining (Consolidation) Ordinance is amended, the opportunity will be taken to abolish the double appeal first to a single Judge and then to the Full Court. This appears to be a relic of the period when a double appeal lay from decisions of Magistrates and is an anachronism which should be repealed.

Appeal allowed.

Solicitors: *H.C.B. Humphrys,* for plaintiff.

ARGOSY CO. *v.* BOOKER BROS.

THE ARGOSY COMPANY LIMITED,
Plaintiffs,

v.

BOOKER BROTHERS, McCONNELL, AND COMPANY, LIMITED,
Defendants.

[1948. No. 133.—DEMERARA]

BEFORE WORLEY, C.J.

1949. MAY 9; SEPTEMBER 7.

.....*Rules of Court* 1900—*Order XXXII rule* (5) (1)—*revivor—Limitation Ordinance, Cap.* 184.

Three days before the period of limitation expired the plaintiffs issued their writ against the defendants claiming damages. The defence was filed on the 10th May, 1948, and therefore became ripe for hearing on the 10th June, 1948. Neither plaintiffs nor defendants filed a request for hearing and in accordance with Order XXXII, r. (5) (I) the action was deemed deserted on the 10th December, 1948.

On the 2nd May, 1949, the plaintiffs applied pursuant to Order XXXII, r. (5) (1) for revivor of the action.

Held: The last day on which the plaintiffs could have brought their action was the 23rd February, 1948, and as their action was now barred by limitation the application for revivor failed.

Action by the plaintiffs against the defendants for damages.

C. V. Wight and *L. A. Luckhoo,* for plaintiffs.

H. C. Humphrys, K.C. and *W. J. Gilchrist,* for defendants.

Cur. adv. vult.

WORLEY, C.J.: This is an application filed by the plaintiffs on the 2nd May, 1949 for an Order pursuant to the provisions of Order XXXII rule (5) (1) of the Rules of Court 1900 for revivor of an action in which they seek to recover from the defendants a sum of $237,500:— in respect of the destruction of certain of their buildings, plant, stock and fittings by fire which originated on the defendants' premises in Georgetown on the 23rd day of February, 1945, and for further consequential Orders.

The application is supported by an affidavit sworn by the solicitor to the plaintiffs which recites that the Writ of Summons herein was filed on the 20th February, 1948; appearance was entered on behalf of the defendants on the 27th February, 1948. the Statement of Claim filed on 6th April, 1948 and the Defence filed on the 31st May, 1948 and that, consequently, the above action lapsed on the 30th November, 1948. (As will appear later, this date is incorrect and should be the 10th December, 1948). By way of explanation of this lapse the affidavit states that senior counsel for the plaintiffs in the action is Mr. Malcolm Butt, K.C. (of Trinidad) and that counsel associated with him in the Colony are the Honourable C. Vibart Wight and Mr. L. A. Luckhoo, that the plaintiffs have been unable up to the present to pay counsel's retainer, and in consequence the solicitor for the plaintiffs was

unable to approach counsel as to whether or not a reply should be filed to the defence of the plaintiffs herein; further that unless an order for revivor is made on or before the 30th May, 1949 the above action will be deemed abandoned and cannot be revived because the period of prescription allowed by law will be restored. (The date 30th May, 1949 is incorrect and should be the 10th June, 1949).

The application is opposed by the defendants on the ground that the plaintiffs' right of action has become statute barred and the court will not make an order which would deprive the defendants of this plea. They further contend that the plaintiffs have been guilty of laches and that there is no substance in the reason given for their failure to file a reply.

It will be convenient at this stage to set out the history of this matter and the relevant rules of court. The fire which destroyed the plaintiffs' premises on the 23rd February, 1945 originated on the premises of the defendants who have pleaded that it was caused by inevitable accident without any negligence or default on the part of themselves, their servants, agents or employees. On the 1st March, 1946 the plaintiffs' solicitors wrote the defendants the following letter: —

> "We are instructed by our clients Messrs. The Argosy Company, Limited, to request payment from you of the sum of $95,500:—being the loss sustained by our clients as represented by the difference between the value of their properties and assets and the amount recovered therefrom through Fire Insurance as a result of the destruction of their property and assets by fire on the 23rd February, 1945 which originated in your property and for which our clients claim you are responsible. We shall be glad to hear from you what you propose doing in the matter".

On the 27th April, 1946 the defendants replied through their solicitors repudiating all liability for the claim. On the 10th September, 1947 plaintiffs' solicitors wrote the defendants a further letter as follows: —

> "With reference to our previous letters to you in connection with the claim by the Argosy Company Limited against you for the loss they sustained in the fire which took place on the 23rd February, 1945, we have been instructed by them to inform you that their delay in filing the action against you is not due to the fact that they do not intend to proceed in the matter, but rather to the fact that they do not desire other claims to be filed against you by other parties in similar circumstances to our clients, because our clients have instituted a claim against you. They prefer that this matter remain as one between yourselves and themselves alone. Therefore, any action that our clients may file against you in this matter will be at the latest possible moment within the period allowed them by law".

No reply was sent to this letter.

The action being one for injury to property in which damages might be recovered, the period of limitation prescribed by section 8 of the Limitation Ordinance (Chapter 184) is three years next after the cause of action has arisen. On the 20th February, 1948, three days before this period of limitation expired, the plaintiffs issued the Writ in this action against the defendants claiming $237,500:—damages. The difference between the amounts claimed

in the Writ and that claimed in the letter of demand dated the 1st March, 1946 appears to be due, in part at least, to the fact that in the letter the plaintiff's were only claiming the difference between the value of their property and assets and the amount recovered from the insurers. The defendants allege that the plaintiffs have recovered $126,000 from insurance companies in respect of their loss by the said fire, and have not been authorised by the companies to bring this action. The defendants also allege that the plaintiffs have further received approximately $80,000 under the Town Planning (Georgetown Fire Area) Ordinance, 1945. On the view I have formed of this matter, these aspects of the case become irrelevant: as does also the defendants' further contention that they were prejudiced and prevented from bringing in third parties by the plaintiffs' delay in issuing the Writ.

The Writ was served and appearance was entered for the defendants within the ten days therein limited. The plaintiffs' Statement of Claim was delivered and filed out of time but with the defendants' solicitors' consent to an extension of time. The defence was likewise delivered and filed out of time but with similar consent given by the plaintiffs' solicitors: it was not confined to a denial of the allegations in the claim but stated new matter by way of defence: e.g. the defendants alleged that the effective cause of the escape or spreading of the fire was the failure of the Governor-in-Council and|or the Mayor and Town Council of Georgetown to perform a statutory duty and, also, the negligence of the persons controlling the Fire Brigade, et cetera.

Under the provisions of Order XXV rule 6 of the Rules of Court 1900, if the plaintiffs do not deliver a reply and file a copy thereof, or any party does not deliver any subsequent pleading and file a copy thereof within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last filed shall be deemed to have been denied and put in issue.

By Order XXI r.l. the time limited for the plaintiffs to deliver their reply was within ten days from 31st May, 1948 the day on which the copy of the defence was filed and, therefore, the action became ripe for hearing on the 10th June, 1948. Order XXXII r.3 provides that the Registrar shall keep a Hearing List, in which he shall enter every action which, by the close of the pleadings or otherwise, has become ripe for being heard by the Court. The entry shall be made on the request of the plaintiff or other party having the lead, but if he does not, within ten days after the action has become ripe for hearing, request that it be entered then the opposite party may so request and the Registrar shall make the entry. In this case neither the plaintiffs nor the defendants made any request for hearing and consequently the provisions of Order XXXII r.5 came into play. That rule provides as follows: —

> "(1) If any action which has become ripe for hearing shall not, on the request of either party, be entered on the Hearing List within six months after it shall so have become ripe,

the same shall be deemed deserted, and shall not be capable of being further proceeded in to any effect until an order of revivor has been made by the Court, which Order the Court may grant upon the application of any party.

(2) If no order of revivor be applied for within a further period of six months, or if in any action whatever there has been no proceeding for one year from the last proceeding had, the action shall be deemed altogether abandoned and incapable of being revived. An action which has been thus abandoned shall be of no effect in interrupting prescription".

In the present case the six months contemplated by rule 5 (1) ran out on the 10th December, 1948 and the action was deemed "deserted" as from that day. Mr. Wight for the plaintiffs in support of the application for revivor contended that there is an understanding between practitioners in the Colony (including the firms of solicitors concerned in this case) whereby an extension of time is always agreed to, that opposition to such an application is most unusual as the Court grants extension almost as of course on terms as to costs, the principle applicable being that the Court is reluctant to prevent parties pleading their cause. Further that, although the rule does not specifically require an applicant to show good or reasonable cause, the plaintiffs had in this case shown good cause for their delay in filing a reply. With regard to the defendants' allegation that they had been prejudiced by the delay in filing the writ, which had precluded them from citing as co-defendants the Mayor and Town Council of Georgetown and|or the Governor-in-Council, his instructions were that there was an understanding between Mr. Oscar Wight, (who is connected with the plaintiff company) and Mr. W. S. Jones, (an Attorney of the defendant company) on the lines of the plaintiff's letter of the 10th September, 1947 quoted above.

Mr. Humphrys for the defendants denied the existence of any understanding between Mr. Oscar Wight and Mr. Jones. He agreed that between solicitors in the Colony there has always been an understanding to allow extensions of time to file pleadings subject to the proviso that the six months contemplated by Order XXXII r. (5) (1) had not elapsed and that this understanding did not apply to a case where a statute of limitation could be pleaded and the client would be prejudiced by such an extension.

He founded his main ground of opposition to the application on the argument that when the plaintiffs filed the Writ there remained to them only three days of the statutory period of limitation and that, though by filing the Writ there was an interruption of the time running against the plaintiffs which interruption continued up to the 10th December, 1948, after that, by virtue of the fact that the action was deserted, time began to run again so that the period of prescription became complete on the 13th December, 1948; the defendants therefore have an accrued right (or, as I would prefer to put it, a valid plea in defence), of which they will be deprived if the action is revived and the Court will not make the order asked for as the defendants will be thereby prejudiced.

In reply Mr. Wight argued that questions of limitation do not arise under sub-rule (1) of rule 5; that when an action is deemed deserted it is in suspense but not wholly dead and prescription cannot begin to run again until the action is deemed altogether abandoned under sub-rule (2); and that in dealing with applications under sub-rule (1) the Court has merely to be satisfied that there is a prima facie cause of action.

The provisions of Order XXXII rule 5 appear to be peculiar to this Colony and I have been unable to find any judicial interpretation of their provisions other than the case of Vaughan v. Richards 9th December, 1905, reported in B.G.L.J. 1903-6. In that case Hewick J. held that if a defendant allowed the period of twelve months from the time when the action is ripe for hearing to elapse without exercising his option to have it put on the Hearing List, he had abandoned his right to apply for costs. I do not think the decision is of any assistance in the present case.

The first question therefore for determination is what principles should guide the Court in considering applications for orders of revivor under the rule and, after a careful review of the authorities, I have no doubt as to the main principle, which is expressed in general terms in the following quotation from the Encyclopaedia of the Laws of England, 2nd Edition, cited at p. 1448 of the Annual Practice 1948.

> "An application to enlarge time is an appeal to the Court for increased facilities to carry on the action and the Court in such a case is always inclined to act with clemency towards the applicant provided he can show that his opponent will not thereby be injuriously affected".

Where questions of limitation arise the principle is expressed in the following note at pp. 58, 59 of the same volume of the Annual Practice: —

> "Although the Court has power to enlarge the time under Order 64 r. 7 (which corresponds to Order XLV r. 4 of the Rules of Court 1900), the practice is not to do so after the expiration of twelve months from the date of the writ or of six months from the date of the last renewal, where, but for such enlargement of time, the plaintiff's claim would be barred".

I have said that the provisions of Order XXXII r. 5 are peculiar to the Colony but, nevertheless, an application for revivor is an application for renewal of an action and analogous to applications for renewal of a writ. I think, therefore, that in seeking the principles applicable, assistance can be found in the decisions on applications for renewal of unserved writs made under Order 8 of the Rules of the Supreme Court in England.

The principle set out above was emphatically asserted by the Court of Appeal in England in the case of Battersby & ors v. Anglo-American Oil Co. Ltd. & ors. (1944, 2 All E.R. 387). In that case, the writ in the first place was issued within the period allowed by the statute but no application to renew it was made within twelve months from the date of issue; moreover, when the application for renewal was made, not only had the time for renewal expired, but also twelve months, the statutory period of limitation appropriate to the claim, had elapsed. It was however contended by the plaintiff that the court had a discretion under

Order 64. r. 7 to enlarge the time for renewing the writ and that it was accordingly open to the Judge to renew the writ notwithstanding that the application was made more than twelve months after the date of issue. In rejecting this contention Lord Goddard L.C.J., delivering the judgment of the court, said

> "That the widest discretion is given to the court under that rule, none will deny, but there is a line of authority, unbroken till the recent decision to which reference has already been made, that the court will not exercise that discretion in favour of renewal, nor allow an amendment of pleading to be made if the effect of so doing be to deprive a defendant of the benefit of a limitation which has already accrued".

After referring to earlier authorities the judgment then referred with approval to Hewitt v. Barr (1891, 1 Q.B. 98) in the following terms: —

> "This case has never been questioned, and in our opinion is really conclusive of the present appeal. Lord Esher, M.R., stated, as a general rule of conduct, that amendments ought not to be granted where they would have the effect of altering the existing rights of the parties. He then said at p. 99 'this being the rule with regard to amendments……..the same principle applies still more strongly to the case where we are asked to allow the renewal of a writ, though by so doing we should deprive the defendant of his existing right to the benefit of the Statue of Limitations"

The judgment also quoted with approval the following passage from the judgment of Scrutton L.J. in Mabro v. Eagle Star and British Dominions Insurance Co. (1932) 1 K.B. 485 at p. 487.

> "The court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the court to disregard the Statute".

To this the judgment adds the following comments: —

> "That, if we may say so, puts the reason underlying the rule clearly and emphatically. In the present case the court is apprised of the fact that the period of limitation had run when the application for renewal was made. To grant the renewal would, therefore, be to disregard the statute, which no court has a right to do merely because its operation works hardship in a particular case".

Finally, the judgment concludes with this passage: —

> "We conclude by saying that even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by Order 64 r. 7 ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course, on an application which is necessarily made ex parte. In every case, care should be taken to see that renewal will not prejudice any right of defence then existing, and in any case, it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service as indeed is laid down in the order."

The principle was expressed by Lord Denman C.J. in Roberto & anor v. Bate & Robins (1837) 6 A. & E. 778, in the following terms

> "It seems to me a great exercise of power in any court to say that a party should be deprived of any plea which the law gives him

and when that plea raises a defence which is founded in strict justice I should be sorry to extend the limits of authority with respect to it."

The same underlying principle has been applied to application for amendment of pleadings, as is exemplified in the case of Stewart v. North Metropolitan Tramway Co. (1885) 16 Q.B.D 178 and 556 (C.A.). In that case Pollock B, said at p. 180:

> "The test as to whether the amendment should be allowed is whether or not the defendants can amend without placing the plaintiff in such a position that he cannot be recouped as it were by any allowance of costs or otherwise. Here the action would be wholly displaced by the proposed amendment and I think it ought not to be allowed".

Another example is to be found in Hilton v. Sutton Steam Laundry (1945) 2 All E.R. 425 (C.A.) where there was an application to amend a writ after the appropriate statutory period had expired. Lord Greene M.R. said at p. 428.

> "The substantial question we have to decide is whether or not those amendments will have the effect of altering the position of the respondents for the worse with regard to the statutory period of limitation laid down in the Fatal Accidents Act 1864 s. 3……it is very well settled that the court does not allow amendments where the effect of doing so would be to deprive a defendant of any defence open to him under a statutory limitation".

And he goes on at p. 429 to point out that the statutory limitation is not concerned with the merits of the case: —

> "Once the axe fails it falls and a defendant who is fortunate enough to have acquired the benefit of the statutory limitation is entitled to insist upon his strict rights. He is similarly entitled to insist upon the strict application of the rule that the court will not deprive him of those rights by allowing amendments in pleading and so forth. In this case, it seems to me that to allow this amendment would be to deprive the respondents of the benefit of section 3 of the 1846 Act, by setting the action on its feet again and in effect validating ab initio the original representative writ".

From the consideration of these and other authorities to which I have been referred it is clear to me that the substantial question I have to decide in this application is whether the order for revivor will have the effect of altering the position of the respondents for the worse with regard to the statutory period of limitation laid down in section 8 of the Limitation Ordinance. If it does, then the order should not be made. This brings me to a consideration of the construction of Order XXXII r. 5.

As I have said, the question raised in this case does not appear to have come previously under judicial consideration, which is, perhaps, not surprising because it must be unusual for an action to be delayed until "the parties were upon the verge of the statute of limitation" and then for the plaintiff to ask to revive it after it has fallen within the ambit of rule 5(1). Let me first clear the ground by stating four general propositions which seem to be clearly established: —

1. The filing of a writ has the effect of preventing the bar of the statute and so long as the writ is effective, the plaintiffs' right to recover is kept alive.
2. If a writ be issued within the required time and not properly continued, and a fresh writ be afterwards issued on which the

plaintiff proceeds, the commencement of the action is the issuing of the last writ, and, if this be out of time, the plaintiff is barred.

(Halsbury's Laws of England 2nd Ed. Vol. 20 para. 1085: Pratt v.Hawkins (1846) 15 M & W 399)

3. The issue of a writ in one action, before the expiration of the statutory period, only keeps alive the cause of action in the action in which it was issued, and if another action for the same cause is commenced after the expiration of the statutory period, the second action will be barred.

(Halsbury: op. cit. para. 1087 p. 785: Manby v. Manby (1876) 3 Ch. D. 101)

4. If the writ has ceased to be in force, the position is the same as if it had never been issued, in the absence of express provisions for a renewed writ preventing the operation of the statutes of limitation.
(Battersby v. Anglo American Oil Co. Ltd. (supra) at p.389)

In the cases cited the action had lapsed because the writ had not been served and the requisite steps had not been taken to keep it alive. But, in my view, the principles therein enunciated apply equally to an action which has lapsed for any other reason; and they are, in effect, expressly so applied to cases coming within the scope of sub-rule (2).

It is then to be inferred from the absence of any express provision in sub-rule (1) that these rules are not to apply in appropriate cases? I do not think so. It was obviously not difficult to express in simple terms a rule which would cover the cases falling within the scope of sub-rule (2); but it would clearly be much more difficult to frame a rule to cover all likely foreseeable circumstances in which an application for revivor might be made under sub-rule (1). If the application is made within the statutory period, there is of course no need for such a rule; but if it is made by the plaintiff after the expiry of the statutory period and it is shewn that the delay has been caused or contributed to by the conduct of the defendant, a question may arise as to whether the defendant should be allowed to avail himself of the statute. Or again, if the defendant applies for revivor, as he might well do to ask for costs, questions may arise as to whether he thereby waives the statute and waives the plaintiff's right to recover. There is also the possibility that the defendant may not wish to plead the statute.

I think therefore that the absence of any specific reference in sub-rule (1) to prescription or limitation does not warrant the conclusion which counsel for the plaintiff has drawn and that the proper construction of the rule is that each case is to be considered according to its own circumstances in the light of the principles set out above.

I can see no difference in meaning between "deserted" and "abandoned": when used in relation to a claim both words imply relinquishment or giving up. In my view when an action is deemed deserted under sub-rule (1) it is (unless and until it is revived) completely ineffective to keep alive the plaintiff's right to recover and to prevent the operation of the statute.

If Mr. Wight's construction of sub-rule (1) is correct then a plaintiff could wait till the last day of the statutory period to file his writ, let it lie "deserted" for six months all but a day and then

start a fresh action. Such a construction seems to me clearly wrong.

Mr. Humphrys would allow the plaintiff the benefit of the interruption of time between the filing of the writ and the commencement of the desertion. That would be sufficient for his argument in the present case, but, in my view, it is not sound in principle. The filing of a writ only keeps alive the right to recover for the purposes of the action in which it is filed: it does not avail the plaintiff in another action for the same cause commenced after the statutory period has elapsed. If I am right in this then it follows that, if a plaintiff whose action is deemed deserted should elect to bring another action instead of applying for revivor, he must do so within the statutory period, In the instant case, the last day on which the plaintiffs could have brought another action for this cause was therefore the 23rd February, 1948.

Then the next question is whether the plaintiff is in any better position if he elects to apply for revivor after the statutory period has elapsed and this was, perhaps, Mr. Wight's real contention, namely, that the original writ is in that case still effective to prevent time running against the plaintiff until six months have elapsed from the date the action became deserted.

He has contended that this is the correct inference to be drawn from the absence of any reference in sub-rule (1) to prescription. I think myself that the inference should be the other way. The plaintiff usually has the lead in the action and it is primarily his duty to see that the cause is entered on the Hearing List. He should be vigilant to see that it does not become deserted and I see no reason in law or equity, why, if he fails in this and then applies for an order of revivor, he should thereby be able to defeat the statutory plea to which he would have no answer in a fresh action. If it had been the intention of the rule to confer such a privileged position upon a plaintiff with a statute-barred claim, I should have expected to find appropriate express provision for it.

This construction of sub-rule (1) leaves ample scope for its operation. A plaintiff whose claim is not barred may obtain a revivor and thereby save himself the cost and trouble of filing and serving a fresh writ, and delivering fresh pleadings. A defendant who is confident of the justness of his cause and who wishes to get an order for costs or pursue a counterclaim may also apply.

As I have said, if the application fails upon the ground that the action is now barred by limitation the court is not concerned either with the merits of the action or with the merits of the reasons for the delay which has occasioned the application for revivor, unless, perhaps, the delay is attributable to the defendant but, in the event of, the matter going further and it being held that my construction of the rule is at fault and that the granting or withholding of the order of revivor be a matter for discretion, it might be as well for me to express my views on the reason adduced in the solicitor's affidavit for the delay in filing a reply. I observe that the statement of claim was signed by two counsel

for the plaintiffs and that, although in view of the questions raised in the defence the plaintiffs might reasonably desire to have the advice of leading counsel on the question of filing a reply, yet they made no application either to the opposing solicitors or to the court for an extension of time for such purpose. I have already cited the Rule of Court which renders it unnecessary to file a reply to put in issue matters raised in the defence: the plaintiffs therefore could have saved their rights by filing a request for hearing and still have applied subsequently for leave to file a reply upon terms as to costs. Their solicitors cannot be unaware that in practice in this colony it is quite usual for parties to file pleadings or amended pleadings subsequently to a request for hearing and even at the hearing. For the reasons given, therefor, I think that the order asked for should not be made and the application be dismissed with costs.

Solicitors: *A. G. King,* for plaintiff; *J. Edward de Freitas.* for defendants

ZAITOON,

Plaintiff,

v.

BUDHIA,

Defendant.

[1948. No. 331.—DEMERARA]

BEFORE WARD, J.

1949. JUNE 28; SEPTEMBER 5, 6, 9.

Rules of Court 1900—*Amendment to endorsement of writ to include additional cause of action—Principle on which such amendment granted at late stage of trial.*

When no real injustice will be done by allowing an amendment and the party against whom the amendment is allowed can be re-couped by costs, an amendment may, in the discretion of the Court, be allowed even at a late stage of the trial.

Application by the plaintiff at a late stage of the trial to amend the endorsement in the writ so as to include a claim for money lent. The original endorsement was for possession of a building wrongfully and unlawfully detained and occupied by the defendant and for damages for such wrongful detention and occupation.

Amendment allowed on terms.

H. A. Fraser, for the plaintiff.

T. A. Morris, Solicitor, for the defendant.

Cur. adv. vult.

WARD, J.: I have given careful consideration to the application made by counsel for the plaintiff to amend the endorsement on the writ so as to include a claim for $180:— for money lent by the plaintiff to the defendant at her request. The authori-

ties, I think, are clear that an application made at so late a stage in the trial should be most carefully scrutinised. The defence in this action has been from the beginning, not that the defendant is not indebted to the plaintiff but that the plaintiff's claim which is based on the alleged sale of a house by the defendant to the plaintiff, is ill founded. It was open to the plaintiff at least from the time when the affidavit of defence was filed so to amend her endorsement as to add an alternative claim in debt for a liquidated sum and so place herself in the same position as that in which she now seeks to shelter. If the amendments had been based on facts wholly inconsistent with the grounds of the action as originally pleaded I should have no hesitation in refusing the application; but I have further to consider whether the amendment asked for would on the facts proved at the trial prejudice the defendant's position as to deprive her of a valid defence or of the costs of the issues on which she has succeeded. The rule, I think, is that, when no real injustice will be done by allowing the amendment, and the party against whom the amendment is allowed can be recouped by costs, an amendment may, in the discretion of the Court, be allowed. That is the basis of the decision in J. Leavey & Co. v. George H. Hirst & Co. (1944) L.J.K.B. 229 where an amendment in circumstances somewhat similar to this case was allowed.

But amendment can only be allowed on two conditions: —

(a) that counsel for the plaintiff formulates the amendment in writing and formally enters it on the record in accordance with the appropriate Rule of Court and

(b) payment or an undertaking for payment of the defendant's costs in the action to the time of amendment.

In this case I shall further direct that, inasmuch as the defendant might well have pleaded tender with payment into Court if the plaintiff had either included the amendment in her original endorsement or had amended at any time before the defence was filed, the plaintiff shall be allowed no costs in the action other than such costs as may be taxed and certified by the Registrar as directly attributable to the recovery of the amount viz:— $30 which the defendant has throughout the proceedings contested.

Application granted.

Solicitor for plaintiff: *S. M. A. Nasir,*

R. SCHULTZ *v.* E. WARD.

RUTH SCHULTZ,
Appellant (Defendant),
v.
EDMUND WARD, Detective Corporal, No. 3602
Respondent (Complainant).

[1949. No. 263.—DEMERARA]

BEFORE FULL COURT: WORLEY, C.J., WARD, J. AND MANNING, J. (ACTING).

1949. JUNE 29; JULY 1 AND SEPTEMBER 17

Larceny—proof of ownership—reasonable explanation—animus furandi,

The appellant was convicted by the Magistrate of the Berbice Judicial District with stealing three reels of thread and a napkin the property of the Inhabitants of the Colony of British Guiana. She was employed at the Mental Hospital, New Amsterdam and, a patient of the Hospital was seen to go into her yard with a bag. Shortly afterwards the thread and napkin were found in her house. The thread was similar to that imported by the Hospital through the Crown Agents but there was no evidence that any thread was missing from the Hospital. The napkin was clearly identified and was admitted by the appellant to be the property of the Mental Hospital but her explanation was that she had used, the napkin as a wrapper for some patties which had been given to her and intended to return it.

Held: There was no sufficient identification of the thread to establish ownership. There was no evidence to disprove the explanation with regard to the napkin and although the taking amounted to a trespass, in the absence of some evidence of an intention permanently to deprive the owner either at the time of the taking or at some time subsequent to the original trespass, the appeal must be allowed.

Appeal by the defendant who was convicted by the Magistrate for the Berbice Judicial District.

J. T. Clarke, for the appellant.

E. Mortimer Duke, Solicitor-General, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

The appellant, who is an employee of the Mental Hospital, New Amsterdam, and was in charge of Palmer's Ward at that institution, was charged by the respondent with the larceny of a number of articles from the Hospital sometime between the month of December 1948 and February 25th, 1949. The Magistrate convicted her of the theft of some of the articles mentioned in the charge, namely, three reels of thread and a napkin, and ordered her to pay a fine of $150 or in default of payment to undergo three months imprisonment with hard labour.

The grounds of appeal are in substance —

(a) that the evidence for the prosecution did not establish a prima facie case in that the articles in respect of which the charge was laid were not satisfactorily

identified as being the property of the Mental Hospital;

(b) as to the napkin, that there was no evidence of an animus furandi in the appellant, and that the Magistrate should have accepted as reasonably truthful her account of how it came to be in her possession; and

(c) there was no evidence of loss of thread from the Hospital and the appellant's explanation of her possession of the three reels should have been accepted as reasonable.

At the trial the learned Magistrate overruled a submission by counsel for the appellant that there was no case to answer, and called on the appellant for a defence in respect of all the items charged. He subsequently acquitted her in respect of ail the articles except the reels of thread and the napkin; but it does not appear from his reasons whether he did so because he considered the evidence of identification unsatisfactory or the appellant's explanation of her possession reasonable.

In our view there was no sufficient identification of any of the articles included in the charge except the napkin; nor was there any evidence that any thread had been stolen from the Hospital. None of the articles had a special mark to indicate their ownership, and they were all articles of a kind which might be obtained outside the Hospital. The evidence of the respondent is that the reels of thread were Coates thread; and the evidence amounted to no more than that a patient from the Hospital had been seen carrying a bag into the appellant's yard, that shortly afterwards the articles charged were found in her house, and that they were similar in kind either to articles issued to the appellant in the course of her duties at the Hospital or to articles kept in stock there. The Warden of the Hospital in a detailed list of articles found by him to be missing when he took an inventory on February 28th, 1949 does not mention reels of thread among the missing articles, and, as to identification, he could only say that they were similar to the reels imported by the institution through the Crown Agents.

The appellant also gave an explanation of her possession of the reels of thread, namely that they had been given to her in September, 1948 by a nurse from the Public Hospital, New Amsterdam, who has since died. Even if there had been evidence of the larceny of reels of thread from the Mental Hospital the explanation given by the appellant would have been sufficient, in our opinion, to raise a doubt in the mind of the learned Magistrate. The meaning of the judgment of the Court of Criminal Appeal in the case of R. v. Abramovitch (1914) 112 L.T. 480 is sometimes misunderstood, but it clearly enunciates the principle, as explained in R. v. Garth (1949) 1 A.E.R. 773, that if the accused person gives a reasonable or probable explanation of his possession of articles proved to have been recently stolen, and so raises a doubt in the minds of the judge or jury whether or not he knew the property was stolen, the case has not been proved and he is

entitled to be acquitted. For the reasons stated we are of opinion that the conviction in respect of the three reels of thread cannot stand.

The napkin is admitted by the appellant to be the property of the Mental Hospital, and is sufficiently identified by the letter "P" embroidered on it in a design made by the Medical Superintendent. It was found, by the Police in the appellant's house about 4 p.m. on February 25th, 1949. The respondent was unable to state precisely where it was found, and the appellant's evidence that it was found among a heap of soiled linen is uncontradicted. The appellant was at work until midday on February 25th, and, according to her evidence, made some pastry during the morning for the Medical Superintendent who gave her some of the patties she had made, and lent her the napkin to wrap them in. We do not accept the story of the loan of the napkin, as she made no mention of this when a departmental enquiry was being made; but there is no evidence to disprove her statement that she took the napkin as a wrapper for some patties when she left the Hospital after completing her half day duty on February 25th. On the inference that she made an unauthorised loan of the napkin it is clear that she committed a trespass to goods of the Mental Hospital; but a trespass in itself does not constitute the offence of larceny. There must be some evidence of an intention permanently to deprive the rightful owner of the thing taken either at the time when it is taken or at some time subsequent to the original trespass. From the evidence it is clear that between the time when the appellant took the napkin from the Hospital and the time when it was found on her premises there was no sufficient interval of time to show conclusively that she had no intention of returning it. Nor is there any evidence that she had dealt with the napkin in such a manner as to show an intention permanently to deprive the rightful owner of it. In both the leading cases on larceny after a trespass to goods there was clear evidence of a dealing with the article in a manner wholly inconsistent with an intention to return it to its rightful owner. In R v. Riley (1853) Dearsley C.C. 149 the accused sold the lamb of the prosecutor with his own twenty-nine; and in Ruse v. Read (The Times 29th January, 1949) the accused attempted to send the bicycle as far as possible from the possession of the rightful owner. In this case the action of the appellant in placing the napkin with other soiled linen for washing is no indication that she intended to keep it for herself. If a long period of time had elapsed between the original trespass and the subsequent finding, or if the appellant had hidden the napkin unwashed, or washed it and placed it among her own belongings in a trunk or press, there would have been evidence from which a felonious intent might have been inferred. In this case the action of the appellant is at least as consistent with innocence as with guilt, and in such a case the prosecution has failed to prove the charge against the accused because there is an element of reasonable doubt as to the felonious intent.

We are of opinion, therefore, that the appeal must be allowed with costs and the conviction and sentence set aside.

Appeal Allowed.

L. CORREIA *v.* V. C. VIEIRA.

L. CORREIA,

Appellant (Defendant),

v.

VICTORINE CHAVES VIEIRA,

Respondent (Plaintiff).

[1949. No. 382.—DEMERARA.]

BEFORE FULL COURT: WORLEY, C.J., WARD, J.

1949. SEPTEMBER 1, 2 AND 17.

Landlord and tenant—Order for possession on ground that building in dangerous condition and beyond repair—Rent Restriction Ordinances—meaning of ejectment.

A landlord obtained an order for possession against his tenant on the ground that the building was in a dangerous condition and beyond repair. It was not disputed that the building was in a dangerous condition. The tenant contended on appeal, however, that the order for possession ought not to have been made since the Magistrate had failed to consider the proviso to section 7 of the Rent Restriction Ordinance No. 23 of 1941 as amended by Section 8 of the Rent Restriction (Amendment) Ordinance No. 13 of 1947 regarding hardship and alternative accommodation.

Held: (1) There were references on the record to show that the Magistrate gave consideration to the proviso.

(2) The learned Magistrate directed his attention specially to subsection (8) of section 7 which provides as follows: "Nothing in this Ordinance shall prevent the making of an order for the ejectment of any person where in the opinion of the Court asked to make the order, the ejectment is expedient in the interest of public health or public safety", and being impressed by the dangerous condition of the premises and the consequent threat to the public safety, rightly made the order.

Appeal by the defendant from an order for possession of a building made by the Magistrate for the Georgetown Judicial District.

J. A. Veerasawmy, for the appellant.

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

Cur. adv. vult.

The judgment of the Court was as follows: —

The appellant was a tenant of a part of a building situate at Lot 72 Barrack and High Streets, Georgetown, of which the respondent is the owner. The appellant occupied the part of which he was tenant as a Grocery Parlour and living room. The contractural tenancy was terminated by a notice to quit given on March 31st, 1949, calling on the tenant to quit and deliver possession of the premises on May 1st, 1949. The appellant remained in possession after the date of the expiration of the notice, and on May 10th, 1949 the respondent filed an action for recovery of possession in the Magistrate's Court of the Georgetown Judicial District. The action was heard on June 21st, 1949 by Mr. C. R. Browne, Magistrate, who inspected the premises the same day on the invitation of the respondent, On June 22nd, 1949 he gave judgment

for the respondent, ordering the appellant to give up possession on July 1st, 1949.

The premises in question are subject to the Rent Restriction Ordinances. The respondent, both in the notice to quit and in the claim filed in the Magistrate's Court, gave as her reason for requiring possession that the building was in a dangerous condition and beyond repair, and that possession was required for the purpose of pulling it down and erecting a new building on the same site. It is generally admitted that the building was in a bad state of repair. As early as February 9th, 1949 the Sanitary Inspector for Georgetown had notified the respondent that the gutters of the building needed repairs, and this notice was followed by notices on May 5th and June 17th calling on the respondent to repair the roof and to abate the nuisance caused by the leaking roof. On March 29th, 1949 the appellant had in a letter called attention to the "serious disrepair" of the premises occupied by him, and threatening legal proceedings for damage caused to his furniture and goods by the defects in the building. On March 28th, 1949 the respondent called in Mr. Carlton Johnson, a building contractor of forty-two years experience, to inspect the building, and his report, which he confirmed in his oral evidence before the Magistrate, was in effect that the building was in a dangerous condition and should be taken down as soon as possible. This opinion was confirmed by Mr. James Fullington, a master carpenter of twenty years experience, and by Rupert Turpin, a foreman carpenter employed by the Carlton Johnson Contracting Company. The Magistrate's inspection showed that these opinions were well founded, and on this evidence, which was not seriously controverted, he found as a fact that the building was rotten, beyond repairs and dangerous, and should be taken down as soon as possible.

Mr. Veerasawmy for the appellant very wisely did not object to this finding of fact, for which there was overwhelming evidence, though he protested that the present condition of the premises is due to the respondent's laches. He based his appeal on the ground that the learned Magistrate failed to take into account other factors which he is required by the Rent Restriction Ordinances to take into consideration before making an order for possession. Section 7 of the Rent Restriction Ordnance No. 23 of 1941 as amended by section 8 of the Rent Restriction (Amendment) Ordinance No. 13 of 1947 provides in para. (h) of subsection (1) that the magistrate may make an order for possession where "the premises, being a dwelling house or a public or commercial building, are required for the purpose of being repaired, improved or rebuilt", with the proviso that no order shall be made on any ground specified in this paragraph "unless the Court is also satisfied that, having regard to all the circumstances of the case, less hardship would be caused by making 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." Mr. Veerasawmy submitted that there is nothing in the learned Magistrate's reasons for his decision to show that he took into consideration either the ques-

tion of relative hardship or of alternative accommodation before making the order. He further submitted that there was no evidence on the record in relation to these two matters, and that in consequence of this failure of the magistrate to perform a duty made obligatory on him by sub-section (1) paragraph (h) of Section 7, the case should be remitted to him with a direction to take evidence with respect to these two matters.

It is well settled that the absence of any reference in a judgment or reasons for decision to a particular fact or set of facts does not show conclusively that the judge or magistrate has not considered or applied his mind to the particular facts which are not mentioned. In Tendler—v—Sproule (1947) 1 A.E.R. 193 Morton L.J. (as he then was) said at p.195 in regard to the question of reasonableness under the Rent Restriction Acts, "when evidence is lead which is directed to the question of reasonableness and when the judge gives a decision giving possession to the landlord, this court will always assume that he has applied his mind to the question of reasonableness before giving his decision."

In the case before us there are references, both in the record of the evidence and in the magistrate's reasons, which, in our opinion, show that he did give consideration to these matters. In paragraph 4 of his reasons the Magistrate states that several of the defendants intimated that they wanted time to procure other accommodation and in the final paragraph he says that the present appellant as well as the other defendants had had two years verbal notice to quit.

But while it appears to us that these considerations were not absent from his mind, the learned Magistrate appears to have directed his attention specially to sub-section (8) of section 7 which provides as follows:— "Nothing in this Ordinance shall prevent the making of an order for the ejectment of any person where in the opinion of the Court asked to make the Order the ejectment is expedient in the interest of public health or public safety." Counsel for the appellant drew attention to the difference between the wording of this sub-section which refers only to "an order for ejectment of any person" and the words in other sub-sections of section 7 which refer to "an order or judgment for the recovery of any premises or for the ejectment of a tenant therefrom." He submitted that this sub-section only comes into operation when a warrant of ejectment is applied for after the order for possession has been made and disregarded. Such an interpretation would, in our opinion, not only do violence to the language of the sub-section which speaks of an "order for ejectment" and not of a "warrant of ejectment", but would also lead to some very absurd and dangerous consequences. Such an interpretation would mean that, though on an application for the recovery of possession of premises a magistrate is apprised of imminent danger to the public he would be precluded from making an order for ejectment until weeks or perhaps months had elapsed and a warrant of ejectment had been applied for. It would lead further to the conclusion that where, on such an application, the landlord failed to satisfy the court that alternative accommodation was available for the tenant he could make

no order for possession at all and the question of the public safety could never be considered by him, however dangerous the condition of the premises might be. The construction suggested is due to a misconception of the use of the term "ejectment" in the Rent Restriction Ordinances. The history of the writ of ejectment shows that it gradually developed from a writ for the protection of the possession of a termor into the general action for the recovery of possession, and that, except in certain provisions of the County Courts Acts, the terms "recovery of possession" and "ejectment" have become interchangeable. In the Rent Restriction Ordinances recovery of possession is used in relation to premises and ejectment in relation to the tenant. Sub-section (8) of section 7 of the Rent Restriction Ordinance gives power to a magistrate to make an order of ejectment not only against the tenant but against any person, clearly indicating in our opinion that the Legislature intended considerations of public health and public safety to be paramount; so that even if any of the persons occupying the premises do not fall within the categories of tenants or sub-tenants the magistrate is given power under this subsection to make an order of ejectment against such persons. It is further to be noted that this power is to be exercised without regard to considerations of reasonableness or relative hardship or alternative accommodation for which other sub-sections so carefully provide. Acting under this sub-section the learned Magistrate, who in our opinion was rightly impressed by the dangerous condition of the premises and the consequent threat to the public safety, made the order which is appealed against. It may be that the form of the order is not strictly exact and there should have been an order for ejectment, but in substance the decision of the magistrate is, in our opinion, correct and should be affirmed. The appeal is accordingly dismissed with costs and a direction will issue to the Magistrate that the form of the proper order is to be an order for the ejectment of the appellant from the premises as of the date July 1st, 1949.

Appeal dismissed

C. MAHADEO v. C. GRANGER.

CYRIL MAHADEO

Appellant (Defendant),

v.

CHETWYND GRANGER, County Sergeant-Major of Police, No. 4081

Respondent (Complainant).

[1949. No. 351.—DEMERARA.]

BEFORE FULL COURT: WORLEY, C.J., WARD, J.

1949. AUGUST 30; SEPTEMBER 17.

Practising Dentistry—Colonial Medical Service (*Consolidation*) *Ordinance, Chapter* 186 *as amended by the Colonial Medical Service* (*Consolidation*) (*Amendment*) *Ordinance* 1939 (*No.* 39 *of* 1939)—*what constitutes practising.*

The appellant was convicted by the Magistrate of the Essequibo Judicial District of practising dentistry without being registered as a dentist under the Colonial Medical Service (Consolidation) Ordinance, Cap. 189 as amended. The Magistrate was of opinion that in order to establish proof of practising dentistry it was incumbent upon the prosecution to prove more than one instance or act against the person charged and therefore he admitted evidence of a previous act of the appellant.

Held: By virtue of section 36 A of the Amending Ordinance of 1939 the practice of dentistry is to be deemed to include the performance of any such operation and the giving of any such treatment advice or attendance as is usually performed or given by dentists and consequently the act is enough. Although the evidence of previous acts was inadmissible, the Magistrate in his reasons had considered that possibility and had held that there was sufficient admissible evidence relating to the material day. Appeal dismissed.

Appeal by the defendant who was convicted by the Magistrate for the Essequibo Judicial District.

B. O. Adams, for the appellant.

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

Cur. adv. vult.

The judgment of the Court was as follows: —

The appellant, a barber living at Bartica, was convicted on a charge that he, on 6th March, 1949, not being registered as a dentist under the Colonial Medical Service (Consolidation) Ordinance, Chapter 186, practised dentistry at Bartica, contrary to section 37 of the aforesaid Ordinance as amended by the Colonial Medical Service (Consolidation) (Amendment) Ordinance, 1939 (Ord. No. 39 of 1939). He was fined $300. His appeal against the conviction and sentence was dismissed by this Court on the 30th August, 1949 and we now record our reasons therefor.

The only grounds of appeal that need be considered now are:—

(a) that inadmissible evidence was wrongly admitted
(b) the decision was unreasonable and against the weight of evidence
(c) there was no proof of practice which requires more than one instance

We deal first with ground (c). The learned Magistrate was of opinion that in order to establish proof of practising dentistry it was incumbent upon the prosecution to prove more than one instance or act against the person charged. He therefore admitted evidence of the appellant having inserted two gold teeth into the mouth of one Solomon in December 1947, which is the evidence referred to in ground (a).

We think the learned Magistrate was wrong in law in so holding. By the section under which the appellant was charged an unregistered person is guilty of an offence if he practises dentistry or holds himself out as practising or entitled to practice dentistry; and. by section 36A as enacted by section 2 of the Amending Ordinance of 1939 the practice of dentistry is to be deemed to include the performance of any such operation and the giving of any such treatment, advice or attendance as is usually performed or given by dentists.

The evidence of Kenneth Pearson, which the Magistrate accepted, established that on the day specified in the charge the appellant arranged to extract a tooth from his lower jaw for $1.00. The appellant first anaesthetised Pearson's jaw with an injection and then attempted to extract the tooth with forceps. The crown of the tooth broke and, as Pearson was in considerable pain, the appellant made another injection into the jaw. He made further unsuccessful efforts to extract the tooth, and then Pearson left. The appellant subsequently gave Pearson tablets, cotton wool and powder in order to relieve his pain from the broken tooth.

That evidence shewed that the operations the appellant on the day in question performed on Pearson and the treatment given him were such as are usually performed and given by dentists and this was sufficient of itself to support the charge.

There was also other evidence, given by Pearson, which the Magistrate also accepted, that, while he was waiting to be attended to, he saw the appellant extract teeth from two other persons. This evidence was admissible as affording cumulative evidence of practising on the day in question.

Counsel for the appellant sought to rely on the decision of the Full Court in *Khan v. Hinds* (1939) L.R.B.G. 106 but that case when examined does not assist him. The appellant therein contended that a singular transaction would not constitute the offence of practising sight-testing in contravention of section 4 of the Opticians Ordinance (No. 27 of 1933) of which he had been convicted. The Court, without expressing any opinion on this point, held that the evidence established that the appellant had used apparatus within the meaning of section 9 of the Ordinance on at least two occasions and that it was sufficiently proved that he had practised sight-testing.

A similar question arose in *Doobay v. Thomson* 1937 (1931—37 L.R.B.G. 490) in which the Full Court held that one transaction was sufficient to constitute the offence of acting as a house agent within the meaning of section 25 of the Tax Ordinance (Chapter 37). The judgment distinguishes the English case of Apothecaries Company v. Jones (1893) 1 Q.B. 89 in which it was held that the words "act or practise as an apothecary" in section 20 of the

Apothecaries Act, 1815 were directed against a habitual or continuous course of conduct. In that case Hawkins J. said: (p.93) "to 'practise' a calling does not mean to exercise it upon an isolated occasion, but to exercise it frequently, customarily or habitually……..and though it is true each individual act would afford cumulative evidence of practising, yet bare proof of one individual act would not of itself amount to a 'practising' ".

Assuming that to be correct statement of the general rule, it is inapplicable to the case before us, which is governed by the express provisions of interpretation enacted in section 36A.

We agree that the evidence relating to events in December 1947 was irrelevant to the charge of practising on a named day in March 1949 and ought not to have been admitted. But the learned Magistrate in his reasons for decision has considered this possibility and has held that there was sufficient other admissible evidence relating to the material day. We think he was right in so holding.

For these reasons we dismissed the appeal and confirmed the conviction and sentence.

Appeal dismissed.

ALBERTHA DURANT, Appellant (Defendant),
v.
VINCENT ROSE, Respondent (Plaintiff).

[1949. No. 157.—DEMERARA.]

BEFORE FULL COURT: WORLEY, C.J., and WARD, J.

1949. AUGUST 31; SEPTEMBER 17.

Landlord and tenant—possession of premises obtained in order to effect repairs—misrepresentation—order for possession discharged—Rent Restriction Ordinance No. 23 *of* 1941 *and (Amendment) Ordinance No.* 13 *of* 1947.

The appellant, the owner of a house let to the respondent obtained a conditional order for possession in order to effect repairs. The repairs were not carried out within the time specified and the order was discharged on the respondent's application. Instead of permitting the respondent to re-enter, the appellant purported to sell the premises to her niece. A week after this sale the respondent successfully re-entered. Two days after he claimed damages against the appellant in the sum of $100 on the ground that he had suffered loss by reason of the appellant's misrepresentation. The Magistrate upheld his contention and assessed the damages at $100.

Held: Possession had been obtained as a result of misrepresentation and the action was maintainable under the Rent Restriction Ordinance 1941 as amended by the Rent Restriction (Amendment) Ordinance No. 13 of 1947.

Appeal by the defendant from the decision of the Magistrate of the Georgetown Judicial District.

C. V. Wight, for the appellant.

J. Carter, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

The appellant was the owner of a house situate at Lot 167, Charlotte Street, Bourda within the Georgetown Judicial District which she rented to the respondent at a monthly rental of $16.00 a month. The tenancy was terminated on September 1st 1948 by a notice to quit, but the respondent remained in possession as a statutory tenant. On September 8th the appellant filed an action for possession on the ground that she needed the house to carry out repairs. A conditional order for possession was made by consent on October 5th, the appellant's agent representing that she was in possession of the necessary materials for effecting the repairs which could be completed in two weeks. The appellant failed to carry out the repairs within the time specified and the respondent applied for the revision of the conditional order. The application was granted and the order rescinded on November 29th .1948. The respondent then applied to the appellant's agent for the key to re-enter, but this was refused and on December 1st 1948, the appellant purported to sell the house to her niece. On December 8th 1948 the respondent re-entered on the premises. On December 10th 1948 the respondent filed the present action against the appellant alleging that by reason of the misrepresentation of the appellant he had suffered loss in respect of which he claimed $100.00 damages and costs. The learned Magistrate gave judgment for the respondent for the amount claimed with costs and this Court is now asked to reverse this judgment and to dismiss the respondent's claim with costs. The grounds of appeal advanced on behalf of the appellant are substantially three: —

(1) that there was no cause of action;
(2) that there was no evidence to support a finding of misrepresentation and
(3) that the damages were excessive.

On the first point Mr. Wight for the appellant submitted that the action was brought under Section 7 (4) of the Rent Restriction Ordinance No. 23 of 1941, as amended and re-enacted by Section 8 of the Rent Restriction (Amendment) Ordinance No. 13 of 1947, which provides that "where, after a landlord has obtained an order or judgment for possession or ejectment under this section, it is subsequently made to appear to the Court that the order was obtained by misrepresentation or the concealment of material facts, the Court may order the landlord: to pay to the former tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as a result of the order or judgment." He further submitted that under this section the right to compensation is given to the "former tenant" and as the respondent has regained possession he is still in the position of a tenant and the section cannot apply to him, as "former tenant" must mean a tenant who has been dispossessed and is no longer a tenant. This submission of the learned counsel ignores the fact that before the respondent regained possession of the premises the appellant had severed the nexus between the respondent and herself by selling the house, and that the relationship of landlord and tenant no longer subsisted between the appellant and the respondent after December 1st, 1948. Whatever may be the legal

relationship between the respondent and the appellant's successor in title, it is clear that the respondent as from December 1st, 1948 was no longer a tenant to the appellant and would therefore fall within the category of a "former tenant", even if the Court accepted the submission of the learned counsel for the appellant as to the meaning of this term.

The second point is, in our opinion, without merit. There was ample evidence on which the Magistrate could find that there was actual misrepresentation. The appellant's agent represented that she had an intention of effecting repairs to the house and that she was in possession of the necessary materials for this purpose. In his evidence before Mr. Sharpies on November 23rd, 1948, the agent admitted that the appellant was not even then in possession of the necessary materials, and we think it is clear on the evidence that, at the time the appellant's agent made these representations, the appellant had no intention of carrying out repairs and was using this misrepresentation to get the tenant out. The duty imposed on a landlord under the Rent Restriction Ordinance has been stated on the high authority of the Court of Appeal in Thorne v. Smith (1947) K.B. at p. 312 to be one of "the utmost good faith"; and the failure to make a full disclosure of all relevant facts within his knowledge by the landlord is a statutory breach of duty, for which the Ordinance provides that he shall pay compensation for loss or damage resulting therefrom.

Further, it is to be observed that the respondent would have been equally entitled to judgment on the ground of fraudulent misrepresentation in an action of deceit. Scott L.J. in the case above-mentioned at p. 311 puts the position clearly: "If the misrepresentation was fraudulent, the tenant who had submitted to a consent judgment because of the landlord's misrepresentation, could have brought a common law action for damages for deceit, and the consent judgment would have been no defence." As there are no strict rules of pleading in the Magistrate's Court the Magistrate would have been free to regard paragraph 8 of the respondent's claim as either an action for deceit or a claim under Section 7 of the Rent Restriction Ordinance.

On the question of damages we are satisfied that the learned Magistrate did not take into consideration any factors which he ought not to have taken into account. The respondent has proved not only serious inconvenience to himself and his family, but substantial financial loss, and the damages are in no way excessive. The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *A. G. King,* for appellant, *E. D. Clarke,* for respondent.

GORDON McDONALD, Plaintiff,
v.
MOHAMED DEEN, Defendant.

[1948. No. 356.—DEMERARA.]

BEFORE WARD, J.

1949. SEPTEMBER 14, 15, 16, 20.

Malicious prosecution—Proof of absence of reasonable and probable cause—Prosecution after advice of counsel—when to be deemed a good defence—Inference of malice from absence of reasonable and probable cause.

The defendant was charged with a breach of the Control of Prices order as a result of information given by the plaintiff. The defendant was convicted by the Magistrate. He gave notice of appeal and while the appeal was pending he charged the plaintiff on three separate counts for perjury in respect of statements made by him in giving evidence on oath before the Magistrate in support of the charges against the defendant. The defendant's appeal against conviction was dismissed by the Full Court. Before swearing the information the defendant consulted a practising barrister who advised on statements submitted to him that there was a good case for perjury against the plaintiff. The Court found, however, that the defendant did not lay the facts fairly and honestly before counsel, and at the time he sought counsel's advice, had no bona fide belief in the statements submitted and knew that they were false.

Held: The defendant having no reasonable and probable cause for two of the counts for perjury, since he knew them to be without foundation, he was guilty of malice in relation to those two counts, and. that plaintiff was entitled to damages for malicious prosecution although there was reasonable and probable cause and the absence of malice in relation to the third count.

Action by the plaintiff against the defendant for damages for malicious prosecution.

John Carter, for the plaintiff.

Sugrim Singh, for the defendant.

Cur. adv. vult.

WARD, J.: The plaintiff is a baker of Bagotville, West Coast, Demerara, and a man of some repute in his community, being a village councillor and a prominent member of his church. In this action he claims damages against the defendant, who carries on the business of a provision dealer in Stabroek Market, for wrongfully and maliciously instituting criminal proceedings against him in the Magistrate's Court of the Georgetown Judicial District on the 26th day of October, 1942. The proceedings were commenced by an indictable information sworn by the defendant before the Magistrate containing three separate counts for perjury. For some reason not fully explained the information was not brought on for hearing until 1947, when the matter was again adjourned on the defendant's application to enable him to make a search for a bill book, which he claimed was necessary for proving his case. The document was not found, and in the meantime another wit-

ness, whom the defendant had summoned, died in December 1947. Accordingly, when the case was called for hearing on April 15th, 1948 the defendant offered no evidence and the information was dismissed.

It is not contested by the defendant that he instituted the proceedings or that they terminated in favour of the plaintiff. Nor did he contest the fact that the plaintiff was put to expense in defending himself. The defendant's case is that he was actuated by the purest motive, viz. the desire to see justice done, in instigating the proceedings, that he had reasonable and probable cause for so doing, and that he was careful to obtain the opinion of learned and experience counsel before swearing the information before the magistrate.

The facts in the case are not complicated. The plaintiff, who had on former occasions purchased flour from the defendant, went to the defendant's stall at Stabroek Market on July, 14th, 1942 to purchase a half bag of flour. There was a great shortage of flour, and the defendant charged the plaintiff six dollars for the flour for which the price fixed by the Price Control Authority was $4.00. The plaintiff, who on his own admission had previously purchased flour at $5.00 and $5.50 per half bag from the defendant, and so had assisted in a breach of the regulations, felt that the defendant was going too far in his demands and laid the matter before the police. A trap was then laid, and, on police instructions, the plaintiff again approached the defendant, who sold him the half bag of flour for six dollars. He received payment and made delivery of the flour which was immediately seized by the Police. The defendant was then interrogated by the police, and, according to the evidence of L/Cpl. Lambertis Jackman, wrote on a slip of paper before replying that he had sold the plaintiff a half bag of flour for $4.00 and a ten lb. carton of margarine for $2.00. The plaintiff denied any transaction as to margarine, and defendant was asked why he had not delivered the margarine. His story was that the plaintiff was in a hurry to get the flour on the ferry, and said he would return for the margarine. The Police were not satisfied with this story and prosecuted the defendant for a breach of the Defence Regulations in (a) selling flour above the price fixed by order under the Regulations and (b) with failing to give the purchaser a bill. The Magistrate convicted the defendant who appealed against the conviction and sentence. While the appeal was pending he swore to the information charging the defendant on three separate counts for perjury in respect of statements made by him in giving evidence on oath before the Magistrate in support of the charges against the defendant. The appeal was heard in due course and was dismissed by the Full Court and the conviction and sentence against the defendant affirmed.

In the course of his evidence the plaintiff said that the defendant had never furnished him with a bill in any of his transactions, that he had never purchased margarine from the defendant and did not know what margarine was, and that on July 14th. 1942 he had purchased a half pack of yeast from Weiting and Richter. In relation to the latter statement a witness, Manoel Nascimento, was called in rebuttal, and he stated that he was the

manager and attorney of American Standards Brand Inc. who carried on business in a portion of the premises of Weiting and Richter, and that no yeast had been sold by his firm on that day. This statement of Nascimento, amplified, according to the defendant's evidence before me, by documents shown to the defendant after he had given evidence and before the information was sworn, was used by the defendant as a ground for one of the counts of perjury laid in the information.

The defendant also alleges that before swearing the information he consulted the late Mr. Justice Luckhoo, who was then practising as a barrister, and laid before him all the facts, including Nascimento's statement; and that he was advised by counsel that he had a good case against the plaintiff on a charge of perjury. This evidence is not contradicted and I accept it as virtually correct.

In other respects I do not accept the defendant's statements. He was convicted by a competent court and this conviction was affirmed by the Full Court. Part of his evidence in defence to that charge consisted of a bill book, purporting to contain duplicate bills in relation to the sale of flour to the plaintiff on three previous occasions. These bills, according to the defendant's evidence, showed that he had sold the flour on the three previous occasions at the proper price of $4.00 per half bag. This evidence was contradicted by the plaintiff, whose evidence on this point was accepted by the Magistrate and the Full Court. Yet it was on these entries in the bill book that the first count in the information was laid. I have no doubt that the defendant told his counsel, as he told this Court, that these entries were a true record of the transactions, and on this representation he was advised. But it is clear to me on the evidence that these bills were not true records of the transactions. One statement made by the defendant in the course of his evidence before me is significant: "If I sold over the control price, I wouldn't put $5.00 on the bill." I am satisfied that at the time when the defendant laid the information about the bills before his counsel he knew that this information was false, and therefore could not have believed in the Plaintiff's guilt. The same comment applies to the statements in relation to margarine. The plaintiff said that he did not know at that time what was margarine. In evidence before me he again asserted this and said that at that time he used only lard for the manufacture of bread, though he had since learnt of margarine as a substitute. If it were true that plaintiff had purchased from defendant on July 4th ten pounds of margarine the statement would have been palpably false. But on the evidence I find, as the Magistrate and the Full Court did in the case of *Jackman v. Deen,* that the defendant's story of the sale of margarine was false. Apart from other considerations the defendant has been unable to give any satisfactory explanation of the fact that he sold the plaintiff margarine at $2.00 when the fixed retail price was $2.10. In relation to both the counts numbered 1 and 3 in the information for perjury I find that the defendant at the time he sought counsel's advice had no *bona fide* belief in the statements submitted to counsel for his opinion and in fact knew

that they were false. In an action for malicious prosecution the onus is on the plaintiff to prove both the absence of reasonable and probable cause for the institution of the prosecution, and also malice on the part of the defendant. It has been pointed out by high authority that this is one of the few cases in which a plaintiff is required to prove a negative averment, and it is sufficient if the plaintiff establishes by evidence a state of facts or circumstances inconsistent with the existence of reasonable and probable cause. Here it has been established that the defendant did not believe in two of the charges which he laid, and if a prosecutor has no belief in the grounds of his prosecution he can have no reasonable and probable cause for making the charge. The advice of counsel will not shield him, because it is a prerequisite that the facts shall be fairly and honestly laid before counsel. The opinion of Bayley J. in *Ravenga v. Mackintosh* (1824) 2 B & C at p. 697 is accepted as an authoritative statement of the law: "I accede to the proposition, that if a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel (however erroneous that opinion my be) he is not liable in an action of this description." It is for this reason that I hold that the defendant had reasonable and probable cause for laying the count numbered 2 in the information for perjury against the plaintiff.

But the fact that there was reasonable and probable cause for one of the charges preferred is no answer to a claim for damages for malicious prosecution if other charges in the indictment or information were maliciously and without probable cause preferred. The case of *Reed v. Taylor* (1812) 4 Taunt. 616 decided this point. It has been suggested that some doubt was thrown on this decision in *Johnstone v. Sutton* 1 Term Rep. 547, but after declining to give any opinion in the course of the argument in *DeLisser v. Towne* (1 Q.B. 333), Lord Denman C.J. said in the same case at p. 343: "There is one entire issue, and if there was no probable cause for any part of the charge, the plaintiff was entitled to a verdict. Whether there was or was not probable cause for other parts of the charge would affect the damages, but could not affect the verdict, or show that the defendant had properly preferred the indictment, that is, with probable cause for every part of it." In Ellis *v. Abrahams* 1846 8 Q.B. 709 Lord Denman explained the observations of Lord Mansfield in *Johnstone v. Sutton:* "Lord Mansfield said that if the defendant were right in trying the plaintiff for disobedience, the additional charges of delay and of obstructing the public service were only two or three superfluous words, stating the effect of the alleged disobedience," and therefore the rule in *Reed v. Taylor* would not apply. This case was not drawn to the attention of the Court in *Palmer v. Birmingham Manufacturing Co.* (1902) 18 T.L.R. 552 where Jelf J., in spite of counsel's effort to throw doubt on the decision said: "By the case of *Reed v. Taylor* I must stand."

If a prosecutor presents a case in which it is evident that he had no bona fide belief the inference of malice is irresistible. Finding as I do that the defendant well knew that two of the counts laid were without foundation it follows that his motive was

not to vindicate justice, His object was to injure and cause inconvenience to the plaintiff. The plaintiff is therefore entitled to a verdict and to damages. His counsel has urged that he is entitled to exemplary damages. Certainly the defendant's conduct is highly reprehensible, and in the assessment of damages I must take into consideration not only the actual monetary loss suffered by the plaintiff, but also the inconvenience and the mental anguish he has suffered, and the aspersion cast on his reputation by the charge. On a careful consideration of ail the circumstances I am of opinion that the plaintiff should have damages for $600.00 and the costs of the action, excluding in the taxation any costs for witnesses which may have been incurred for the disproof of the issue of reasonable and probable cause in relation to the second count in the information.

Judgment for plaintiff.

Solicitors: *H. A. Bruton,* for plaintiff; *S. M. A. Nasir,* for defendant.

ANGELINA SUTHERLAND, Plaintiff,

v.

MONICA BARROW, individually and as executor under Last Will and Testament of Albert Holder, deceased, and DAVID EDWARDS, individually and as executor under Last Will and Testament of Albert Holder, deceased, Defendants.

[1947. No. 156—DEMERARA.]

BEFORE WORLEY, C.J

1949. APRIL 22, 25, 26; SEPTEMBER 21.

Breach of contract—Specific performance—probate—Section 33 *Supreme Court of Judicature Ordinance Cap.* 10*—Deceased Persons Estate's Administration Ordinance* (*Chapter* 149).

In this action the Court held that the plaintiff was clearly entitled to damages for breach of contract by the first defendant in refusing to convey a piece of land sold by her in her capacity as executrix of her father's estate. But since the first defendant was without means to pay the damages the plaintiff sought to compel the first defendant to obtain probate of her testator's will and for specific performance of the contract. Observations by the Chief Justice on the impracticability of combining probate actions with other forms of action.

Action by the plaintiff against the defendants for specific performance of a contract and for certain declarations.

P. A. Cummings, for the plaintiff.

M. A. Charles, Solicitor, for the first-named defendant.

S. I. Cyrus, for the second-named defendant.

Cur. adv. vult.

WORLEY, C.J.: In this case I find on the evidence that the first-named defendant did on the 16th May, 1945 contract to sell to the plaintiff a piece of land described as the north half of

lot 256 Stanleytown,West Bank, Demerara River with a building thereon for the sum of $100 of which $25 was paid to and received by the first defendant, the balance to be paid at the time of transport. The contract was sufficiently evidenced by a memorandum written by the first defendant, (Exhibit C) and I entirely disbelieve her evidence that this was written merely as a "security" for monies advanced by the plaintiff to or for the benefit of the first defendant's deceased father. I also find that plaintiff advanced to the first defendant two further sums of $5 and $10 on account of the balance of the purchase price, that the plaintiff has at all times been ready and able to complete the transaction and that the first defendant has resiled from the bargain.

The plaintiff now seeks an order for specific performance of the contract and for certain ancillary declarations which she deems necessary for that purpose.

At the date of the contract of sale the land in question formed part of the estate of the first defendant's father, Albert Holder, who died on the 9th May, 1945, leaving a will dated 7th May, 1945 under which the first defendant was the sole residuary beneficiary and executrix. When she contracted with the plaintiff she held herself out as entitled in this dual capacity to deal with the property: she subsequently as beneficiary and executrix on 11th June, 1945 authorised the plaintiff to act as her agent to look after and protect the property (Exhibit D), no doubt in order that the plaintiff could protect herself against trespassers or other claimants, and she obtained the $10 from the plaintiff for the purpose of consulting her solicitor, Mr. Charles, with a view to obtaining probate of the will of the 7th May. The title to the land by transport is said to be in the name of one Kaladdin Maraj, who sold to one McFarley, who in turn sold to Albert Holder. These sales being evidenced by receipts given for the purchase money. But, if the first defendant had obtained probate she could have perfected her title by means of an application under section 28 of -the Deeds Registry Ordinance.

From the evidence adduced, I am satisfied that the will of 7th May, 1945 was valid and duly made according to law. It was lodged in the Registry by the first defendant with an application for probate on July 28th 1945. No caveat has been entered to the will but the first defendant has taken no further step to obtain probate.

The deceased Albert Holder had previously on 1st May, 1945 made a will in favour of a friend, David Edwards, the second-named defendant, who was the sole executor and beneficiary thereunder. This will was lodged in the Registry and application made for probate by Edwards on 18th June, 1945. The defendant Barrow had entered a caveat on 11th June, 1945 but she withdrew this on 24th August, 1946. On the latter day the plaintiff entered a caveat, to which there has been a warning and an appearance by plaintiff but no further action taken, presumably because this present action was started in April 1947.

I may note here that in Edward's application for probate deceased's estate was valued at $208 and in Barrow's at $126.88.

From the facts which I have found proved, it follows that

the defendant Barrow having bound herself by her contract to do all that she could to convey the property sold, has taken no effective steps at all to place herself in a position to pass title to the plaintiff but has deliberately refrained from doing so, and is therefore in breach of her contract: see the judgment of Luckhoo J. in *Clarke v. Daniel* (Demerara No. 1 of 1947: *Official Gazette* 13.8.1949) and the cases there cited.

The plaintiff will therefore be entitled to damages but that, I imagine, will give her little satisfaction as the first defendant appears to be without means, and the plaintiff, having been in possession of the land since 1945, wants to have that possession confirmed and strengthened by title. The real question therefore in this case, and I confess I find it one of some difficulty, is whether the plaintiff can get an order for specific performance of the contract. The Court will not make an order for specific performance unless it is satisfied that the order can be enforced and the difficulty in the present case lies in the fact that, even if the defendant Barrow is sole executrix and beneficiary under the last will of her father, she cannot effect any conveyance of the property unless her right to do so is evidenced by a grant of probate. It seems very doubtful whether the plaintiff could compel Barrow to pursue an application for probate which might involve her in costly litigation beyond her means. The plaintiff, perhaps realising this difficulty, has asked for declarations:

(a) that the first named defendant was on 16th May, 1945 and still is the sole executor of the true and original last will of Albert Holder, deceased, dated 7th May, 1945: and that the said defendant entered into the said contract of purchase and sale with the plaintiff as the executor thereof, and that the plaintiff is entitled to specific performance of such contract;

(b) a declaration that the will made by the said deceased on the 1st day of May, 1945 wherein the second named defendant is appointed as executor was revoked by the will made the 7th May, 1945.

On the evidence before me, I should have no difficulty in making a finding in favour of the later will but I have grave doubts as to whether such declarations can be asked for in a suit of this nature or whether they would be effective even if made. The plaintiff is seeking to combine in one action a common law claim for damages, a prayer for the equitable remedy of specific performance and a probate action. Mr. Cummings admitted that he could find no precedent for this but prayed in aid Section 33 of the Supreme Court of Judicature Ordinance. He argued that any judge of the Court once a matter is properly brought before him can exercise any of the jurisdictions vested in the Court and, therefore, that if the Court as a Court of equity holds there was a valid contract which should be specifically performed, then the Court will exercise its probate jurisdiction if that is a necessary step towards righting a wrong that would otherwise be done to the plaintiff. The argument is superficially attractive but I do not think it faces the real problem.

Certain powers of the Court in relation to the granting of probate and letters of administration appear to spring from the Deceased Persons Estates' Administration Ordinance (Chapter 149) e.g. Sections 24 and 26: but, nevertheless, it is probably true to say that the probate jurisdiction is included among the authorities, powers and functions conferred upon the Court by section 3 (2) of the Supreme Court of Judicature Ordinance. Williams on Executors 11th Edition Volume 1 at page 203 has the following passage:—

> "Now by the Supreme Court of Judicature Act 1873(see now the Judicature Act 1925) the existing Courts therein named (of which the Court of Probate was one) were united and consolidated together as one Supreme Court of Judicature in England."

The author then points out that, although the jurisdiction transferred to the High Court by the Act included the jurisdiction which previously had been vested in the Court of Probate, and that this jurisdiction could be exercised by any judge of the High Court, yet

> "Although according to this principle, a judge in the Chancery Division would have jurisdiction to grant probate of a Will, it would appear for many reasons to be so inconvenient that any judge except a judge in the Probate Division should grant probate, that a judge in the Chancery Division, if requested to exercise such jurisdiction, would use a sound discretion in refusing to do so and in directing the parties to obtain probate in the Division to which such matters have been assigned."

This passage appears to express the better judicial view on this point as shewn by the cases cited at page 205.

In this Colony, although the Supreme Court in its original jurisdiction is not separated into three Divisions as is the High Court in England, and although no special Probate Rules of Court have yet been made, yet there is a recognized practice relating to matters of probate and administration based upon the English practice in these matters. In my view, any attempt to unite probate actions with other forms of action will in the long run lead to inconvenience and confusion.

But the matter does not rest there. Even if the plaintiff can properly pray in aid section 33 of Chapter 10, one question has still to be answered: are the declarations for which she asks relating to the two wills, a remedy or relief to which she is entitled in respect of her claim for specific performance? She is, in effect, asking for probate of the second will since the declarations asked for would be useless unless they either have the effect in law of a grant of probate or are followed up by such a grant. The position at law is I think correctly put in the following passage from Williams (op. cit.) at page 221:

> "The only person by whom the testament can be proved is the executor named in it whom the Court may cite to the intent to prove the testament, and take upon him the execution thereof, or else to refuse the same. This the Court may do, not only ex officio, but at the instance of any party having an interest, which interest is proved by the oath of the party……..Availing himself therefore of the rule, a person having an inferior interest, but unable to procure the renunciation of the persons who have the superior interest, cites all those persons who have such superiority to take the required grant or shew cause why it should not be made to himself,"

A legatee or a creditor of the estate of the deceased may have such an interest and, therefore, by this rule force the executor either to take probate or to renounce. But I know of no authority for the view that a person claiming under a contract with the executor or with a beneficiary can avail himself of the rule. The case *Lindsay v. Lindsay* 1872 42 L.J. P. & M. 32 to which I was referred does not seem to me to assist the plaintiff. In that case, there had been a grant of letters of administration and a suit for revocation of the grant on the ground of subsequent discovery of a will: in these circumstances, persons who had purchased from the administrator and whose title would have been imperiled if the grant were revoked were given leave to intervene. I cannot see that that case has any application to the very different facts of the present case. Whether the plaintiff as a judgment creditor seeking execution against the first named defendant would be in a better position or whether the plaintiff could successfully invoke section 28 of the Deeds Registry Ordinance (Chapter 177) are points on which I need express no opinion. In my view, as the matter stands, she has no interest which would entitle her to probate if the executor renounced and therefore is not entitled to the declarations for which she asks. In these circumstances an order for specific performance would be ineffective.

As I have already indicated, the first defendant is in breach of her contract and the plaintiff is entitled to general damages. She has claimed a sum not exceeding $500 but, beyond the sums actually paid out amounting to $40 she has not proved any damages. She alleges that she has paid rates and taxes on the land since 1945 but has produced no receipts. She has denied receiving any income from the produce. At any rate, she has not given me any foundation to work on and I cannot award an arbitrary sum. She is entitled to receive what she has actually paid out towards the purchase price. There will therefore be judgment for the Plaintiff against the first named defendant for the sum of $40 and costs to be taxed.

The plaintiff not having succeeded in that part of her claim which concerned the second-named defendant must pay to him his costs of the action to be taxed.

Solicitors: *H. B. Fraser,* for plaintiff; *H. A. Bruton,* for second-named defendant.

M. BAKSH *v.* RAHIMAN & A. HACK.

MAHAMAD BAKSH, Petitioner,

v.

RAHIMAN, Respondent,
and
ABDOOL HACK, Co-respondent.

[1948. No. 153—.DEMERARA.]

BEFORE WARD, J.

1949. SEPTEMBER 27, 28, 30.

Dissolution of marriage—Husband's petition—Petition by wife dismissed on ground of collusion—Connivance of wife's adultery.

On the 11th September, 1944, a petition by a wife for dissolution of her marriage on the ground of her husband's adultery was dismissed because collusion was proved. Prior to her petition the wife had obtained in the Magistrate's Court an order for maintenance against her husband. After the dismissal of the wife's petition the husband discovered on the 25th September, 1944, that his wife was committing adultery. On the 20th November, 1944, the husband and wife entered into an agreement whereby the wife would not seek to enforce the maintenance order or contest any application for its rescission. The husband agreed to take no steps to prevent his wife living with another man as her husband nor would he at any time defend any divorce proceedings brought against him. Subsequently he petitioned for a dissolution of marriage on the ground of his wife's adultery with the man with whom she was living on the 25th September, 1944.

Held: The agreement of November 20, 1944, satisfied all the conditions as proof of connivance and the petition must be dismissed in accordance with section 10, subsection 1 of the Matrimonial Causes Ordinance, Cap. 143 which provides that if the Court finds the petitioner has during the marriage been accessory to a conniving at the adultery of the other party to the marriage then the Court shall dismiss the petition.

Cases referred to:

Churchman v. Churchman (1945)
P. Gipps v. Gipps 11 A.L.C. 1.
Glenie v. Glenie 32 L.J. Pro. M. & A. 17
Lankester v. Lankester 1925 P. 114.

Petition by Mahamad Baksh against his wife Rahiman for dissolution of marriage on the ground of adultery with Abdool Hack.

F. Ramprashad, for the petitioner.

C. Shankland, for the respondent and co-respondent.

Cur. adv. vult.

WARD, J.: The petitioner was married to the respondent on 24th March, 1929 in accordance with the laws of this Colony, where they are domiciled. They lived together and cohabited at the Hague Village, West Coast, Demerara from 1929 until October 3rd, 1942, and there was one child of the marriage, born in 1931, who died in infancy. The couple had matrimonial differences from time to time, the petitioner alleging that the respond-

ent absented herself from the matrimonial home at intervals for long periods, and the respondent in turn alleging that the petitioner had a series of affairs with a number of women, culminating in the early days of October 1942 with an illicit intercourse with one Jankie. On October 3rd 1942 petitioner, who had slept the previous night at Jankie's house, took her to the matrimonial home and announced his intention *more* Mohamedan, of bringing Jankie to live in the house with the respondent. Her refusal to accept this polygamous arrangement incensed the petitioner, who beat the respondent with a leather strap and locked her out of the house. Jankie took up her abode with the petitioner and was married to him by Muslim rites later in October 1942. They have lived together in concubinage from that date. Later in 1942 the respondent lodged a summons for maintenance against the petitioner in the Magistrate's Court of the West Demerara Judicial District and in April 1943 the Magistrate adjudged the petitioner guilty of desertion and ordered him to pay $1.20 per week for the support of the respondent. It is noteworthy that in 1943 when the summons for maintenance was heard the petitioner made no allegation of infidelity against the respondent.

These facts are clearly proven. What is not clearly established is the date on which the association between the respondent and the co-respondent began. The evidence of the respondent and the records of this Court show that on June 10th 1944 a petition for dissolution of marriage was filed by the respondent against the petitioner. According to the respondent's evidence this petition was filed as the result of an agreement between the petitioner and respondent whereby the petitioner agreed to give to respondent the sum of $200.00 and some items of household furniture including a bedstead and a. sewing machine on condition that respondent abandoned the order for maintenance in her favour and brought a petition for dissolution of marriage which the petitioner would not defend. Both parties carried out the agreement, but the petition was dismissed on September 11th 1944 by Sir John Verity, C.J. on the ground of collusion. The petitioner, according to respondent's evidence, claimed and obtained the return of the bedstead.

The petitioner's next step was to obtain evidence of acts of adultery by the respondent. On September 25th 1944 he visited premises occupied by the respondent and co-respondent with other persons and according to his evidence they both admitted that they were living together. As a result of this visit he applied to the Magistrate of the West Demerara Judicial District for discharge of the Maintenance Order. Before this application was heard there were negotiations between the parties and on November 20th 1944 the petitioner and the respondent entered into an agreement which was executed before Mr. A. Rayman, a Justice of the Peace. By this agreement the respondent agreed to rescind the maintenance order and to forego all arrears and the petitioner agreed not to prevent her from living with anyone as a husband and further that he would not at any time bring any action against any man that she may be living with as a co-respondent nor defend or object to divorce proceedings brought against him in the

Supreme Court of British Guiana. In view of this agreement he did not attend the Court for the hearing of his application to rescind the maintenance order which was struck out. On legal advice, however, he again filed his application on 8th December, 1944 and on 20.3.45 this application was heard and the order discharged. Subsequently on 11th December, 1945 he gave the respondent, as he alleges at her request, a telack, which corresponds in Mohamedan law to a bill of divorcement.

I am satisfied on the evidence that the statements of the respondent and co-respondent as to the date on which the adulterous intercourse began are not true, and that in fact they were cohabiting from September 1944 when the petitioner visited the house in which they resided. This finding of fact may be important on the question of connivance in view of Lord Merrirnan's observations in Churchman v. Churchman (1945) P. at p. 50: "It is of the essence of connivance that it precedes the event and, generally speaking, the material event is the inception of the adultery and not its repetition although the facts may be such that connivance at the continuance of an adulterous intercourse shows that the husband must be taken to have connived at it from the first." Section 10(1) of the Matrimonial Causes Ordinance provides that if the Court finds that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, then the Court shall dismiss the petition. The presumption of law is always against connivance and the onus of disproving it only rests on the petitioner where the evidence is so nicely balanced pro and con that the Court can come to no definite conclusion. On the evidence in this case it appears to me that the petitioner was anxious to escape the burden of the Maintenance order in favour of his wife and he entered into both agreements in 1944 with the respondent with a view to effecting this. The first agreement was collusive and has been disposed of. But the second agreement was made after he had obtained evidence of the respondent's adultery and had filed an application for the discharge of the maintenance order. By this agreement the sole benefit accruing to the petitioner was release from the order for maintenance, and to secure this he entered into covenants which show manifestly that he was willing to acquiesce in any adulterous acts on respondent's part if he secured release from the burden of contributing to her support. The language of Lord Phillimore in Drew v. Drew (1842) C. Jur. 110 is appropriate to the facts of this case: "The wife, deprived of the society and protection of her husband, and banished from her natural home, fell into a course of adultery; the husband looked at the whole transaction in a pecuniary point of view and directed his immediate object to the reduction of 4|- in the amount of her allowance."

It has been suggested that the judgment in Churchman v. Churchman lays down the sweeping proposition that connivance applies only where the acts of acquiescence precede the initial act of adultery, but Lord Merrirnan's language is carefully guarded and the passage already cited must be read in connection with other passages in his judgment and with the opinions expressed

by courts of equal or higher authority. If the words were meant to imply that there cannot be connivance in respect of continued acts of adultery, even though the initial act of adultery was not connived at, because the petitioner had no knowledge of it at its inception they would, in my opinion, be contrary to the opinions of the members of the House of Lords in Gipps v. Gipps 11 A.L.C. 1. Lord Chelmsford, who agreed, with Lord Wensleydale that the compromise of the first petition did not amount to connivance at the subsequent adultery, made the following observations: "I say that the husband who sells his right to obtain a separation from a guilty wife to the man who is the partner of her guilt, can never afterwards be heard to renew his application for divorce on the ground of criminal intercourse with the same individual; which is not strictly speaking first adultery, but merely the evidence of the adultery which had been consummated when the bargain was made to purchase a disgraceful silence." At p. 30 he observes that "a husband who sells his right to complain of his wife's adultery, and afterwards discards her, without providing her with any means of living, or taking any precaution to protect her against any future intercourse with the adulterer, must be considered as an accessory to the renewal of that intercourse in the sense of contributing to produce the effect." And a few lines further on he says "there is strong evidence to warrant the conclusion that the appellant connived at the subsequent adultery."

The definition of connivance given by Lord Wensleydale in his dissenting judgment in Gipps v. Gipps at p. 25 is accepted as a exact statement of its legal meaning: Connivance excuses on the principle volenti non fit injuria. To constitute it there must be corrupt intention, as laid down upon full consideration of the authorities by Sir Creswell in the case of Glennie v. Glennie and Bowles (32 L.J. Pro. M & A 17) when he said that to prove connivance it is necessary to show not only that the husband acted in such a manner as that adultery might result; but also it must be proved that it was his intention that adultery should result", it being understood that a man intends the probable consequences of his act.

In my opinion the agreement of November 20th, 1944 satisfies all the conditions as proof of connivance. By it the petitioner, having discovered the adultery of his wife, enters into an agreement not to complain of the acts of his wife both past and in future, and to abandon any legal remedies he might have in return for a release of his obligation to pay maintenance to his wife for the future and any arrears of maintenance then subsisting. It was clearly executed with a corrupt intention to facilitate the continuance of the adulterous intercourse and is of such a nature, to use Lord Merriman's words in Churchman v. Churchman, as to show that his connivance at the continuance of the adulterous association is a proof that he connived at it from the first and ratified it.

Petition Dismissed.

Solicitors: *S. M. A. Nasir,* for petitioner; *T. A. Morris,* for respondent and co-respondent.

MANGAR *v.* R. SINGH

MANGAR also known as MANGRA or CHATTERGOON,
Plaintiff,

v.

ROHUN SINGH also known as ROHAN and HARDEO,
Defendants.

[1946. No. 571—DEMERARA.]

BEFORE WORLEY, C.J.

1949. JANUARY 17, 24 AND OCTOBER 7.

Immovable property—specific performance—execution creditor—absence of collusion or fraud.

On the 15th April, 1948, the Court by consent of the parties decreed specific performance of an undivided one half interest in a piece of land against the first defendant in favour of the plaintiff. The property was under levy for a debt but the plaintiff did not disclose that fact at the trial. No action was taken to enforce the consent order. During December 1948 the first defendant's undivided interest in the land was advertised for sale at execution at the instance of Inkomarie, a judgment creditor. Inkomarie had originally issued execution on the 7th January, 1947, but the sale was the subject of opposition proceedings by the plaintiff which were eventually abandoned in November 1948. When the land was re-advertised for sale in December 1948, the plaintiff obtained an interim injunction and sought to continue it on the ground that specific performance of the same land levied on had been decreed and that the judgment against the first defendant was the result of a fraudulent conspiracy.

Held: Since the order for specific performance was obtained without disclosing to the Court that the property was under levy for a judgment debt, the plaintiff had not shown that utmost good faith towards the Court which his position as a suitor in equity required and unless there was proof of collusion or fraud between judgment creditor and the first defendant, the application to continue the injunction would be refused.

P. A. Cummings, for the plaintiff.

L. A. Luckhoo, for the defendants.

Cur. adv. vult.

WORLEY, C.J.: The writ in this action was filed on 13th December 1946 endorsed with a claim for

> (a) Specific performance by the defendants of a contract in writing dated the 22nd day of June, 1942, at New Amsterdam, Berbice, made with the plaintiff by the first-named defendant and assented to by the second-named defendant whereby the first-named defendant agreed to sell and transport to the plaintiff for the sum of $250.00 a parcel of land described as "East half of West half of lot number 2 (two) portion of Plantation Caracas, part of Plantation Vryheid cum annexis on the left bank of the Canje River, save and except all buildings and erections thereon, the property of vendor", and upon which said land the plaintiff was put into

possession on the 1st October, 1942, and subsequently erected a building thereon at a cost of $1,500.00 in which building he now dwells.

(b) Alternatively, $2,500.00 damages for breach of contract aforesaid,

(c) Costs.

The statement of claim filed on 2nd May, 1947 repeated the allegations in paragraph (a) of the indorsement and further alleged that, at the time the memorandum of the contract was made, the plaintiff paid the defendants $50 on account of the purchase price, a further $175 to be paid on the passing of transport and the balance on the 3rd December 1943; and that on 25th May, 1943 he paid the first defendant a further sum of $80 on account.

The statement of claim also alleged that the defendants have refused or neglected to carry out their obligations under the contract and have fraudulently sold parts of the lands in question and have in like manner executed promissory notes to divers persons with the object of enabling execution to be levied upon those lands and so to defeat the plaintiff's rights under the contract.

The second-named defendant entered, appearance on 2nd January, 1947 and filed a defence (with the usual consent to extension of time) on 5th November, 1947 in which he pleaded infancy at the date of the alleged agreement. The action came on for hearing before Luckhoo J. on 15th April, 1948, plaintiff and the second defendant being represented by counsel, the first defendant being present in person though he had not entered appearance. The two defendants are brothers and each owned an undivided half-interest in the property. On that day it was ordered by consent that the first defendant Rohan Singh should advertise and pass transport to the plaintiff of his undivided one- half interest in the property on or before the 1st May, 1948 and, should he fail so to do, the Registrar be empowered to do so: directions were given for the payment of the balance of the purchase price and the plaintiff given liberty to withdraw the action against the second-named defendant.The order was entered on 23rd August, 1948. No action was taken to put it into effect.

On 11th, 18th and 25th days of December, 1948, the Registrar advertised the property for sale at execution on 6th January, 1949 at the instance of one Inkomarie, a judgment-creditor of the first-named defendant, Rohan.

The history of Inkomarie's judgment is as follows: Inkomarie having brought actions against Hardeo and Rohan for money due on promissory notes, obtained judgment by default against Hardeo on 18th November, 1946 and against Rohan on 9th December, 1946. (The writ in the present action was issued four days later, namely on 13th December, 1946).

On 7th January, 1947 Inkomarie proceeded to levy on Rohan's undivided half-share in the property in question, as well as on other immovable property of Rohan's. The usual advertisements appeared in January and on 31st January the plaintiff Mangra entered opposition and followed it up by a writ in action No.

53|47 on 3rd February, 1947. For some unexplained reason these opposition proceedings were framed upon the footing that Inkomarie had levied upon the property of Hardeo. It is therefore no matter for surprise that the plaintiff took no further steps therein after Inkomarie had filed a defence in October, 1947 and on 2nd November, 1948 the action was declared altogether abandoned in terms of O.XXXII rule 5 (2).

Meanwhile in May, 1947 plaintiff had filed his statement of claim in the present action and in April, 1948 obtained the consent order for specific performance against Rohan.

In December, 1948, Inkomarie revived the execution proceedings and, according to the usual practice, the intended sale was re-advertised on 11th, 18th and 25th December.

The plaintiff thereupon on the 5th January, 1940 obtained ex parte interim injunctions restraining the defendants, Rohan and Hardeo, and Inkomarie, from entering upon or interfering with the property and an order staying the levy and the sale in execution.

The matter now comes before me in the form of an application to continue these injunctions and for an order that, notwithstanding the levy made by Inkomarie, the transport of the said property be passed in favour of the plaintiff, and incidental relief.

It is not at all clear to me why the former second-named defendant Hardeo is included in this application: neither defendant appears to have been served with the summons and the only respondent who appeared was the judgment-creditor, Inkomarie.

In the plaintiff's affidavit filed in support of the application for the interim injunction he alleged that the judgment-creditor's judgment against Rohan was obtained by means of a fraudulent conspiracy, the object of which was to prevent him from obtaining title to the property pursuant to the contract of sale, and that the judgment-creditor was aware of the judgment of this Court ordering specific performance of the contract at the time she proceeded to execution.

In her counter-affidavit the judgment-creditor has denied the existence of any conspiracy as alleged, and has asserted that he claim against Rohan was bona fide and judgment thereon obtained before the plaintiff began his action for specific performance. She also alleges that the plaintiff built his house on the said property after he had become aware of her levy.

Before offering evidence on these questions of fact, counsel for the plaintiff-applicant submitted two propositions of law, namely: —

(1) whether it is competent for the judgment-creditor to proceed with her levy in the face of the order of this Court made on 14th April, 1948 for specific performance of the contract and for the advertisement and passing of the transport to the plaintiff, and

(2) whether, in the face of a contract which gives a cause of action for specific performance, it is competent for a judgment-creditor to levy on immovable property, the subject matter of the contract, for a

debt due from the vendor to the judgment-creditor not secured on the land.

This second contention is, as Mr. Cummings admitted, directly contrary to the decision of Dalton J. in Gangadia v. Barracot (1919) B.G.L.R. 216 in which it was held that a purchase of immovable property not completed by transport is no bar to the claim of a judgment-creditor of the vendor to levy upon and sell such property to satisfy his debt.

In the course of the subsequent years, a considerable weight of authority has accumulated upon this decision. It was referred to with approval by the West Indian Court of Appeal in Parikhan Rai v. La Penitence Estates Company, Ltd. (1926) L.R.B.G. 142 and was followed by de Freitas J. in Mangru v. Kalla (1936) 1931-37 L.R.B.G. 414 and by Duke Ag. J. in Bhoolai v. Girwar and Sadiq (1944) B.G.L.R. 84. In British Colonial Film Exchange Ltd. v. S .S. de Freitas (1938) L.R.B.G. 35 at p. 38, Verity J. said that one and the same principle lies at the root of the decisions in Gangadia v Barracot, Parikhan Rai v. La Penitence Estates and In re Samson, ex parte the Official Receiver (1922) L.R.B.G. 134, namely, that the existence in this colony of equitable estates or interests in land is precluded by statute law prescribing the methods of vesting title to immovable property. Reference may also be made to Peroo v. Dooknie (1919) B.G.L.R. 150 where Douglas ag. J. reviewed the earlier authorities.

Verity J. in the British Colonial Film Exchange case, also pointed out that equity, as now administered in England, in no case seeks to override the specific provisions of statutes and that the exercise of the equitable jurisdiction in this Colony is, of necessity, subject to such restrictions as may be imposed upon it by statute either directly or indirectly by reason of some difference in the statute law of the colony which renders its exercise in certain cases improper or impossible. By its provision of a system of civil law, the Civil Law Ordinance does limit the application of the doctrines of equity in so far as they may be repugnant to specific enactment or impossible of application to the legal system in force in the Colony. It may be that, as Mr. Cummings contended, as between the parties themselves, equity will consider the vendor on an incompleted sale of land as constructed trustee for the purchaser, though, as de Freitas J. pointed out in Mangru v. Kalla at p. 419 even in England this is only a general statement subject to qualification and in cases where the Court declines to grant specific performance the purchaser is not treated as being in equity the owner of the property. In a proper case the Courts of this Colony will see that the trust is performed: see Coltress v. Coltress (1937) 1931-37 L.R.B.G. 523 and Sunichery v. Sooknannan (1943) L.R.G.B., 125. But the line of authorities above cited has established that in this Colony the doctrines of equity are, with reference to the sale of land, restricted in their application by the statutory provisions of sections 12 and 21 of the Deeds Registry Ordinance (Chapter 177), and that a contract for the sale of immovable property uncompleted by transport is no bar to a levy at the instance of a judgment-creditor of the vendor. These authorities

are binding on me, sitting in a Court of first instance and it is not open to me to reconsider this point.

This provides the answer to Mr. Cumming's second question put as a general proposition: but, of course, if the plaintiff can establish fraud and collusion between the judgment-debtor and judgment-creditor, as in Peron v. Dooknie, the levy may be set aside.

Before leaving this branch of the argument, I may refer briefly to counsel's suggestion that the position of the judgment-creditor might be affected by notice of the incompleted contract or knowledge that the purchaser was in possession: see Brunton v. Neale (1845) 14 L.J.R. Eq.8. Whether or not in the present case Inkomarie had in fact such notice or knowledge is in dispute and, apart from conflicting averments in affidavits, there is no evidence before me on the point.

On the other hand there is no dispute that, in fact, the plaintiff had knowledge of Inkomarie's levy at the time when he obtained the order for specific performance and, as will appear later in this judgment, this is in my view a fact which materially affects his position. I need only say, therefore, on this point at this stage, that in none of the previous decided cases in the Colony has it ever been suggested that the levy might be invalidated by such notice or knowledge (in the absence of fraud or collusion) and that, as at present advised, such a view seems to me inconsistent with the principle underlying those decisions.

I turn now to consider Mr. Cumming's first question, which is based on the argument that if the Court allows the levy to proceed it will stultify its prior order hat the defendant Rohan should convey the property to the plaintiff. Mr. Cummings sought to rest this part of his argument on the following dicta in the judgment of Verity C.J. in Demerara Storage Co. v. Demerara Wharf & Storage Co. (1942) L.R.B.G. 306 at p. 307.

> "It is true that in this country (immovable) property passes only by transport and that until transport has been duly passed the property remains in the vendor and, it is submitted, is subject to levy for the judgment debts of the vendor. Superficially this may appear to be incontrovertible, but nevertheless the nature and effect both of an order for specific performance and of a writ of execution cannot be overlooked. Both move from the Court in the execution of its judgment and it may be difficult to conceive of a position in which the Court may properly order in the first instance the conveyance of property to one person and subsequent thereto direct its sale to another to satisfy the debt of the defaulting vendor. The question does not appear to have been decided in these Courts in any case, where, as in the present, there is no allegation of fraud or collusion between the debtor and creditor, but in the case of Peron v. Dooknie and Another 1919, L.R.B.G. p. 150, Douglass J., expressed the view that ' were the court to order the levy to proceed……it would stultify its former judgment that the vendor do convey the said property to the plaintiff'. The case was not decided on this ground for in that case the learned judge found that there was fraud and held that opposition to the sale at execution was for this reason well founded. Nevertheless the view expressed appears to be consonant not only with reason but also with the principles upon which a court of equity in England would be disposed to act, as appears

from Brunton v. Neale 14 L.J.R. (N.S.) Chancery p. 3, for it is to be observed that in the present case the judgment creditor must have-been aware of the order for specific performance and only brought proceedings to recover his debt after that order had, been made and while his company was in default of compliance".

I do not dissent in any way from anything expressed by the learned Chief Justice in this passage but I would observe that, difficult as the conception may be, yet, if equity can only be done by setting aside an order for specific performance in favour of a later levy, the Court would not, I think, shrink from so doing. But, in truth, in the instant case, the Court is not being asked to prefer a subsequent order for sale to a prior order for specific performance, the reverse is the case. I ask myself therefore whether the plaintiff can show a prior equity or the clean conscience which might justify his preference over the judgment-creditor.

The undisputed fact is that Inkomarie obtained her judgment on 9th December, the writ of execution on 13th December, 1946, levied on the property on 7th January, 1947 and caused the property to be advertised for sale the same month. There is no reason to suppose that, but for the opposition entered by the plaintiff, the execution would not have been completed by sale at that time the plaintiff, who had merely instituted the present action against Rohan on 13th December, had no legal or just ground for opposition (in the absence of fraud or collusion), yet by the device of a factitious opposition he succeeded in holding up the sale at execution for nearly two years. When that obstacle was finally cleared away in November 1948. the levy still held good and Inkomarie instructed the Registrar to complete the sale. Upon this the plaintiff again interposes, relying this time upon the order for specific performance which he had obtained in April 1948.

It is not disputed that this order was obtained without disclosing to the Court that the property was under levy for a judgment debt, or that the plaintiff had entered opposition thereto. Mr. Cummings contended that it was not incumbent on the plaintiff to disclose these facts. I disagree. They were most clearly very material for proper consideration of the equitable relief he was claiming and it is very difficult to suppose that the Court would have made the order it did had full disclosure been made. I need not go so far as to say that the plaintiff came into Court with a preconceived plan of fraud in his mind, but I am satisfied that he has not shown that utmost good faith towards the Court which his position as a suitor in equity required. The fact is that Inkomarie's right as a judgment creditor who has levied are prior in time to the plaintiff's rights under the order for specific performance, and that the plaintiff's judgment was obtained with lull knowledge on his part of her rights and without the full disclosure to the Court which the circumstances required.

There is, further, for consideration, the fact that the plaintiff slept upon his rights under the contract for more than four years and took no action to secure the passing of transport until after Inkomarie had obtained her judgment. If, as Mr. Cummings said, he was lulled into inaction by having possession and the

privilege of deferring payment in lull until transport was passed, he has only himself to blame for the weakness of his position at law.

For these reasons therefore I hold that it would be inequitable to permit the judgment-creditor's levy to be ousted by the plaintiff's order for specific performance and, unless the plaintiff can satisfy me that there has been fraud and collusion between the first named defendant and the judgment-creditor, the application will be refused with costs.

I ought to refer briefly to Mr. Luckhoo's argument that, apart from any question of the merits, the plaintiff's abandonment of the opposition suit (Action No. 53|47) effectively bars him from invoking the equitable remedy of an injunction. The argument rests upon the decision of Sir Charles Major, C.J. in Robertson v. Yarde (1919) B.G.L.R. 55, disagreeing with Dalton J. in Obermuller v. de Souza (1917) B.G.L.R. 34. Dalton J. appears to have affirmed his opinion in Gangadia v. Barracot (supra) and also in In re Robertson: Robertson v. Yarde (1920) B.G.L.R. 151. On the view I have taken of the present matter, it is not necessary for me to express any opinion on this submission and I prefer not to do so as the point was not fully argued and it has arisen in another matter before me which has been specially set down for argument on this same point.

Application refused.

Solicitors: *H. A. Bruton*, for plaintiff; *E. A. Luckhoo,* for defendants.

Re—G. T. B. de FREITAS, Deceased.

RE—GERMANA TEIXEIRA BRAZAO de FREITAS, deceased,

[1949. No. 167.—DEMERARA]

BEFORE WORLEY, C.J.

1949. SEPTEMBER 6; OCTOBER 14.

Estate Duty Ordinance. Cap. 44 *Section* 14 (3)*—Appeal—Further declaration under section* 20*—effect of.*

This was an appeal under section 14 (3) of the Estate Duty Ordinance, Cap. 44 against an assessment of estate duty by the Registrar. Maximiano Jose de Freitas' wife died intestate on the 4th June, 1944, and on the 13th July, 1944, an inventory and declaration as required by section 13 of the Estate Duty Ordinance was delivered and estate duty assessed and paid. De Freitas died testate on the 14th January, 1945. In March 1949 the executors of de Freitas' estate delivered a corrective declaration and inventory claiming that estate duty had been overpaid with respect to the declaration and inventory of 13th July, 1944. The Registrar accepted one small item but rejected the two major ones. The executors appealed. The Solicitor-General for the Registrar contended that in the circumstances of this assessment, there was no right of appeal: The facts and arguments are fully set out in the judgment.

Held: Where a further declaration is delivered under section 20 (1) there must be a further valuation and assessment and therefore a right of appeal under section 14 (3).

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

E. Mortimer Duke, Solicitor-General, for the respondent.

Cur, adv. vult.

WORLEY, C.J.:

The petitioners have lodged an appeal under section 14 (3) of the Estate Duty Ordinance (Chapter 44) against an assessment made by the Registrar on 21st March, 1949 whereby he assessed estate duty on the estate of Germana Teixeira Brazao de Freitas (hereinafter referred to as the deceased) in the sum of $4,079.24, instead of the sum of $2,584.77 which they contend is the correct assessment.

The Registrar was served with a copy of notice of intention to appeal, of the grounds of appeal and of the petition and was represented at the hearing in Chambers by the Solicitor-General who took the preliminary objection that, in the circumstances of this matter, the petitioners have no right of appeal either under section 14(3) of the Estate Duty Ordinance or under sub-section (2) of section 30 of the Deeds Registry Ordinance 1919 as enacted by section 3 of the Deeds Registry Ordinance, 1931 (No. 2 of 1931) (now section 29 of Chapter 177), and that the proper remedy if duty has, in fact, been overpaid, is that provided for enforcing claims against the Government of the Colony by section 46 (2) of the Supreme Court of Judicature Ordinance (Chapter 10). He referred to Dymond on The Death Duties 10th Edition p. 163.

Before considering these submissions, it is convenient to set out the relevant facts. The deceased died intestate on 4th June, 1944 in Georgetown and on the 13th July of that year, her husband, Maximiano Jose de Freitas delivered at the Deeds Registry, Georgetown an inventory and declaration as required by section

13 of the Estate Duty Ordinance. The property shewn in the inventory included 350 shares of nominal value $100 each in de Freitas Ltd., valued at $100 each, the valuation being supported by the certificate of a certified accountant, who was also the auditor of the company. Under this item there appears on the form the following note made by the proper officer:—

"valuation accepted provisionally".

Three items of deductions totalling $492.65 were claimed and allowed. The assessment of duty is set out on the last page of the prescribed form in the following form:

"I allow the foregoing valuations and deductions and assess the duty on the within-mentioned property as follows: —

Property subject to duty at 6 per cent ...	49,988.66	2,999.32
Property subject to duty at 3 per cent ...	7,616.72	228.50
Total duty		3,227.32
Surcharge of 25% on duty payable		806.83
Interest at rate of 6%		4.034.15
from 4.8.44-23.8.44		12.78
		$4,046.93

A. SINGH,

The Proper Officer under the Estate Duty Ordinance,
Chapter 44.

There is also an endorsement that this amount was paid on 23rd August, 1944.

On 28th August in the same year the Registrar wrote to the administrator requesting a list shewing all life assurance policies held by the deceased either as the person assured or by assignment and also the production and a list of all articles of jewellery owned by the deceased at her death. On 5th December, 1944, a reminder letter was sent to the administrator.

The administrator did not reply to these letters (because, according to the present petitioners, he fell ill) and he died testate on 14th January, 1945.

The petitioners are three of the children of the deceased, Germana, and of Maximiano (hereafter called the testator) and are the executors under their father's will and the intended administrators *de bonis non* of the estate of the deceased.

On 2nd March, 1949 they delivered in the Registry a "corrective declaration and inventory" of the property subject to estate duty on the death of the deceased, declaring that duty had been overpaid. The three items of difference are: —

(a) the shares in de Freitas Ltd. are shewn as 250 shares, valued at $90 each;
(b) household goods, apparel, jewellery, etc. are valued at $660, instead of $25 as before;
(c) two fresh items of deductions are claimed, namely: — "nursing, $26" and "De Freitas Ltd. Money tent, $1,438.51".

If these corrections were accepted, the amount of duty overpaid would be $1,453.72. The Registrar, however, accepted item (b)

but rejected items (a) and (c) and assessed the correct duty payable at $4,079.24 with interest, which left a balance of $45.72 with interest thereon to be paid.

The grounds of appeal may be summarised as follows: —

(1) the evidence before the Registrar established that one hundred of the shares in de Freitas Ltd. which stood in the name of the deceased were the property of the first-named petitioner, Virgil Joseph deFreitas, and they were therefore exempt from duty by virtue of section 9 (4) of the Estate Duty Ordinance;

(2) the original valuation of $100 a share was accepted provisionally by the Proper Officer and, if the Registrar was not satisfied with the valuation given in the corrective declaration, it was his duty to cause an inventory and estimate to be taken as provided in section 14(1) of the Ordinance;

(3) the disallowance of the two fresh items of debt, amounting to $1,464.51 was erroneous because the first declaration and inventory made was a provisional one and was so accepted by the Proper Officer.

The petitioners also contend that no certificate within the meaning of section 19 of the Ordinance has yet been prepared. On this point however the Court will take notice of its own practice, which is that the certificate prepared under section 15 (3) is annexed to the application for probate or letters of administration and that without it no grant will be made.

The Solicitor-General, in submitting that, in these circumstances, no appeal will lie under subsection (3) of section 14 of the Ordinance, argued that the right of appeal conferred thereunder is limited to a valuation or assessment made by or on behalf of the Registrar under the provisions of sub-section (1) of the same section, that is to say, to cases where the Registrar, being dissatisfied with the inventory and estimate delivered, causes an inventory and estimate to be taken by an assessor as therein provided and assesses the duty on the footing of the assessor's inventory and estimate. He contended that, in the instant case, the Registrar was satisfied with the inventory and valuation and made an assessment on the footing thereof, which, so far as he was concerned, was final, subject however to his statutory right and duty under section 16 to require further information, explanations or evidence as he thought necessary and, if the case so required, to demand further duty under section 20. The letter of 28th August, 1944 was a requisition within the meaning of section 16: the only amendment made in the inventory and estimate upon that requisition was the increase of the item of household goods etcetera to $660 with which the Registrar was satisfied and no appeal has been or could, in these circumstances, be brought against the assessment thereon.

He further contended that where a claim is made for the return of duty overpaid, whether because of an over-valuation under section 18 or because of further deductible debts under section 19, there is no valuation or assessment made by or on behalf of the

Registrar within the meaning of section 14(3) and therefore no light of. appeal.

Other points in his argument were that the question of the existence or non-existence of a trust in respect of the one hundred shares was a matter which would more fitly be argued before the Court than before the Registrar, that there was no evidence that the two debts now claimed as deductible had been paid and that, in any event, they had not been claimed within the three years limited by section 19(1), nor did the exception provided in section 19(2) apply.

Counsel for the petitioners contended that there is no justification for limiting the right of appeal conferred by section 14(3) to valuations or assessments made on the inventory as originally delivered or as amended upon the Registrar's requisition, and argued that, if a further declaration is delivered under section 20(1) there must be a further valuation and assessment thereupon and therefore a right of appeal under section 14 (3).

I think this argument is sound. The material words used by the Legislature in section 14(3) are "any person who is made accountable by this Ordinance and is dissatisfied with any valuation or assessment made by or on behalf of the Registrar". Prima facie, these words are wide enough to cover any valuation or assessment made under any section of the Ordinance and, if it had been intended to limit them in the sense suggested by the Solicitor-General, one would expect to find suitable words of limitation such as "any such valuation or assessment", or "any valuation or assessment as aforesaid". In the absence of any such limiting words there is no good reason for cutting down the scope of this provision and thereby limiting the right of appeal to the Courts.

The question then is whether in the matters which have led up to the present petition there has been any valuation or assessment by or on behalf of the Registrar subsequent to that made on 23rd August, 1943. As to section 20, the discovery that the property chargeable is of greater value than that mentioned in the certificate may be made either as the result of requisitions made by the Registrar under section 16 or by the accountable person himself in the course of administration; in either case, a further declaration must be delivered with an account. Further duty is then to be-paid according to the "true value" of the estate and effects, which seems to me necessarily to involve an assessment, and, if the person accountable is dissatisfied with the Registrar's assessment of the "true value" and the further duty to be paid, I can see no reason for so construing section 14(3) as to deprive him of the right of appeal. Let it be supposed that, in the instant case, the petitioners had produced to the Registrar in response to his letter a number of articles of jewellery which had belonged to the deceased and that the parties were not ad idem as to their value. Why should not section 14(3) apply in such a case as it would have applied if the jewellery had been included in the original inventory?

But I find some obscurity in the scheme of the Ordinance when it comes to dealing with claims for duty overpaid. Neither

section 18 nor section 19 seems to require a further declaration to be made. Section 18 provides that if, at any time during the administration, the value mentioned in the certificate is found to exceed the true value of the chargeable property, the Registrar, "on proof of the facts to his satisfaction and with the sanction of the Governor", may return any duty which has been overpaid and cause a fresh certificate to be written.

Section 19 provides that the payment of further debts claimed as deductible is to be proved "by an affirmation and proper vouchers to the satisfaction of the Registrar," and, upon such proof the Registrar is empowered and required to refund the difference in the amount of duty payable. The question then is whether in either or both of these cases, there is a "valuation or assessment made by or on behalf of the Registrar".

I have come to the conclusion that in cases coming within section 18 where the true value of the property chargeable is in question there must be a valuation and an assessment. The facts of which the Registrar has to be satisfied may be that property was included in the inventory which was not properly chargeable, or that property was correctly included but at an excessive value: in either case, if he is so satisfied, there is a re-assessment of the duty payable but, if he is not so satisfied, a confirmation of the original assessment, and it is, I think, significant that both this section and section 20 provide for the issue of a fresh certificate setting forth the true value of the estate.

Some doubt as to whether, in a case under section 18, an appeal would lie has been occasioned in my mind by the requirement that the duty overpaid can only be returned with the sanction of the Governor, a requirement which, curiously, is not prescribed under section 19. However I have come to the conclusion that the Governor's sanction is provided as a purely administrative check and is neither a judicial nor a quasi-judicial function.

I have felt more doubt about cases coming under section 19. Here there are two matters which have to be proved to the satisfaction of the Registrar, namely, whether the debts have in fact been paid and, if so, whether they or any of them are debts which might have been deducted "as hereinbefore provided", that is to say, under section 10 as either

(a) reasonable funeral expenses, or

(b) debts or incumbrances incurred or created by the deceased bona fide for full consideration in money or money's worth wholly for the deceased's own benefit:

and without right of reimbursement from any other person.

The determination of the question whether the debts "might have been deducted", i.e. whether they are properly deductible, appears to me to involve, again, an assessment of the nett value of the estate for the purpose of calculating duty and, in general, to be subject to the right of appeal conferred by section 14(3).

With respect to this last aspect of the present appeal, the petitioners have contended: —

(1) that the Registrar's assessment made on 23rd August,

1944 was only provisional, and there was no certificate issued as contemplated by section 19(1), and

(2) that the debts now claimed as deductible were in fact first claimed in a declaration made and lodged by the secretary to de Freitas Ltd. on 1st February, 1945, but that owing to a series of accidental events, for which the petitioners were not to blame, the "corrective declaration" was not completed until 2nd March, 1949.

The petitioners founded their first point upon the note against the valuation of the shares "valuation accepted provisionally" and upon the fact that in the original Declaration and Inventory, the testator has signed the following note at the foot of the inventory of property: —

> "The deceased is believed to have been possessed of other estate and effects, the precise details of which cannot at present be ascertained, but in respect of which corrective declaration will be delivered duly stamped so soon as the particulars and value thereof have been ascertained."

Against this is a note "Delete if not required" and Mr. Stafford has stated that, in practice, this paragraph is struck out if the assessment is final.

The proper officer may have made his note "valuation accepted provisionally" out of an abundance of caution but, in my view, it had no legal effect at all. Even without any such reservation, the Registrar is not estopped from re-opening questions of valuation at any time and from time to time within three years of the certificate and, indeed, it is his duty to do so under section 16 if he has any reason to suppose that property chargeable with duty has not been declared or has been wrongly valued.

As to the note at the foot of the inventory, it may well be that this is generally struck out if the declarant believes he has declared all the chargeable property, but the decision as to whether or not it is to be struck out or to be signed rests with the declarant. It appears to have no legal effect for, in either case; section 20 imposes on him a duty to declare any further property which he discovers was subject to duty. Further, whether that note is signed or struck out, an assessment will be made and a certificate issued under section 15 (3) stating the value of the property as shewn by the inventory and accepted by the Registrar, and the date of issue of that certificate will be the beginning of the period of limitation prescribed in section 19(1).

The petitioner’s second point has more substance. As I have already said, section 19 does not appear to contemplate a further declaration and inventory, though I have no precise idea of what is meant by an "affirmation". The actual document filed was a statutory declaration that a debt of $1,438.51 due to de Freitas Ltd. was due and unpaid. This might well satisfy the section as to form but it is, in substance, quite clearly inadequate, for what has to be proved is that the debt has in fact been paid, the allegation of payment being supported by vouchers.

Such being my views on the question of whether an appeal lies under section 14 (3), it is unnecessary for me to determine

whether, in the alternative, an appeal would lie under section 30(2) of the Deeds Registry Ordinance (Chapter 177) but I may say briefly that in my opinion it would not. The history of that subsection shews that the right to appeal from a decision of the Registrar was created in consequence of the enactment of section 2 of the Deeds Registry Ordinance, 1931 which conferred upon the Registrar powers in connection with the passing and execution of transports, mortgages and leases, which had theretofore been only exercisable by a Judge. In my view therefore, the "decisions" contemplated by subsection (2) of section 30 are those made in matters connected with the Registrar's functions under the Deeds Registry Ordinance; as, for instance, questions as to the title under which it is proposed to pass transport, etcetera.

For these reasons I overrule the Solicitor-General's objection to the competency of this appeal and direct that it be heard on the merits.

Solicitor: *J. E. de Freitas,* for petitioners.

ALFRED CHOO KANG,

Plaintiff,

v.

AJODHIA PERSAUD SINGH,

Defendant.

[1949. No. 143.—DEMERARA]

BEFORE MANNING, J. (AG.).

1949. SEPTEMBER 22, 26; OCTOBER 20.

Specially indorsed writ—Leave to defend—Pleadings closed—Application by *defendant for an Order to join another person as defendant—Rules of Court* 1900—*Order* 14 *rule* 13—*principles on which Court acts.*

In an action on a promissory note the defendant alleged in his defence that the note was made in favour of an unregistered moneylender and therefore illegal and void. The plaintiff replied that he was a holder for value and was not affected with notice that the original lender was a money lender. The defendant then applied for an order to join the original lender as a co-defendant.

Held: In deciding whether an order ought to be made or not the Court always has recourse to the actual words of the relevant rule (Order 14 rule 13) and since the Court could, effectually and completely adjudicate on the issues raised without the presence of the proposed co-defendant the order applied for must be refused.

Summons filed by the defendant for an order (i) granting leave to the defendant to deliver and file an amended defence, (ii) that Alexander Chin be joined as a co-defendant in the action.

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

W. J. Gilchrist, for the plaintiff.

Cur. adv. vult.

MANNING, J, (Acting): By specially indorsed writ dated 4th April, 1949, the plaintiff sued the defendant for an alleged balance due on two promissory notes payable to one Alexander

Chin, endorsed by Chin to the plaintiff. The defendant in an affidavit of defence admitted the making of the notes payable to Chin, but deposed that Chin was an unregistered money-lender, and that the notes were therefore illegal and void. He was granted leave to defend and repeated in his defence the allegations made in his affidavit, but did not admit having made the notes. The plaintiff in his reply denied that Chin was a money-lender; he, the plaintiff, was a holder for value, and was not affected with notice that Chin was a money-lender. The reply was dated May 4th, 1949; and this closed the pleadings.

On May 13th, 1949, the defendant applied for leave to serve a third party notice on Chin, claiming to be indemnified by him against the whole of the plaintiff's claim. Leave was refused on August 26th, 1949.

On September 14th, 1949, the defendant applied for leave to deliver and file an amended defence and for an order that Chin be joined as a co-defendant. A copy of the proposed amended defence has been laid over. It consists of the original defence with an amendment containing an admission that the defendant made the notes. There is, of course, no objection to this amendment being made. A counterclaim, however, now appears, which assumes that Chin will be added as a defendant. It seeks for certain declarations against the plaintiff and Chin; and for an injunction restraining the plaintiff and Chin from further negotiating certain other promissory notes or from suing the defendant thereon.

As regards the application for an order that Chin be added as a defendant, it is stated in the supporting affidavit

(a) that Chin is a party interested in the result of the action
(b) that to enable the Court to have all the evidence before it will be necessary to administer interrogatories to Chin
(c) that there were other notes besides those sued on and the Court will be able to make a final adjudication on all the notes.

These matters were developed by Mr. Stafford in his argument. He said that if Chin were a mere witness it would tax the ingenuity of any counsel to extract the information from him, therefore he must be made a defendant, so that discovery may be obtained and interrogatories administered.

He further argued that the defendant has a right to claim a declaration as to Chin's status. There must be an adjudication as to his status i.e., whether he was an unregistered moneylender or not. If Chin is not added as a defendant, the defendant may issue a writ against him in a separate action and claim the declarations that he now seeks. This might result in two inconsistent judgments; one in the present case finding for the plaintiff, and one in the proposed case finding that the notes were void. A declaration should not be made as to Chin's status unless he is a party. Once the issue of money-lending is raised, the Court should make the money-lender a party. Mr. Stafford referred particularly to the words of O. XIV r.13 empowering the

Court to add "the names of any parties whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action". He did not cite any authorities to support the particular circumstances of the present application.

Mr. Gilchrist, who opposed the applications, cited a number of authorities. Moses v. Marsden, 1892, 1 Ch. 487, was a case in which one Montforts applied himself to be added as a defendant; his application was refused because he was not affected directly, but only incidentally. Hood Barrs v. Frampton, Knight and Clayton, 24 W.N. 287 was a case where the defendants sought to add one Mrs. Clayton as a co-defendant; but the Court declined to add a defendant against whom no relief was sought. Leave was given to issue a third party notice. Mc Cheane v. Gyles, 1902, 1 Ch., 911 was a case where Gyles was sued for breach of trust. The other trustee was dead, but his legal personal representative was alive; and Gyles sought to have her added as a defendant. Buckley, J., reviewed a number of authorities, and refused the application on two grounds; firstly, that the presence of the proposed defendant was not necessary to enable the Court to decide whether Gyles was liable for a breach of trust; secondly, that an order ought not to be made in an action when it is ready to be set down for trial. In Norris v. Beazley, 25 W.R. 320, it was held that the rule did not apply where the party sought to be made a defendant was a person against whom the plaintiff did not desire to prosecute any claim and whom the defendant only wishes to add for his own convenience. Guthrie v. Guthrie, 156 L.T.J. 382, was a case of joint liability, where a third party notice was held to be the proper procedure; Associated Home Co. v. Whichcord 38 L.T. 602 was a case where a third party notice was sought and the application refused on the ground, inter alia, of delay; Bhowney Persaud v. Attorney-General of British Guiana, (19th September, 1908) was decided by Bovell, C.J., on the principle that the presence of the proposed defendant was not necessary to enable the Court effectually and completely to adjudicate on and settle the questions involved in the action.

An examination of these authorities shows that, as in the one last cited, the Court has always to have recourse to the actual words of the relevant rule. It is obvious that Chin should not be made a party on the ground that it would enable the defendant to administer interrogatories to him. What is alleged against Chin is a criminal offence. If such interrogatories were allowed Chin may deny, leaving the defendant in the same position as before. He may refuse to answer and have reasonable grounds for doing so. The question then remains, if Chin is made a party, will this enable the Court to adjudicate on the issues effectually and completely. The issues are

(a) Was Chin a money lender?
(b) If so, was he unregistered?
(c) If (a) and (b) are proved, was the plaintiff affected with notice of the illegality?

The burden of proving them is on the defendant; and, as he cannot prove them by administering interrogatories, he must prove them

by independent evidence. His chance of proving them will not be assisted if Chin is made a party. It follows from this that Chin's presence as a party would not be of any assistance to the Court in determining the issues. There may have to be, as urged by Mr. Stafford, a declaration as to Chin's status, but this is not the principle on which the matter ought to be decided; neither is it relevant that the defendant may have to institute a separate action against Chin.

The amendment of the original defence, as asked for, will be allowed, in order to make it clear that the defendant admits the making of the promissory notes. The application to add Chin as a defendant is refused. The amendment of the defence by adding a counterclaim will be refused. The Court should not have to decide the validity of any notes save those sued on; and, as Chin is not being added as a party and the other matters specified in the counterclaim must be determined in the action itself, any counterclaim with reference to the notes sued on would be superfluous.

The defendant has failed in the main application and must pay the costs to be taxed. Fit for counsel.

Solicitors: *N. C. Janki,* for the plaintiff; *S.M.A. Nasir,* for the defendant.

ANTHONY BERTIE CHAPMAN,

Plaintiff,

v.

FERDINAND CHRISTOPHER ARCHER,

Defendant.

[1949: No. 637.—DEMERARA]

BEFORE WORLEY, C.J.

1949. NOVEMBER 28; DECEMBER 12

Rules of the Supreme Court (*Deeds Registry*) 1921—*Non compliance with rule* 9—*Reasons for opposition not indorsed on specially indorsed writ—submission that writ should be set aside—application for leave to amend—Power to grant by reason of O. XXVI Rules of Court* 1900.

Defendant advertised transport of his property to a third party which was opposed by the plaintiff. Plaintiff then issued a specially indorsed writ but omitted to allege any reason for opposition. In reply to a submission that the writ should be set aside, counsel for the plaintiff applied for leave to amend.

Held: After an opponent has complied with rule 7 of the rules of Court (Deeds Registry) 1921, the procedure in his action is (save where those rules make express provision to the contrary) governed entirely by the Rules of Court 1900 and an amendment was permissible under the appropriate rules contained in O. XXVI of the Rules of Court 1900.

A. B. CHAPMAN *v.* F. C. ARCHER.

Action by the plaintiff against the defendant for money due as commission on sale of property belonging to the defendant.

C. V. Wight, for the plaintiff.

H. A. Fraser, for the defendant.

Cur. adv. vult.

WORLEY, C.J.: The plaintiff in this action is claiming on a specially indorsed writ issued on the 14th November, 1949 the sum of $210 as commission due to him "on the sale of a property belonging to the defendant." In the Statement of Claim indorsed on the writ he also asks for—

> "An order declaring that the opposition entered on the 5th day of November 1949 to the passing of Transport advertised in the Official Gazette (on specified dates) and numbered 39 therein for the Counties of Demerara and Essequibo in favour of Seetaram Chickrie (etc) to be just, legal and well-founded".

The defendant filed an affidavit of defence under protest in which he denied being indebted to the plaintiff for the sum claimed or at all.

When the matter was called in the Bail Court, counsel for the defendant asked that the writ should be set aside on the ground that it did not comply with the Rules of the Supreme Court (Deeds Registry), 1921 rule 9, in that the Statement of Claim did not allege any reason for opposition. Counsel for the plaintiff admitted that the indorsement of a specially indorsed writ is the Statement of Claim for the purposes of Rule 9 (and indeed this is so provided in the Rules of Court, 1900 Part I Order IV Rule 6 as amended by the Rules of Court, 1932) and that it is the usual practice to set out therein the reasons for opposition. He contended however that the reasons for opposition were set out in the notice of opposition entered in the Deeds Registry on 5th November, 1949 in pursuance of Rules 2 and 3 of the Deeds Registry Rules and were therefore on record in the Court, and he further contended that, if it were held necessary to include the reasons for opposition in the Statement of Claim, the plaintiff should be given leave to amend accordingly.

Prior to the coming into force of the Rules of Court 1932 a plaintiff could not include in a special indorsement a claim for a declaration that his opposition was just, legal and well-founded nor a claim for an injunction restraining the passing of a transport or other conveyance. Such relief could be sought only by a generally indorsed writ and it appears from Mr. Duke's "Treatise on the Law of Immovable Property in British Guiana, 1923" at pages 24 and 26 that the practice was to incorporate in the Writ the particulars of the grounds of opposition by reference (in a form similar to that adopted in the present case), and that the Statement of Claim alleged the advertisement by the defendant of the property, the entry of opposition by the plaintiff and set out the grounds of opposition verbatim.

This practice was in accordance with the ruling of Berkeley J. in Porter v. Jones (1915) L.R.B.G. 37 that the Statement of Claim ought to include the grounds of opposition, this being the intention of the relevant rule then in force, namely, Rules of Court 1900, Part II, O. II r. 5 which provided —

> "It shall not be competent for the plaintiff to allege in his Statement of Claim, or to rely upon any grounds or reasons of opposition other than those alleged by him when entering the opposition".

That rule was annulled by the Rules of the Supreme Court (Deeds Registry) 1921, which are still in force. Rule 9 thereof provides: — (1) Unless by leave of the court, the opponent may not, in the action to be brought as aforesaid, allege in his statement of claim or rely upon, any reason for opposition other than those contained in the statement thereof filed in the registry.

(2) An application to the court under this rule shall be made on summons in the action at any time after entry of appearance therein and before delivery of the statement of claim, but, unless the court shall otherwise order, the plaintiff shall deliver and file his statement of claim within the same time after appearance as is now limited for the purpose.

I find in this rule, as in the former rule, a clear intention that the reasons for opposition shall be set out in the Statement of Claim, and also express provision of procedure, appropriate to a generally indorsed writ, for applying for leave to amend or enlarge the reasons for opposition contained in the notice thereof filed in the registry.

This procedure is inappropriate to a case where the plaintiff elects to issue a specially indorsed writ under O. IV r. 6, and no special provision for amendment in such a case has been made. Is it then to be inferred that a plaintiff who has endorsed his writ specially cannot amend? I do not think so. If rule 9(1) is invoked to support the argument that the reasons for opposition must be endorsed on the specially indorsed writ (and in my view it is rightly so invoked) then the whole of that sub-rule must be applied and some effect given to the words "unless by leave of the Court."

In my judgment in Mankuar v. Pearson (Action No. 288|48 unreported) I expressed the view that "after the opponent has complied with Rule 7 of the Rules of Court (Deeds Registry) 1921, the procedure in his action is (save in cases where rule 9 applied) governed entirely by the Rules of Court 1900." I might perhaps more correctly have said "save where those rules make express provision to the contrary", for Rule 10 also makes special provision governing actions, but, however that may be, I adhere to the principle expressed in that passage. I conclude therefore that I can apply to this case the appropriate rules contained in O. XXVI of the Rules of Court 1900 and grant the plaintiff leave to amend his Statement of Claim by setting out therein his reasons for opposition as contained in the Statement thereof filed in the Registry.

I do so with some reluctance as the amount claimed by the plaintiff is within the jurisdiction of the Petty Debt Court and it is only by reason of the entry of opposition that the action is brought in this Court. The property in question has been sold for over $10,000 and it appears to me that the plaintiff with a paltry claim of $210 is seeking an unfair advantage by utilising this procedure whereby the transport may be indefinitely held up or the defendant forced to deposit the sum claimed in Court. In

such circumstances, strict compliance with the Rules might well be demanded.

Accordingly in granting the plaintiff leave to amend I impose the condition that he file and deliver copies of the amended Writ within seven days of this order and that, before doing so, he pay to the defendant the costs occasioned by the abortive attendance in Court and by the amendment which I fix at $25.00. In default the writ to be set aside.

Solicitors: *A. G. King,* for plaintiff; *W. D. Dinally,* for defendant.

A. SANKAR LTD. *v.* A. M. SMITH

A. SANKAR LTD.,

Appellants (Respondents),

v.

A. M. SMITH,

Respondent (Applicant)

1948. No. 260.—DEMERARA

BEFORE WORLEY, C.J., IN CHAMBERS.

1949. JANUARY 11, 25.

Rent Assessment—Letting of furnished house prior to Ordinance 13 *of* 1947—*Standard rent—Where no rent paid for furniture—No basis for standard rent.*

In 1942 the owner of a cottage let it furnished at a rental of $35 per month. In 1946 the same cottage was let unfurnished for $35 per month and the tenant furnished, it and sub-let it at $65 per month. The Rent Restriction (Amendment) Ordinance 1947 (Ordinance No. 13 of 1947) came into force on the 23rd April, 1947 and as a result furnished houses came within the control of the Rent Restriction Ordinance. In an application to the Rent Assessor Georgetown, the standard rent was fixed at $35 per month.

Held that the evidence disclosed that the first furnished rental at $35 per month was for the house alone and that no charge was made for the furniture and the standard rent was $65 per month.

Appeal by the respondents from a decision of the Rent Assessor, Georgetown.

J. Edward de Freitas, Solicitor, for the appellants.

The respondent was in default of appearance.

Cur. adv. vult

WORLEY, C.J.:

The appellants are the owners of a cottage situated at 10, Lamaha Street Georgetown and they appeal from a decision of the Rent Assessor Georgetown whereby he assessed and fixed the standard rent of the cottage let furnished at $35 a month and the maximum rent at 40.34 a month.

The history of the matter is rather unusual and is essential to an understanding of the point in issue on the appeal. Originally the cottage stood on the front of lot 10, but in 1941 it was reconstructed at the back of the lot by the then owner and in 1942 let with furniture at a rental of $35 a month. As the law then stood, furnished houses were not within the control of the Rent Restriction Ordinance. The appellants bought the property (comprising the cottage and a three-storeyed block of flats) in1946. At that time the cottage was let unfurnished to another tenant at a rental of $35 a month; it was therefore controlled at a standard rent of $35. The tenant furnished the cottage with a different set of furniture and sub-let at $65 a month. When the tenant vacated the cottage in December 1946 the appellants bought his furniture for $975 and re-let the cottage furnished in January 1947. At the request of the incoming tenant, the interior was re-decorated, repairs done and the soft furnishings renewed: about $430 was spent in all. The new tenant expected to stay

in the cottage about three years and agreed to pay $12 a week more (making $77 a month in all) to reimburse the appellants for this expenditure.

In August 1947 the respondent Smith took over the tenancy by arrangement between him and the outgoing tenant and with the consent of the appellants. The rent for August was apportioned between the respondent and the outgoing tenant on the basis of $77 a month.

The application of the Rent Restriction Ordinance 1941 was extended to premises let furnished by the Rent Restriction (Amendment) Ordinance 1947 (Ordinance No. 13 of 1947) which came into force on 23rd April 1947 and, in October 1947, the respondent applied to the Rent Assessor under the provisions of section 4B of the Principal Ordinance (as enacted by section 5, of the amending Ordinance) for the ascertainment of the standard and maximum rents of the cottage. The three tenants of the flats made similar application and it would seem that all four applications were heard and determined together: at any rate the reasons for decision supplied by the learned Assessor deal with all four applications and relate mostly to the flats: as regards the cottage he says "Mrs. Melville also reconstructed the cottage and let it furnished…..The principle on which the standard rent is based is the rent at which the premises were first let (furnished). After reviewing the evidence carefully I have come to the conclusion that the first rent of the cottage (was) $35 furnished". In the result he fixed the standard rent at $35.00: increase permitted under section 6 (1) (a) 88 cents: increase permitted under section 6 (1) (b) 96 cents: 10% of the standard rent permitted under section 6 (1) (c) $3.50. He therefore fixed the maximum rent of the cottage furnished at $40.34.

The hearing of this appeal has been unduly delayed and, in the meantime, the respondent has left the Colony. The appellants however wished to pursue the appeal as the certificate of the Assessor will operate as the criterion of the proper rental for future tenancies. I was informed that the cottage is now untenanted and, in these circumstances, agreed to hear the appeal.

The appellants' contention is that the learned Assessor was wrong in taking as the standard rent for the cottage let with its present set of furniture, the rent paid in 1942 for the cottage let with an entirely different set. They suggest that that rent was not an economic one, as there was evidence that the then tenant was a friend of the then owner and point out that after he vacated in 1943 the cottage was let unfurnished at the same rental, namely, $35 per month.

The Ordinance defines "let furnished" as meaning "let at a rent which includes payment for the use of furniture" and "let unfurnished" is to be construed accordingly. The evidence as to the letting in 1946 was very scanty and in my view the fair and reasonable conclusion to be drawn from the admitted facts is that the rent agreed between the then owner and the then tenant did not include any payment for the use of the owner's furniture. Such an arrangement is consistent with a friendly relationship between them and with the subsequent letting of the cottage without furniture by the same owner at the same rental. It also

avoids the anomaly of the standard rent of the cottage furnished being the same as the standard rent of the cottage unfurnished.

On this view therefore the first furnished letting of the cottage was in 1946 at a rental of $65 a month.

I am of opinion that the extra $12 a month agreed to be paid by the tenant who went into occupation in January 1947 resulted from a special arrangement made to reimburse the appellants for repairs, re-painting and renewals of soft furnishings etc. Examination of the bills tendered in evidence by the appellants shews that very little of the expenditure is attributable to improvements or alterations to the premises or additions to the furniture.

I therefore fix the standard rate of the cottage let furnished at $65 per month. The increases permitted under items (ii) and (iii) of the certificate are supported by the evidence but the 10 % of the standard rent allowed under item (iv) calls for further consideration.

The learned Rent Assessor took the view that the effect of section 6 (1) (c) of the Principal Ordinance, as amended by paragraph (e) of section 7 of the Amending Ordinance, and read with the further proviso enacted by paragraph (f) of the same section of the Amending Ordinance, limited his discretion in the case of these premises to a maximum allowance of 10% of the standard rent. With great respect I cannot agree with this interpretation of the law and I think it would have been permissible to allow up to 25% of the standard rent. The point is however academic in this case. I have fixed the standard rent at the rent paid in 1946, and no case has been made out for an increase on that under the provisions of section 6 (1) (c). It appears from the record that the standard rent of the cottage is higher than the standard rent of any of the three fiats.

The certificate is therefore amended by substituting $65 for $35 as the standard rent and by striking out the $3.50 allowed under item (iv). The maximum rent will therefore be 365, plus 88 cents and 96 cents, that is, $66.84 a month let furnished.

Appeal allowed.

CECIL GREEN,

Appellant (Defendant),

v.

WILFRED SAMPSON, Lance Corporal of Police No. 4352,

Respondent (Complainant).

[1949. No. 442 DEMERARA.]

BEFORE FULL COURT: WORLEY, C.J. and WARD, J.

1949. NOVEMBER 15; DECEMBER 16.

Criminal law and procedure—Having in possession any implement with intent unlawfully to break into any building—Complaint laid under Summary Jurisdiction (*Offences*) *Ordinance, Chapter* 13, *Section* 147 (*vi*)*—Particulars of complaint—Omission to specify the building—Power of Full Court to amend conviction—Exercise of discretion under Summary Jurisdiction* (*Appeals*) *Ordinance, Chapter* 16, *section* 24.

A complaint under section 147 (vi) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, against a defendant for having in his possession any implement with intent to break into a building must state some definite building into which the accused person is alleged to have the intention of breaking.

R. v. Jarrald 8 L.T. 515 applied.

The Full Court, in the circumstances of the case, refused to exercise any power of amendment of the conviction which the Court may have under section 24 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16.

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

Ramsundar v. *Welcome (*1944) L.R.B.G. 132, considered.

APPEAL by the defendant from a decision of a Magistrate of the Georgetown Judicial District convicting him of having in his possession one picklock and one pen-knife with intent to break into any building, contrary to section 147 (vi) of the Summary Jurisdiction (Offences) Ordinance. Chapter 13.

J. Carter for appellant.

G. M. Farnum, acting Solicitor-General, for respondent.

Cur. adv. vult.

The judgment of the Court was as follows:

The appellant in this case appeals against the decision of the Magistrate of the Georgetown Judicial District on the ground that the complaint as laid was defective in that it disclosed no definite building into which it was alleged that the appellant in-

tended to break. The appellant was charged under section 147 subsection (vi) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, and the complaint alleged that the appellant "on Wednesday, 2nd February, 1949, at Georgetown, in the Georgetown Judicial District, had in his possession one pick-lock and one pen-knife with intent to break into any building". Section 147 sub-section (vi) of the Summary Jurisdiction (Offences) Ordinance provides that "everyone who has in his custody or possession any pick-lock, key, crow-bar, jack, bit or other implement, with intent unlawfully to break into any building", shall be deemed a rogue and vagabond and be liable on conviction to the appropriate penalty. At the hearing before the Magistrate his attention was directed to the alleged defect in the complaint and counsel for the appellant cited the case of R. v. Jarrald and Ost 8 L.T. 515. The learned Magistrate, however, does not appear to have appreciated the importance of the alleged defect and took no steps to amend the complaint as he might have done under the provisions of section 94 sub-section (2) of the Summary Jurisdiction (Procedure) Ordinance Chapter 14. Nor does he consider the point in his memorandum of reasons for decision.

In the case of R. v. Jarrald it was definitely laid down that in a charge under 24 & 25 Victoria Chapter 95 section 58 it is necessary to state some definite building into which the accused person is alleged to have the intention of breaking. This section enacts that "whosoever shall be found by night armed with any dangerous or offensive weapon or instrument, with intent to break or enter into any dwelling house or other building" shall be guilty of a misdemeanour. Cockburn C.J. in his judgment said: "I am of opinion that there must be a definite intention to break into some particular house. It is not enough to say that a man intended to break into a house generally". We are of opinion that the same reasoning applies to sub-section (vi) of section 147 of the Summary Jurisdiction (Offences) Ordinance. Further the word "unlawfully" is omitted from the complaint so that, as was suggested in the argument in R. v. Jarrald, the appellant might, consistently with what is alleged in the complaint, have thought that he was charged with an intent to break into his own building, which is not unlawful.

The Court has been invited by the learned Solicitor-General for the respondent to exercise the power of amendment given to this Court by section 24 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16. It appears, however, that the defects in the complaint are repeated in the order for conviction from which the word unlawfully is omitted and in which no specified building is mentioned. This Court has decided in the cases of Bagadoo v. Welcome (1942) L.R.B.G. 293 and Ramsundar v. Welcome (1944) L.R.B.G. 132 that the omission of an essential element of a statutory offence in an order of conviction is fatal since section 7 of the Criminal Justice Ordinance 1932 (Ordinance No. 21 of 1932) does not apply to convictions. Further, the proviso to section 25 of the former Ordinance provides that if it appears to the Court that the appellant has been misled or deceived by the error or defect the Court may either refer the case back to the Magistrate

with directions to re-hear and determine it, or reverse the decision under appeal, or make any other order for disposal of the cause which justice requires. As we have already intimated, the omission to specify a particular building and the omission of the word unlawfully from the complaint are definitely misleading; the similar omissions from the order of conviction render the conviction bad; and. as one of the defects was drawn to the attention of the learned Magistrate, we think it would be unfair to the appellant at this stage to exercise any power of amendment which may be given to this Court by section 24 of the Summary Jurisdiction (Appeals) Ordinance. The appeal is accordingly allowed with costs and the conviction and sentence set aside.

Appeal allowed.

ZENA GLEN,

Appellant (Plaintiff),

v.

LATCHMINYA,

Respondent (Defendant).

[1949. No. 507 DEMERARA.]

BEFORE FULL COURT: WORLEY C.J. AND WARD J.

1949. NOVEMBER 22; DECEMBER 16

Rent restriction—Widow of a tenant residing with him at the time of his death—Meaning of "residing"—Rent Restriction (*Amendment*) *Ordinance,* 1947 (*No.* 13) *section* 2 (c).

APPEAL by the plaintiff widow, from the decision of a Magistrate of the Georgetown Judicial District dismissing her action against the defendant for damages for breach of the implied covenant for quiet enjoyment of premises occupied by her as a statutory tenant under the Rent Restriction Ordinance, 1941. The plaintiff's husband died on the 11th May 1949. On the 22nd May 1949 the defendant prevented the plaintiff from entering on the premises by padlocking the entrance door and nailing boards across it. The Magistrate found that the plaintiff had not satisfactorily established her claim that she succeeded to the tenancy on the death of her husband who was the statutory tenant: in other words, that the plaintiff had not satisfactorily established that she was residing with her husband at the time of his death.

By section 2 (c) of the Rent Restriction (Amendment) Ordinance, 1947 (No. 13), the expression "tenant" includes the widow of a tenant who was residing with him at the time of his death.

Held: (1) That it is sufficient to show that residence actually existed at the time of the death of the statutory tenant.

(2) That the word "residing" is used in the definition in relation to the matrimonial nexus, and that in the case of married persons residence continues during periods of temporary absence, provided that there is an *animus revertendi* and also a right to return to the matrimonial home.

H. A. Fraser, for appellant.

Sir Eustace G. Woolford. K.C., for respondent.

Cur. adv. vult.

The judgment of the Court was as follows:

The Appellant, Zena Glen, is the widow of the late Arthur Glen, who died on the 11th day of May, 1949. At the time of his death he was in possession of a room situate at lot 46 D'Urban Street, Lodge Village, Demerara as a statutory tenant of Latchminya, the respondent, who had terminated the contractual tenancy in respect of the premises by a valid notice to quit expiring on April 24th, 1949. The appellant claims that, as the widow of Arthur Glen residing with him at the time of his death, she succeeded to the statutory tenancy held by him in respect of the premises. This claim the respondent denied and on May 22nd, 1949 prevented the appellant from entering on the premises by padlocking the entrance door and nailing boards across it. The appellant filed a claim against the respondent in the Magistrate's Court of the Georgetown Judicial District on June 14th, 1949 for damages in respect of the alleged breach of an implied covenant for quiet enjoyment under the statutory tenancy. The learned Magistrate adjudicated the claim on August 4th, 1949 entering a judgment of non-suit with costs $4.44 and $25.00 counsel's fee to respondent.

The sole question in this appeal is whether on the evidence the learned Magistrate could reasonably find, as he did, that the appellant had not satisfactorily established her claim that she succeeded to the tenancy on the death of her husband. The definition of "tenant" in section 2 of the Rent Restriction Ordinance, 1941, as amended by section 2 (c) of the Rent Restriction (Amendment) Ordinance 1947 (No. 13 of 1947) provides that the expression shall include the widow of a tenant who was residing with him at the time of his death. The definition does not require that the residence shall continue for any length of time, so that it is sufficient for the purposes of the Ordinance to show that residence actually existed at the time of the death of the statutory tenant.

It appears from the evidence that the deceased, Arthur Glen, was ill for some months, and from the month of March 1949 his illness took so serious a turn that his sister, Emily Joseph, left her own home to undertake the duty of nursing him. During the whole period of his illness the duty of providing for the household, consisting of the appellant, the deceased tenant and their infant daughter fell on the appellant, who laundered clothes at her mother's house at lot 9 D'Urban Street. The learned Magistrate accepted the evidence of Gwendora Rutherford, the former owner and landlord of the premises that up to some period in February, 1949 the appellant did not actually reside with her husband but only paid him periodic visits. For the remainder of the period from February to May 11th, 1949 the learned Magistrate was unable to discover from the evidence anything definite on which he could find that the appellant was residing with her husband at the time of his death.

It appears clearly from the evidence that there was no separation by the appellant from her husband, and also that a matrimonial home existed, for the maintenance of which she was responsible. To this home she sent daily supplies of cooked food. Residence is a term capable of a variety of meanings according to

the context in which it is used; but, in the definition in the Rent Restriction Ordinance which we are considering, it is used in relation to the matrimonial nexus. Among married persons it frequently happens that one of the spouses is temporarily absent from the matrimonial home because of the nature of his calling; but it would hardly be suggested, for example, that a sailor is not residing in the matrimonial home because he is absent for periods of varying length on voyages. In all such cases it would appear that residence continues during periods of temporary absence, provided that there is an animus revertendi and also a right to return to the matrimonial home. A similar interpretation has been given by the English Courts to the word residence under the Poor Removal Act 1846. In the Queen v. Stapelton (Inhabitants) (1853) 1 E & B 786 Lord Coleridge C.J. says: "I think when a man is absent for a temporary purpose with an intention to return when the temporary purpose is served, it is no break in his residence". Crornpton J. in the same case expressed the same opinion, but suggested the manner in which the interpretation might be limited: "An absence for a mere temporary purpose with an intention to return will be no break in the residence. But an intention to return at a remote period, after a permanent absence, is not sufficient to prevent the absence from being a break". In Bond v. Overseers of St. George, Hanover Square (1870) L.R. 6 C.P. 312 Bovill C.J. said: "It is certainly not necessary that there should be an uninterrupted residing in a place to constitute a residence", and Brett J. quoted with approval a definition of residence given by Erle C.J. in Powell v. Guest 34 L.J. C.P. 69 to the same effect. A similar interpretation of the meaning of residence has been given by the Courts of Scotland in the recent cases of J. & R. Howie Ltd. v. Paterson (1945) 62 Sch. Ct. Rep. 69 and Brand v. Ross (1946) S.L.T. (S.L. Ct.) 38 where a tenant's widow, forced to leave the matrimonial home by the drunkenness of the tenant, was held to be entitled as a widow residing with him at the time of his death.

The learned Magistrate, in our opinion, failed to direct his attention to the legal meaning of residence in relation to the persons comprising a matrimonial home. If he had done so he would have had no difficulty in finding ample evidence to show that the appellant was residing with her husband at the time of his death. Even if the evidence is viewed in the light most unfavourable to the appellant, she has shown that there was a matrimonial home in existence, that she maintained it by her labour, and that whenever it was convenient for her she returned to it. There is no evidence to show that she had separated herself from her husband and child and had established a permanent home elsewhere. But the evidence in favour of the appellant's claim is far stronger, for according to her own evidence and the evidence of two witnesses she returned to the premises each night after her husband became seriously ill in March 1949 to assist in nursing him. No direct evidence has been given by the respondent's witnesses to contradict this statement, and in our opinion it would be against the weight of the evidence to find that the appellant was living separate and apart from her husband and

residing elsewhere than in the matrimonial home. The appeal must be allowed with costs and the case will be returned to the Magistrate with a direction to assess the damages to which the appellant is entitled for a breach of the implied covenant for quiet enjoyment of the premises of which she was the statutory tenant in succession to her deceased husband.

Appeal allowed.

PAUL TOURIST and JAIRAM,
Appellants (Defendants),
v.
ALBERTIS GIDDINGS, Corporal of Police, No. 3908,
Respondent (Complainant).

[1949. No. 529 DEMERARA.]

BEFORE FULL COURT: WORLEY C.J. AND WARD, J.

1949. NOVEMBER 17; DECEMBER 16.

Criminal law and procedure—Spirits Ordinance. Chapter 110, *section* 93 *(5)—Unlawful possession of "bush rum"—Presumption arising from possession—Power of Full Court to modify or amend conviction in part—Summary Jurisdiction* (*Appeals*) *Ordinance, Chapter* 16, *section* 28 (a).

APPEAL by the defendants from conviction on charges of being in unlawful possession of spirits contrary to section 93 (1) of the Spirits Ordinance, Chapter 110.

The statutory presumption from possession of bush rum, namely that every person in such possession shall be deemed to be a person unlawfully possessing spirits under section 93 (1) of the Spirits Ordinance (Chapter 110), created by section 93 (5) of that Ordinance, is not absolute but is rebuttable.

Francois v. *Ram (*1931-37) L.R.B.G. 135 and

Fung v. *Murray (*1941) L.R.B.G. 35, explained.

The decision in *Khan* v. *Harman* (1931-37) L.R.B.G. 138 is no authority for the general proposition expressed in the head note that "a conviction bad in part is bad as a whole"; such general proposition would be incompatible with section 28 (a) of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16.

Jai Narine Singh, for appellant.

G. M. Farnum, acting Solicitor-General, for respondent.

Cur. adv. vult.

The judgment of the Court was as follows:

Both appellants appealed against their conviction on charges of being in unlawful possession of spirits contrary to section 93 (1) of the Spirits Ordinance (Chapter 110). At the conclusion of the arguments we dismissed the appeal of the second appellant being of the opinion that his conviction was fully warranted by the evidence, and reserved decision on the appeal of Jairam.

The relevant facts as disclosed in the record are that Jairam

lives with his father, one Harrichand, in a house at Canal No. 2 Polder, West Demerara. Harrichand is the owner by transport of the land on which the house stands and also owns a timber grant and a saw-pit; the appellant assists his father in the business. In the yard appurtenant to the house there is a hut occupied by Harrichand's labourers. On 10th December, 1948 about midday a party of police were on their way to this house with a warrant to search for bush rum. On nearing the house they saw the appellant on a bicycle and called to him but he made off towards the house saying he was in a hurry. Some of the constables reached the house before the appellant who ignored a second call to stop and tried to enter by the back steps. He was prevented by the police and the warrant read to him. Inside the house was a locked store-room and, on being asked to open it, the appellant did so with a key which he took from his pocket. The windows of the room were bolted from within. Inside the room were a quantity of stores and four bottles containing liquid, one of which (Exhibit B 4) was eventually certified by the Government Analyst to contain two fluid ounces of bush rum, 6.5 per cent. under proof. Subsequently, the police found a bottle (Exhibit E), containing twenty-four fluid ounces of spirits 3.5 per cent. over proof, beneath the plank floor of a bathroom behind the house kitchen. On witnessing this find the appellant said "Trouble now come". In some trash beside the house was found another bottle containing eight fluid ounces of bush-rum 3.5 per cent. over proof.

The trial magistrate found that the appellant was in possession of the four bottles found in the store-room (Exhibits B1—B4) and of the bottle found in the bathroom (Exhibit E) and that, from his behaviour in trying to prevent the seizure of the four bottles and his general attitude and conduct, the appellant knew that the bottles contained bush-rum.

The numerous grounds of appeal may be conveniently condensed into the contentions that there was no, or no sufficient proof of possession in the appellant, and no, or no sufficient, proof that he knew the nature of the contents of the bottles.

In order to clarify the position we will first consider the argument propounded by counsel for the appellant that, assuming the conviction warranted by the evidence in respect of the bottle Exhibit B4 found in the storeroom, if it were not supportable in respect of the bottle Exhibit E found in the bathroom, then the appeal must succeed for "a conviction bad in part is bad as a whole".

He cited as authority for this proposition the head note to Khan v. Harman 1932 (1931-37 B.G.L.R. 138). According to the report of that case, which was an appeal before a Full Court comprised of de Freitas C.J. and Savary J., the learned Chief Justice delivered the judgment of the Court as follows: —

> "The Magistrate convicted the appellant of being in unlawful possession of some things found in his room and of other things found buried in the ground outside that room. There is one conviction in respect to both lots of things. It is clear to us, and counsel for the respondent agrees, that there is insufficient evidence to establish that the appellant was in possession of the buried articles so the conviction in

respect to those articles is bad. The conviction being bad, in part is bad as a whole and it must be quashed"

No further facts are given and we have referred to the original record of the appeal. This shews that no written judgment was delivered and that purports in the report to be the judgment of the Court is based on a minute entered on the docket of the appeal file with no signature or initials to indicate by whom or by whose authority it was written.

But an examination of the appeal record leaves us in no doubt as to what that case really decided. The appellant Khan had been convicted of having in his possession contrary to section 97 (1) of the Summary Jurisdiction (Offences) Ordinance, a number of bottles of gin, whiskey and other liquors, a tin of cigarettes, four packs of playing cards and a quantity of gramophone needles, all reasonably suspected of having been stolen. The case for the prosecution was that, on the day prior to the search which led to the charge, the premises of a club (at which the appellant had formerly worked) had been broken into and a quantity of articles similar to those specified in the charge stolen. The next day a party of police conducted searches in the house where the appellant and others lived and in the yard which was common to that and at least one other house. The search of the appellant's room discovered only the packet of cigarettes, the playing cards and the needles, and it was admitted by the constable who conducted this search that he did not entertain any suspicion or call on the appellant to account for the articles until two other constables came up with the bottles of liquor which they had unearthed in the yard.

From these facts the ratio decidendi and the limitation of the decision are apparent. Since the "reasonable suspicion" was engendered by the discovery of articles which were not proved to have been in the appellant's possession, no conviction under section 97(1) could be sustained either in respect of those articles or in respect of other articles which were proved to have been in his possession. It follows that the decision is no authority for the general proposition expressed in the head note, which would indeed be incompatible with the powers conferred on this Court by paragraph (a) of section 28 of the Summary Jurisdiction (Appeals) Ordinance (Chapter 16).

Reverting to the instant appeal the question in issue, then, is whether the appellant was proved to be in possession of either the bottle Exhibit B4 or the bottle. Exhibit E or both. As to the former, the Magistrate, having rejected the appellant's evidence and found as a fact that the bottle was found in the locked storeroom of which the appellant had the key, there was evidence to justify a finding of physical possession. But possession (except in exceptional cases) comprises a mental as well as a physical element and the question, as in Meerza v. Harding (A.J. 16th December, 1905), is whether there was sufficient evidence (the Magistrate being the judge of fact in all cases) reasonably to justify the conclusion that the appellant knew that the bottle (Ex. B4) was in the room.

The learned Magistrate came to a conclusion on this point

adverse to the appellant upon a consideration of his behaviour at the material time. According to the evidence for the prosecution accepted by the Magistrate, when the bottles Exhibit Bl-4 were seized the appellant "said not to interfere with them as he takes them to his grant to collect water". He was asked to taste the contents of B4 and admitted it tasted like rum. Taking in conjunction with this the appellant's evident anxiety to get into the house before the police arrived, and bearing in mind the advantages which the learned Magistrate had in observing the witnesses and the drift and conduct of the case, we are unable to hold that his conclusion on this point was unreasonable and against the weight of evidence.

Had the discovery of the bottle in the bathroom stood alone, a conviction in respect of that could hardly be sustained, but on a review of the whole of the evidence we are not prepared to hold that the Magistrate's finding in respect of this bottle was unreasonable.

It remains to refer briefly to a contention put forward by counsel for the appellant (if we understood him correctly) that, even if possession were proved, an onus still lay on the prosecution to prove that the accused knew the nature of the contents of the bottles and they had not discharged that onus. He referred to Francois v. Ram 1932 (1931-37 B.G.L.R. 135) and Fung v. Murray (1941 B.G.L.R. 35) but those cases when examined do not support the argument. Francois v. Ram decided, in effect, that the statutory presumption from possession created by subsection (5) of section 93 of the Spirits Ordinance is rebuttable and not absolute. In that case there was no dispute as to the possession but the respondent satisfied the Magistrate that he, having bought the rum under a proper permit from a licensed spirit shop, did not know that what he had bought was bush-rum. The Full Court held that this defence having been accepted the complaint was rightly dismissed.

In the instant case the appellant denied that Exhibit B4 contained any rum at all when it was seized by the Police. That denial having been rejected by the Magistrate, there was nothing left to rebut the statutory presumption and therefore no resulting onus on the prosecution.

For these reasons we dismiss the appeal with costs and confirm the conviction and sentence.

Appeals dismissed.

GOBIN ET AL *v.* H. ELCOCK, P.C. No. 4564

GEORGE GOBIN et al,
Appellants (Defendants),
v.
HENRY ELCOCK, P.C. No. 4564,
Respondent (Complainant).

[1949. No. 533 — DEMERARA]

BEFORE FULL COURT: WORLEY, C.J. AND WARD, J.

1949: NOVEMBER 17; DECEMBER 16.

Criminal law and procedure—Dismissal of charge of larceny brought under section 76 (1) (*b*) *of Summary Jurisdiction (Offences) Ordinance, Chapter* 13—*Fresh complaint under section* 77 (*b*)—*Whether section* 77 (*b*) *creates a different offence—Validity of plea of autrofois acquit—Power of the Magistrate to have amended the complaint laid under section* 76 (1) (a) *if the evidence established offence under section* 77 (*b*)—*Power of amendment under proviso to subsection* 2 *of section* 94 *of Summary Jurisdiction* (*Procedure*) *Ordinance. Chapter* 14.

An order of dismissal made under a mistake as to jurisdiction is no bar to a subsequent plea of autrefois acquit.

Cressall v. Dias (1924) L.R.B.G. 7, *and Reg. v. Bracken-ridge* (1384) J.P. 293, applied.

If a man has been tried and found to be not guilty of an offence by a court competent to try him, the acquittal is a bar to a second indictment for the same offence, and the rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment.

The five appellants had been charged with the commission of an offence under section 76 (1) (b) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, namely, of stealing coconuts growing in open lands the property of Johoran Khadir. On the hearing of that charge, evidence sufficient to prove an offence under section 77 (b), by each of the appellants, namely, of stealing, with four other accused persons, was tendered, and the Magistrate, on the submission of counsel for the appellants, acquitted the appellants as, in his opinion, he could not convict them under section 76 as that section defined praedial larceny in such a manner as to exclude the special forms of praedial larceny defined in section 77.

A fresh charge was then laid against the five appellants under section 77 (b) in respect of larceny of the same coconuts. It was alleged in the complaint that the five appellants had committed the offence "together". The appellants pleaded *autrefois acquit* on the ground that a charge had previously been brought against them under section 76 (1) (b) in respect of larceny of the same coconuts and had been dismissed. The Magistrate held that section 77 (b) created a different offence from that prescribed in section 76 (1) (b) and therefore the appellants were not in peril, on the previous information, of being convicted of the offence laid in the charge under section 77(b). The appellants were convicted, and they appealed.

Held: (1) that section 77 (b) of the Summary Jurisdiction (Offences) Ordinance. Chapter 13 creates no separate offence, but provides that anyone committing the offence mentioned in section 76 under certain circum-

stances of aggravation, namely, "together with one or more other person or persons", shall be liable to be punished with greater severity.

(2) that the appellants could have been convicted on the charge laid under section 76 (1) (b).

(3) that section 77 (b) did not create an offence which was different from the one created by section 76.

(4) that therefore the plea of *autrefois acquit* was a good plea although the acquittal was because of the Magistrate's error as to his jurisdiction.

Upon the hearing of the complaint under section 76 (1) (b) the evidence adduced disclosed an aggravated form of the offence charged which was nevertheless within the summary jurisdiction of a Magistrate.

Held: further that under section 94 (2) of the Summary Jurisdiction (Procedure) Ordinance, Chapter 14, an objection that there was a variance between the complaint and the evidence should have been disallowed, but if the magistrate thought that the defendants had been deceived or misled, he should have exercised his powers under the proviso to the subsection by making any necessary amendments to the complaint and granting an adjournment if he thought it expedient so to do.

APPEAL by the defendants from decisions of the Magistrate of the Berbice Judicial District convicting them of together stealing coconuts growing on open lands the property of Johoran Khadir, contrary to section 77 (b) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13.

S. D. S. Hardyal, for appellant.

G. M. Farnum, acting Solicitor-General, for respondent.

Cur. adv. vult.

The judgment of the Court was as follows:

The appellants in this case were charged under section 77 subsection (b) of the Summary Jurisdiction (Offences) Ordinance Chapter 13 of together stealing coconuts growing on open lands, the property of Johoran Khadir. To this charge they pleaded autrefois acquit on the ground that a charge had been brought against them previously under section 76 subsection (1) paragraph (b) of the same Ordinance in respect of the larceny of the same coconuts and had been dismissed. It appears from the record that when the charge under section 76 was preferred evidence sufficient to prove an offence under section 77 (b) was tendered, but the learned Magistrate, on the submission of counsel for the appellants, held that he could not convict the appellants under section 76 as that section defined praedial larceny in such a manner as to exclude the special forms of praedial larceny defined in section 77. In the present case he held that section 77 (b) created a different offence from that prescribed in section 76 (1) (b) and therefore the appellants were not in peril on the previous information of being convicted of the offence laid in the present charge.

The law as to autrefois acquit has been recently restated in the case of Flatman v. Light and others (1946) 2 A.E.R. 368 where Singleton J. quoted with approval the well-known passage from Archbold's Criminal Pleading and Practice 31st Edition at p. 136: "If therefore a man has been tried and found to be not guilty of an offence by a court competent to try him, the acquittal is a bar to

a second indictment for the same offence, and the rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on t<he trial of the first indictment." The questions in this case are, therefore, whether the appellants could have been properly convicted at the first trial of the offence under section 76 (1) (b) of which they stood charged, or, in the alternative, whether the trial magistrate could have amended the charge to one under section 77 (b). If the answer to the former question is in the affirmative then an order of dismissal made under a mistake as to jurisdiction is no bar to a subsequent plea of autrefois acquit (Cressall v. Dias 1924 B.G.L.R. 7: Reg. v. Brakenridge 1884 J.P. 293). So also if the second question is answered in the affirmative.

An examination of the three relevant sections of the Ordinance shows that, while section 75 creates the offence of larceny of plants, fruits and vegetable produce from a garden, orchard etc., and section 76 creates the offence of larceny of certain specified fruits and produce growing on land which is not an orchard, garden etc., section 77 creates no separate offence in paragraphs (a), (b), (c), and (d) but provides that anyone committing the offence mentioned in section 76 under certain circumstances of aggravation shall be liable to be punished with greater severity. It is only in subsection (e) that a different offence is prescribed.

It is perfectly clear to us that the appellants could have been convicted on the charge laid under section 76 and that the learned Magistrate was in error when he decided that section 77 subsection (b) created a different offence. It is only necessary to refer to subsection (2) of section 94 of the Summary Jurisdiction (Procedure) Ordinance (Chapter 14) which provides that no objection shall be taken or allowed to any complaint, summons, warrant or other process for any variance between the complaint or summons and the evidence adduced in support thereof. At the first trial the evidence adduced disclosed an aggravated form of the offence charged, which was nevertheless within the summary jurisdiction, and the learned magistrate should either have disallowed the objection or, if he thought the appellants had been deceived or misled by the variation, have applied the proviso to this subsection, making any necessary amendments to the charge and granting an adjournment if he thought it expedient so to do.

It follows that as the appellants were in peril of being convicted of the offence under section 76 (1) (b) for which they stood charged at the first trial and as this offence is the same offence with which they were charged under section 77 subsection (b) the plea of autrefois acquit is valid and the appeal must be allowed and the convictions and sentences set aside. As however the magistrate was led into his error by counsel for the appellants, who was also counsel in the instant case and on this appeal, we do not allow the appellants their costs and each party must bear their own costs of the appeal.

Appeals allowed.

L. BOYCE *v.* R. BOYCE

LUCILLE BOYCE,

Appellant (Plaintiff).

v.

REGINALD BOYCE,

Respondent (Defendant).

(1949. No. 559—DEMERARA).

BEFORE FULL COURT: WORLEY, C.J. AND WARD, J.

1949. NOVEMBER 24; DECEMBER 16.

Contract—Husband and wife living separately and apart—Children of marriage in care and custody of wife—Promise by husband to pay wife for maintenance of his minor children—Consideration for—Statutory liability of man to maintain his children—Common law liability of husband to pay debts incurred by wife in furnishing necessaries for the children.

The appellant is the wife of the respondent. Since 1944, the appellant and the respondent have been living separately, and the matrimonial home has been broken up. There were three minor children of the marriage, and in March 1948 they were respectively 9, 7 and 6 years of age. The children were in care and custody of the appellant. In March 1948 the respondent made an offer to the appellant that he would pay her $2.16 a week for the maintenance of the children, and the appellant accepted the offer. The children continued to be in the care and custody of the appellant. The respondent never claimed to have the custody of the children: on the other hand, he suffered them to remain with the appellant, casting upon her the burden of providing for her necessities.

The appellant claimed from the respondent the sum of $97.20, being 45 weeks arrears of maintenance up to 9th February 1949. The magistrate dismissed the action, and the appellant appealed.

On the hearing of the appeal, it was submitted on behalf of the respondent:

(1) that the offer was merely a domestic arrangement between the parties to the marriage and was not intended to form the basis of a contract; and

(2) that there was no good consideration for the offer.

Held (1) that as the respondent made a representation intending that the appellant should act upon it, and as she did act upon it, the ordinary rule would apply, namely that the appellant and the respondent (who at the time the arrangement was made were already estranged and separated and whose matrimonial home was broken up) intended that the agreement should create legal relations, and that the Court would not allow the respondent to go back on his promise.

Balfour v. Balfour (1919) 2 K.B. 571, C.A. and *Hoddinott* v. *Hoddinott* (1949) 65 T.L.R. 266, C.A. distinguished.

(2) that there was sufficient consideration in the statutory obligation to maintain his children cast upon the respondent by section 2 (a) of the Maintenance Ordinance, Chapter 145.

(3) that, apart from the statutory obligation under the Maintenance Ordinance, Chapter 145, good consideration for the respondent's offer may

be based upon the common law liability of the respondent to pay for debts incurred by the appellant as his agent in furnishing necessaries for the children.

APPEAL by the plaintiff from the decision of a Magistrate of the Georgetown Judicial District dismissing her action against her husband the defendant for $97.20 being 45 weeks arrears of maintenance up to the 9th February, 1949, due by him to her on a contract for the maintenance of her children of whom she had the care and custody.

F. R. Jacob, for the appellant.

J. O. F. Haynes, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows:

The appellant and respondent are husband and wife but they have been living separately since 1944. There are three minor children of the marriage, who, since the parties separated have been and still are in the care and custody of the appellant. In March 1948, the appellant complained to the Magistrate's Court in Georgetown under the provisions of section 41 of the Summary Jurisdiction (Magistrates) Ordinance Chapter 9 that the respondent had deserted her and continued to do so and had wilfully neglected to maintain her and the children of the marriage. She asked for orders for maintenance, non-cohabitation and for the legal custody of the children (then aged 9, 7 and 6 years respectively). The application came before Mr. Magistrate Persaud on 31st March. It would seem that no evidence was led and the Magistrate endorsed the following note on the case jacket: —

> "Respondent offers to pay applicant $2.16 a week for the maintenance of his three children. Applicant admits that she has borne a child for another man. Application withdrawn."

The appellant's admission of adultery was, by reason of subsection (3) of section 41 of the Ordinance, a. bar to her application unless she could bring herself within the proviso to that subsection. There is no evidence on the record as to the nature of the differences which caused the spouses to separate and nothing to show that the appellant could have successfully invoked the proviso.

Subsequently the respondent did, on one occasion only, give the appellant some money for the children and, in October 1948, appellant made a second application under section 41 of the Ordinance, in the same terms as her former one. This came on for hearing before another Magistrate who endorsed the case jacket as follows: —

"Complainant admits adultery and having a child for another man. No evidence offered. Struck out."

The learned Magistrate in the instant case thought that this application shewed that the appellant realised she could not sue on the promise made on 31st March. It may be that she was badly advised in the action she took but the Magistrate appears to have overlooked the real point, namely, that if there were a valid contract in existence, the respondent was already in breach of his obligations thereunder when the second application was made.

In March 1949, appellant sued the respondent in the civil jurisdiction alleging that on the 31st March 1948, the respondent agreed with her to pay her $2.16 a week for the maintenance of his children, that she had the children in her custody and that respondent had not contributed to their maintenance as agreed. She claimed $97.20, being for 45 weeks arrears of maintenance up to 9th February, 1949. The Magistrate after hearing evidence and arguments, entered judgment for the defendant without costs and it is from this decision that the appeal is brought.

The appellant's case was that, in the proceedings before Mr. Persaud, it was agreed between her and the respondent that she should keep the three children and withdraw her complaint and that the respondent would pay her $2.16 a week for their maintenance. Her evidence was supported by the case-jacket bearing Mr. Persaud's endorsement and by a letter from the respondent dated 19th May, 1948 addressed to "Dear Mother" in which he wrote "I will be down next week and pay you all off: the base (sci: the U.S. Army Air Base) run out of money. We will not get pay until next Friday. My love to the children." The appellant admitted having received $4.32 from the respondent.

The respondent denied that he had made any agreement with the appellant and swore "In Court the Magistrate (i.e. Mr. Persaud) told me I must give the children something. I agreed to give them for that day alone: 84 cents for the day." He denied that he had agreed to the appellant having custody of the children and said that he was willing to have them. He said that he had given appellant only $4.16, being the 84 cents promised plus something to buy shoes for one child.

The issues, therefore, which the learned Magistrate in the instant case had to determine, were: —

(a) did the respondent offer to pay to the appellant $2.16 a week for the maintenance of the children?

(b) if so, was it intended to be a binding offer so as to form the basis of a contract?

(c) if so, was there any, or any good consideration for the offer?

On the first issue, the Magistrate accepted the respondent's evidence and records in his reasons for decision that he could not find any evidence of an offer and acceptance. He observes, quite correctly, that Mr. Persaud's endorsement is not an order and therefore not, as such, binding on the respondent and he finds it quite inconceivable that the respondent would make a legal binding agreement to pay money which in law he could not be compelled to pay. With due respect, it appears to us that the Magistrate was misled by the erroneous submissions of law put forward by the respondent's solicitor and that his acceptance of the respondent's evidence was attributable to this error. Otherwise he would not, we think, have failed to have given effect to the plain meaning of Mr. Persaud's endorsement.

On the second issue, counsel for the respondent on appeal has urged that the offer, even if made, was merely a domestic arrangement between spouses not intended to form the basis of a contract, and referred to the well-known case of Balfour v. Bal-

four (1919) 2 K.B. 571 (C.A.). But that case, as also the recent case of Hoddinott v. Hoddinott (1949) 65 T.L.R. 266, also in the Court of Appeal, arose out of arrangements made between a husband and wife who were living together in amity. In Rose and Frank Co. v. J. R. Crompton and Bros. Ltd. (1923) 2 K.B. (C.A.) 261, Scrutton L.J. said at p. 288 "It is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. This intention may be implied by the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow."

But there is no true analogy between those cases and the case before us where, at the time the arrangement was made, the spouses were already estranged and separated and the matrimonial home broken up. In those circumstances, if the respondent made a representation intending that the appellant should act upon it and she did in fact so act, the ordinary rule will apply, namely that the parties intended that the agreement should create legal relations, and the Court will not allow the respondent to go back on his promise.

On the third question, the learned Magistrate held that there could be no consideration to support a contract since the respondent was in an unassailable position and could not be legally compelled to support the children. It is at this point that he has misdirected himself on the law. At the trial of the action counsel for the appellant sought to find consideration in the appellant's forbearing to proceed with her complaint before Mr. Persaud; but we do not deem it necessary to consider this point as it is apparent that there was sufficient consideration in the obligation to maintain his children cast upon the respondent by paragraphs (a) and (d) of section 2 of the Maintenance Ordinance, Chapter 145. Had Mr. Persaud seen fit to do so he could have received the appellant's complaint under section 5 of that Ordinance and make an order of maintenance under section 6. We think that this may well have been in Mr. Persaud's mind when he told the respondent that he must contribute to the maintenance of the children, and that, when the respondent made an offer which was both reasonable and acceptable to the appellant, Mr. Persaud contended himself noting the terms of settlement on the case-jacket.

It is true that the respondent could have claimed and might have been given the custody of the children but he has never done so: instead he has suffered them to remain with their mother, casting upon her the burden of providing for their necessities. In such circumstances it would appear that he thereby constituted her as his agent and would be liable for debts incurred to furnish necessaries for the children (see Rawlins v. Vandyke (1800) 3 Esp. 251 and Bazeley v. Forder (1868) L.R. 3 Q.B. 559). So that, apart from the statutory obligation under the Maintenance Ordinance, good consideration for his offer may be based upon this common-law liability.

For these reasons, we find that the learned Magistrate was wrong both in fact and in law. The appeal is allowed with costs;

the judgment in favour of the respondent is set aside and a direction will issue to the Court below to enter judgment for the plaintiff-appellant for the sum claimed and the costs appropriate thereto.

Appeal allowed.

C. ROSS,

Appellant (Defendant),

v.

AUGUSTUS PESTANO,

Respondent (Plaintiff).

(1949 No. 597 — DEMERARA).

BEFORE FULL COURT: WORLEY, C.J. AND WARD, J.

1949. NOVEMBER 25; DECEMBER 16.

Town and country planning—Resolution of Central Authority deciding to prepare a scheme—Publication of—In itself, no restrictive or prohibitive effect—Town and Country Planning Ordinance, 1946 (*No.* 25), *sections* 7 (1) (a), 7 (2), 8 *and* 15 (1).

Publication under section 7 (2) of the Town and Country Planning Ordinance, 1946 (No. 25) of a resolution under section 7 (1) (a) that the Central Housing and Planning Authority has, by resolution, decided to prepare a scheme under the Ordinance to control the development of the area of land specified in the resolution, is a necessary preliminary to and the statutory foundation of the scheme; but the resolution itself has no restrictive or prohibitive effect.

APPEAL by the defendant from the decision of a Magistrate of the Georgetown Judicial District ordering him to deliver up to the plaintiff Augustus Pestano possession of premises at 30 Main Street, Georgetown on the 30th September, 1949.

C. V. Wight, for the appellant.

J. O. F. Haynes, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows:

The appellant herein seeks the reversal of a decision of Mr. Magistrate Browne, ordering him to deliver up possession of premises at 30 Main Street, Georgetown to the respondent on the 30th day of September, 1949.

The facts found by the learned Magistrate, so far as relevant to this appeal, are that the respondent has carried on the business of a piano-repairer, tuner and dealer in these premises for twenty-five years, that he attorned tenant to the respondent when the latter purchased the premises in 1947 and that the tenancy was duly terminated by notice to quit expiring on 1st July, 1949. The premises in question are admittedly subject to the Rent Restriction Ordinance and the respondent's application for an order for pos-

session was founded upon paragraph (e) (iii) of subsection (1) of section 7 of the Rent Restriction Ordinance, as amended and re-enacted by section 8 of the Rent Restriction (Amendment) Ordinance 1947 (No. 13 of 1947), that is to say, that the premises being a commercial building are reasonably required by him for business or trade purposes.

The learned Magistrate correctly directed his mind to the matters which fall to be considered in a case of this nature as set out in the judgment of this Court in Jacob & Sons Ltd. v. Oudkirk and Boodhoo (Appeal No. 503|46) and came to the conclusion on the facts that the respondent had established the reasonableness of his requirement and that in all the circumstances it was reasonable for him to make the order for possession. He found that the respondent, for reasons of health, wished to give up his position as manager of the firm of Pestano and Co. and to establish a business of his own on the premises in question. On the question as to whether it would be reasonable to make the order, he weighed all the relevant circumstances and very properly took into consideration the fact that although, in these circumstances, there is no statutory obligation on the landlord to offer or provide alternative accommodation, yet the respondent had in fact offered alternative and suitable premises at the rear of lot 30. There was ample evidence on which the learned Magistrate could come to his conclusions and no grounds have been shewn for disturbing them.

It remains to consider the submission made by the appellant that it would be unreasonable or ineffectual to make the order asked for as the respondent will not be permitted by the Central Housing and Planning Authority constituted under the Town and Country Planning Ordinance 1946 (No. 25 of 1946) to use the premises in question for the type of business which he proposes to establish there. In the *Official Gazette* of 20th August 1949, Notification No. 1,300, the Central Authority, acting in pursuance of section 7 subsection (1) (a) and subsection (2) of the aforesaid Ordinance, gave notice that it had on 24th June, 1949 resolved to prepare a scheme under the Ordinance to control the development of an area specified in the Notification and comprising practically the whole of the City of Georgetown.

The Secretary of the Central Authority, called as a witness before the Magistrate on behalf of the appellant, deposed that on the 11th August the Central Authority passed a resolution creating a "reserve zone" in which the only businesses permitted would be hotels and blocks of offices, and that lot 30 Main Street would be within this zone. A copy of this resolution was tendered but objected to and, as it is not included in the record, we assume it was not admitted in evidence.

We agree that the learned Magistrate was correct in holding that he would not be justified in refusing to make the order for possession on this evidence. The publication of the resolution of the 24th June, 1949 was a necessary preliminary to and the statutory foundation of the scheme or schemes prepared or to be prepared by the Central Authority, but the resolution has itself no restrictive or prohibitive effect. The resolution of August 11th

of which the Secretary spoke would appear to have been merely an administrative decision to prepare a scheme in pursuance of subsection (3) of section 7 for one part of the area covered by the statutory resolution. No such scheme comes into effect until it has been submitted to and approved by the Governor in Council and published in the Gazette as provided in section 8 of the Ordinance.

Even if we assume in favour of the appellant that the resolution of August 11th was, in effect, the adoption by the Central Authority of a draft scheme for an area in which lot 30 Main Street is included, it has no legal effect until approved and gazetted and this Court cannot speculate on whether or not such a scheme will receive the approval of the Governor in Council with or without modification.

It is pertinent to observe that if, in fact, the respondent's proposed user of the premises is contrary to any projected scheme of development for this area, the Central Authority may, in the interim before such scheme comes into operation and if it thinks fit so to do, exercise its powers of conditional permission or of prohibition under subsection (1) of section 15 of the Ordinance. But again, this Court can neither speculate how the Central Authority might elect to use its powers nor refuse the order asked for on the assumption that the Authority might see fit to exercise them in a certain way.

For these reasons the appeal is dismissed with costs and the order for possession confirmed. As the alternative accommodation is vacant and available for immediate occupation we see no reason to vary the date fixed by the Court below for the appellant to deliver up possession.

Appeal dismissed.

Solicitor for the appellant: — *A. G. King.*

O. HOOKUMCHAND v. W. H. KAILAN

OLGA HOOKUMCHAND,

Appellant (Plaintiff),

v.

W. H. KAILAN,

Respondent (Defendant).

(1949. No. 564—DEMERARA)

BEFORE FULL, COURT: WORLEY, C.J. AND WARD, J.

1949. NOVEMBER 24; DECEMBER 16.

Interpleader—Magistrate's Court—Where claimant in possession of goods when seized by bailiff—Onus on execution creditor—To prove that goods in fact belonged to execution debtor—How onus may be discharged.

Where, in interpleader proceedings in the magistrate's court, there is a deficiency in proof of the levy in question, the Magistrate should offer the claimant an adjournment upon terms to enable him to supply such deficiency.

Henderson v. *Seernaithally* (1938) L.R.B.G. 94, Full Court, and *Lewis* v. *Kailan,* Appeal No. 638 of 1947, Full Court, considered.

In interpleader proceedings in the magistrate's court—

(a) if the execution debtor was in possession of the goods when they were seized by the bailiff, the onus of proof lies on the claimant who, to succeed, must prove that the goods were in fact his goods;

(b) if the claimant was in possession of the goods when they were seized by the bailiff, the onus of proof lies on the execution creditor who to succeed, must prove that the goods in fact belonged to the execution debtor. This onus he can discharge by showing that the goods seized belong to the judgment debtor, or that they were before seizure the property of the judgment debtor and that he conveyed them to the claimant under suspicious circumstances, in which case the onus reverts to the claimant. If the claimant is a near relative of the debtor, it may be easier to show reasonable cause for suspicion.

APPEAL by the plaintiff from the decision of a Magistrate of the Georgetown Judicial District awarding judgment in favour of the defendant W. H. Kailan. The defendant, in execution of a judgment obtained by him against the plaintiff's mother, had levied upon certain goods which were claimed by the plaintiff.

Sugrim Singh, for appellant.

Respondent in person.

Cur. adv. vult.

The judgment of the Court was as follows:

This is an appeal by the plaintiff-claimant against the decision of a Magistrate of the Georgetown Judicial District on an inter-pleader summons issued on the application of a bailiff of

that Judicial District in pursuance of section 57 of the Summary Jurisdiction (Petty Debt) Ordinance Chapter 15. The summons gave notice to the defendant-respondent that certain articles of furniture specified therein seized by him and at his instance at Lot 230 Middle Street, Georgetown, on the 20th July, 1949, under a Writ of Execution dated 2nd March, 1949, No. 88 were being claimed by the plaintiff appellant as bona-fide owner of the said articles which were in her possession at the time of the levy, and that damages for the trespass were claimed.

At the hearing the only evidence adduced was that of the appellant who testified that she was the tenant of the house and the owner of the furniture therein and that "the defendant levied on the articles in question." Cross-examination by the respondent was directed to the merits of her claim but did not contest the levy, nor is there any note on the record to show that he had put the levy in issue. At the conclusion of the appellant's case he made a submission which is recorded as "No case made out. No levy proved," and the learned Magistrate accepting the submission gave judgment for the defendant with costs.

In his memorandum of reasons for decision the Magistrate deals first with the merits of the appellant's case and then proceeds:—

> "Even if I could find on that evidence that the claimant had established her ownership in the articles claimed—there has been no attempt to prove this except by the mere production of the receipts—there were none of the other acts necessary for proof in an interpleader summons. There was no proved evidence of a levy by the Respondent or by any one else, and no evidence that the articles were taken in execution so as to found the action. No writ or certified copy of a writ was tendered and the Bailiff was not called to give evidence. In my opinion there was no real attempt to prove this claim and the respondent has quite rightly submitted that, as there was no levy proved, a case had not been made out."

The grounds of appeal are: —

(1) that the decision was erroneous and could not be supported having regard to the evidence; and
(2) that it was erroneous in point of law in that
    (a) the appellant had given evidence that a levy was made and that this was not denied by the respondent;
    (b) production of the original writ or a copy thereof or formal evidence by the officer who executed the levy is not the only means of proving that a levy was made and executed;
    (c) the Court is bound to take judicial notice of the acts of its officer.

Counsel for the appellant stated that since the decision of this Court in Lewis v. Kailan (Appeal No. 638/1947: unreported.) the practice of calling the bailiff to produce the writ or otherwise prove the levy had been discontinued. No written judgment was delivered in that case and we have therefore consulted the original record and the Judges' notes to see what the actual decision was.

Lewis v. Kailan was also a case of interpleader and the records shews that the defendant-respondent put in issue the fact of the levy. The plaintiff-appellant did not call the bailiff but himself gave evidence (which was not contested in cross-examination) that the defendant-respondent came to his home with a bailiff, who levied on his goods on Kailan's orders for the debt of one Lutchman; that the bailiff made, signed and handed to the witness an inventory, (which was admitted in evidence); that the articles therein enumerated were taken away by the bailiff despite his protest and that he was the owner thereof. Judgment was given for the respondent Kailan, the learned Magistrate accepting his submission that there was no evidence to prove the issue of a Writ from the Court authorising the levy. On appeal, this order was set aside and the matter remitted to the Magistrate to adjudicate on the merits of the claim. It would appear that the Court was of opinion that production of the Writ or a copy thereof was not essential and that the fact of levy at the instance of the respondent and identity of the goods seized thereunder were sufficiently proved.

The requirement of proof in an interpleader action was considered by the Full Court in the case of Henderson v. Seernaithally (1938) L.R.B.G. 94, which arose out of interpleader proceedings under the same section of the Ordinance. The Court there said—

> "The act of levy is therefore the foundation of the proceedings and formal proof thereof by the claimant after the summons has been issued is quite clearly unnecessary. It is, however, necessary that the claimant should, as to the first part of his claim, establish the identity of the goods claimed with those which the bailiff has seized, and, as to the second part of his claim, that the execution creditor has by his conduct rendered himself personally liable for the wrongful seizure of the claimant's goods".

The next paragraph of the judgment adverts to the difficulty of proving the identity of the goods and the execution creditor's liability without proving the act of levy, but the passage cited above is sufficient to shew that there is no inconsistency between that case and the decision in Lewis v. Kailan.

In the instant case the proof offered by the appellant fell far short of that tendered in Lewis's case. Nevertheless we are of opinion that, since the purpose of interpleader proceedings at the instance of the bailiff is to inform the conscience of the Court as to the rightful ownership of the articles seized, the learned Magistrate should have offered the appellant an adjournment upon terms to enable her to supply the deficiency in proof of the levy.

In considering the merits of the appellant's case the learned Magistrate held that there was no real attempt on her part to prove her claim except by the production of receipts for the purchase of the furniture, and that her answers under cross-examination were confused. But it appears to us that he did not properly direct himself on the onus of proof in this case where the fact of possession was all-important.

It has always to be remembered that, if the execution-debtor was in possession of the goods when they were seized by the

bailiff, the onus of proof lies on the claimant who, to succeed, must prove that the goods were in fact his goods: if, on the other hand, the claimant be in possession, the onus is on the execution-creditor, who, to succeed, must prove that the goods in fact belonged to the execution-debtor. This onus he can discharge by shewing that the goods seized belong to the judgment-debtor or that they were before seizure the property of the judgment-debtor and that he conveyed them to the claimant under suspicious circumstances in which case the onus reverts to the claimant. If the claimant is a near relative of the debtor, it may be easier to shew reasonable cause for suspicion.

In the instant case the appellant swore that she was the tenant of the house, lot 230 Middle Street, and produced rent receipts in support of this. It was not disputed that the furniture seized was in that house at the time of seizure. It was, therefore, ostensibly in the appellant's possession. She also produced receipts for the purchase of some, if not all, of the furniture. In cross-examination she gave some confused and contradictory answers as to having formerly lived with her mother (who was the judgment-debtor) in Robb Street and having left the furniture in her possession, and no attempt was made to explain these answers in re-examination. But, unsatisfactory as this may have been, we cannot find in the record any evidence or even suggestion that the appellant's mother was living at lot 230 Middle Street at the date of the seizure, or had ever owned the goods or had collusively transferred them to the appellant. There is, therefore, nothing in the record to shew that the respondent, as execution-creditor, succeeded in discharging the onus thrown upon him by the fact of possession at the date of seizure.

For these reasons the appeal is allowed and the judgment in favour of the respondent set aside: the matter is remitted to the Magistrate to re-hear and determine on such evidence as may be adduced before him. The costs of the first hearing before the Magistrate must abide the event of the re-hearing. As the appeal was partly occasioned by the insufficiency of proof of the levy adduced by the appellant before the Magistrate, each party will bear his own costs of the appeal.

We would add a word of warning to practitioners. It may be that the decision in Lewis v. Kailan has been misunderstood and they will be well advised to study carefully the judgment in Henderson v. Seernaithally, not only for guidance on the evidence required in interpleader actions but also for its very cogent general observations on the obligations of legal practitioners acting as solicitors.

Appeal Allowed.

C. HINDS *v.* B. ABLACK

CECIL HINDS, Appellant (Defendant),

v.

BABA ABLACK, Respondent (Plaintiff).

(1949. No. 574.—DEMERARA) .

BEFORE FULL COURT: WORLEY, C.J. and WARD, J.

1949. NOVEMBER 22, 23; DECEMBER 16.

Motor vehicles—Registered owner—Contract of sale by—Breach of Defence Regulations necessarily involved in—Purchaser not registered as owner—Negligence of driver of vehicle—Action against registered owner—Contrary to public policy—That a person should benefit by his own criminal act—Contract of sale not pleadable as a defence.

Motor vehicles—Person holds himself out to public—As owner and as accepting responsibility for negligence of driver—Cannot be heard to say—That by a private arrangement he had given up responsibility.

Motor vehicles—Use on public road without third-party insurance—Person permitting—Civil liability of—Motor Vehicles Insurance (*Third party Risks*) *Ordinance,* 1937 (*No.* 22), section 3.

On the 10th May 1947 the respondent suffered personal injury and damage to his donkey and cart as the result of a collision on the public road with hire car No. H4646, which was being negligently and carelessly driven by one Cobenah. At that time the appellant was the registered owner of the car. Judgment was given in favour of the appellant.

The appellant contended that although he was the registered owner, he was not in fact the owner on the 10th May, 1947, as he had on the 24th March, 1947 sold and delivered the car to one Eric Burrowes.

Included in such alleged sale were four new tyres. On the 26th February, 1947 the appellant obtained these new tyres by virtue of a delivery order obtained in pursuance of the Control of Distribution (Tyres and Tubes) Order, 1943, as amended by an Amendment Order of 1944. The Orders were made under the Defence Regulations and provided inter alia, that an applicant for a delivery order for new; tyres must state the purpose for which he required them and that "unless authorised in writing by the Controller of Supplies, any transfer of possession, or the use for any other purpose, of the said tyre or tube is an offence against the Defence Regulations, 1939." The Controller of Supplies never authorised the transfer of possession of the four new tyres to Eric Burrowes, and no application for the purpose was made to him.

Held (1) that the appellant had committed an offence against the Defence Regulations by effecting, without the authority of the Controller of Supplies, a sale of his car involving the transfer of the tyres fitted to the car as an essential part of the bargain;

(2) that it is contrary to public policy that anyone should be allowed to benefit by his own criminal act;

(3) that the appellant could not plead, as a defence to the respondent's claim, a contract which necessarily involved, a breach of the defence Regulations.

Where a person holds himself out to the public as the owner of a motor vehicle and the person accepting responsibility for the negligence of the driver, it would be most unjust to the public if he could be heard to say that, by some private arrangement between himself and another person of whom the public has no notice or knowledge, he had given up responsibility.

Venables v. *Smith* (1877) L.R. 2 Q.B.D. 279, 282, 283, *King* v. *London Improved Cab Co.* (1889) 23 Q.B.D. 281, 283, and *Steel* v. *Lester* and *Lilee* (1877) L.R. 3 C.P.D. 121, 127, followed and applied.

A breach of section 3 of the Motor Vehicles Insurance (Third-party Risks) Ordinance, 1937 (No. 22) creates a civil liability in favour of anyone of the class of persons whom the Ordinance is intended to protect, when such person is injured by reason of a breach of the statutory duty.

Monk v. Warbey (1935) 1 K.B. 75. and *McLeod* v. *Buchanan* (1940) 2 All E.R. (H.L.) 179, 186.

Appeal by the defendant from the decision of the Magistrate of the East Demerara Judicial District awarding $120 damages to the plaintiff Baba Ablack on a claim founded in negligence.

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

Jai Naraine Singh, for respondent.

Cur. adv. vult.

The judgment of the Court was as follows:

This is an appeal from a decision of the Magistrate of the East Demerara Judicial District in civil jurisdiction awarding the respondent $120 damages and costs on a claim founded in negligence. The facts which led up to the claim are not in dispute.

On 10th May 1947 the respondent suffered personal injury and damage to his donkey and cart as the result of a collision on the public road with hire car No. H 4646, which was being negligently and carelessly driven by one Cobenah. At that time the appellant was the registered owner of the car and the respondent first sued him alone alleging that Cobenah was the appellant's servant or agent.

The appellant in his defence admitted that he had been the owner of the motor-car up to the 24th March, 1947 but alleged that one Eric Burrowes became the lawful owner thereof on that date by purchase from the appellant; and he denied that Cobenah was or had been at any time his servant or agent.

Upon the filing of this defence leave was given to the respondent-plaintiff to join Burrowes as a defendant and the action having proceeded on that footing, judgment was eventually given for the plaintiff-respondent against both defendants for the sum above-stated. The defendant Burrowes has not appealed.

The grounds of appeal are, in substance, that the learned Magistrate was wrong in law in holding that the appellant was the legal owner of the motor car H 4646 at the date of the accident and, by virtue of the provisions of the Motor Vehicles & Road Traffic Ordinance 1940, could not disclaim the legal ownership and possession of the vehicle; and secondly, that the Magistrate was wrong both in law and in fact in holding that Cobenah was driving as the agent or servant of the appellant.

The further facts material to the consideration of these contentions are as follows: — On the 28th September, 1946 the car in question was registered as a private car in the appellant's name. At some time between that date and March 25th, 1947, the appellant arranged to sell the car to Burrowes for $900 and on the latter date received $500 as the final instalment of the purchase price. Burrowes intended to use the car as a hire car, which would necessitate both changing the licence under the Motor

Vehicles and Road Traffic Ordinance 1940 (No. 22 of 1940) as amended by the Motor Vehicles and Road Traffic (Amendment) Ordinance, 1946 (No. 21 of 1946) and, also, an alteration in the terms of and premium payable on the policy of insurance in force in relation to the user of the vehicle, in accordance with the provisions of the Motor Vehicles Insurance (Third-party Risks) Ordinance, 1937 (No. 22 of 1937).

It was also necessary to effect a transfer of the registration of the vehicle within the seven days limited by section 9 of the Motor Vehicles and Road Traffic Ordinance 1940; but there was at the time and to the full knowledge of both the appellant and Burrowes a statutory clog on such transfer. The appellant had on 26th February, 1947 obtained four new tyres for the car by virtue of a delivery order obtained in pursuance of the Control of Distribution (Tyres and Tubes) Order, 1943, as amended by the Control of Distribution (Tyres and Tubes) (Amendment) Order 1944. These Orders were made under the Defence Regulations and provided, inter alia, that an applicant for a delivery Order for new tyres must state the purpose for which he required them and that "unless authorised in writing by the Controller of Supplies, any transfer of possession, or the use for any other purpose, of the said tyre or tube is an offence against the Defence Regulations, 1939." Although, therefore, it remained theoretically possible for the appellant to apply for the transfer of the registration to Burrowes, it was practically useless and impossible to do so unless he first obtained the Controller's authorisation to transfer the tyres.

Neither appellant nor Burrowes attempted to obtain this authority; the car remained registered in the appellant's name and on 1st April was licensed as a hire car. On the same day, a new policy of insurance was effected appropriate to use of the car for "private hire". The evidence of Burrowes was that he paid the premium, but the proposal form was signed by the appellant and the receipt and policy were in his name. The policy covered the car when driven by either the policy holder or "any other person provided he is in the policy holder's employ and is driving on his order or with his permission."

Burrowes arranged with Cobenah to drive the car on the basis of the latter receiving one-third of the profits, the other two-thirds going to Burrowes. The appellant admitted that he knew and approved of Cobenah as the chauffeur. Burrowes swore that on one occasion the appellant had told him to warn Cobenah to drive carefully.

Conflicting evidence was given by appellant and Burrowes as to the real nature and terms of their bargain: the appellant swore that on March 25th he divested himself of the ownership of the car and that there was no agreement between them to rescind the sale and return the money in the event of the intended transfer being refused. Burrowes on the other hand swore that the arrangement was a provisional one and the purchase money was to be refunded if the Controller refused to issue his authorisation. The learned Magistrate did not find it necessary to express any opinion on this evidence as he took the view that the appellant

remained the legal owner of the car because of the definition of owner in the Motor Vehicles and Road Traffic Ordinance and because of the provisions of sections 5, 8, 9 & 11 of that Ordinance. He held that the appellant could not disclaim the legal ownership and possession of the vehicle as in so doing he would in effect be relying on his own breach of the Ordinance as a defence, and he added "Under the circumstances I held that despite the transaction of sale the car was being driven en the road by Cobenah as the agent of Hinds."

Counsel for the appellant contended that the learned Magistrate was wrong in his conclusion that the appellant was relying on the failure to effect a transfer of registration of the vehicle as relieving him of liability; he was in truth relying on the sale and delivery of the motor-car and, though the evidence might disclose a breach of an obligation under the Motor Vehicles and Road Traffic Ordinance, constituting an offence, yet such a breach would not avoid the transaction; the Ordinance clearly contemplates (e.g. in section 9 (1) and in section 20) a lawful change in the ownership separate and distinct from the registered ownership and there is, accordingly, no provision in the Motor Vehicles and Road Traffic Ordinance which would make Cobenah the agent of the appellant by operation of law. Counsel further contended that, even-though by the fact of registration the appellant might be deemed to have held himself out to the public as the person responsible for the vehicle, yet that is at most prima facie evidence of liability which can be met by shewing the truth of the matter (Smith v. Bailey 1891 2 Q.B. 403); and that the evidence in the instant case established clearly that the appellant had parted with the control of the vehicle, had no authority to direct or control Cobena and that the Magistrate's conclusion as to agency, if an inference of fact from the evidence, was unwarranted.

Mr. Stafford submitted that the true test of the appellant's liability was the relationship between him and the driver of the vehicle, and that this was unaffected by any statutory obligations or prohibitions unless the effect of the relevant statutes is to put the registered or legal owner of the vehicle under an absolute liability for damage caused by the negligence of the driver, irrespective of such relationship. He referred to the line of cases in which the Courts in England have held that, although the relationship between the proprietor and driver of cabs and carriages coming within the provisions of the Metropolitan Hackney Carriage Act, 1843, was that of bailor and bailee, yet that quoad third parties, the drivers were under the provisions of the Act deemed to be servants of the proprietors (see, for example, Smith v. General Motor Cab Co. Ltd. (1911) A.C. H.L. 188); but he contended that those cases rested upon the special provisions of that Act.

The appeal is from the decision and not from the reasons for decision and, whether or not the learned Magistrate's view of the law is correct, it is the function of this Court to apply to the facts of the case the law as we conceive it to be.

The questions therefore which we find it necessary to pose are firstly, whether there was in fact a completed sale of the motor

car and, secondly, whether the alleged contract of sale and delivery could be pleaded at all and whether it was not void ab initio as unlawful and contrary to public policy? On the first question we are of opinion that the evidence taken as a whole shows clearly that there was never a completed transaction, but only an arrangement, the final conclusion of which depended on the assent of the Controller to the proposed transfer. As to the second question it is our view that it is contrary to public policy that any one should be allowed to benefit by his own criminal act and the sale involving the transfer of the tyres fitted to the car as an essential part of the bargain, having been done without the authority of the Controller, constituted an offence against the Defence Regulations. The appellant therefore could not plead a contract which necessarily involved a breach of the Defence Regulations as a defence to the respondent's claim.

This view is really sufficient to dispose of the appeal but we also agree with the learned Magistrate (though on different grounds) that the car was being driven by Cobenah at the material time as the agent of the appellant.

In the case of hackney carriages in London it has been held that "The provisions of the Act of Parliament (sci. 6 & 7 Vict. c. 86) alter what would otherwise be the relation of the proprietor and the driver, and for the protection of the public produce the result that, as regards mischief done by the driver, who is selected by the proprietor, the relation of master and servant so far exists as to render the proprietor responsible for the acts of the driver" (per Cockburn C.J. in Venables v. Smith (1877) L.R, 2 Q.B.D. 279 at p. 282-3).

In King v. London Improved Cab Co. (1889) 23 Q.B.D. 281 at p. 283, Lord Esher M.R. said "Without going in detail through the sections of the Act (i.e. the same Act) it seems to me to be a necessary implication arising from them that the Act was made in favour of the public irrespective of the agreement that might subsist between the proprietor and the driver. I have come to the conclusion that by virtue of the Act the public are entitled whether as between the proprietor and the driver the relationship of master and servant exists or not, to say that so far as the public are concerned that relationship must be deemed to exist." And Lindley L.J. in concurring added:— "The regulations as to what has to be registered and accessible to the public seem to be based on the supposition that where a proprietor allows persons to drive his cabs in the public streets such persons so far as the public are concerned are to be deemed servants of the proprietor."

Steel v. Lester and Lilee (1877) L.R. 3 C.P.D. 121 was a case under the Merchant Shipping Act, 1875. The defendant Lester was registered as the "managing director" under the Act, but the ship was being navigated by Lilee. It was held that the agreement between the defendants did not amount to a demise of the vessel and whatever was the precise relationship thereby created between the defendants inter se, Lester was responsible to the public for the negligence of Lilee. Grove J. said (at p. 127) "Lester was registered as managing owner and therefore did not give up responsibility under this Act, and, as I think, his general re-

sponsibility to the public for the damage done by the ship. He might have done so....He by his own act remained managing owner, and therefore that was evidence on which the county court judge could reasonably conclude that he continued responsible to the public."

The underlying principle of these decisions appears to us to be applicable to the present appeal. It is clear that both the Motor Vehicles and Road Traffic Ordinance and the Motor Vehicles Insurance (Third Party Risks) Ordinance have been enacted for the protection of the public, the latter in particular being designed to protect the public against loss from mischief done by the negligent use of motor vehicles. The relevant provisions of these Ordinances are so well known that it is not necessary for us to go through them in detail. It is not disputed that everything that had to be registered or done for the information or protection of the public was done by the appellant or in his name with his knowledge and consent: he remained the registered owner of the car: the change of licence was either made by him or in his name with his permission: he signed the proposal form for the new insurance policy and was the policy holder. He expressly approved of Cobenah as the driver and, though he did not exercise any direct control over Cobenah, he knew of and permitted the use of the car as a hire car. He has, in these circumstances, held himself out to the public as the owner of the vehicle and the person accepting responsibility for the negligence of the driver and it would be most unjust to the public if he could be heard to say that he had given up responsibility by some private arrangement between himself and another person of whom the public has no notice or knowledge.

If, in truth, there was no relationship of master and servant between the appellant and Cobenah inter se, then the appellant, as insurer, would appear to have committed a breach of section 3 of the Motor Vehicles Insurance (Third Party Risks) Ordinance. It is well settled law that such a breach creates a civil liability in favour of any one of the class of persons whom the statute is intended to protect when such persons is injured by reason of a breach of the statutory duty: see Monk v. Warbey (1935) 1 K.B. 75 and the speech of Lord Wright in McLeod v. Buchanan (1940) 2 All E.R. (H.L.) 179 at p. 186. If the respondent had included an alternative claim for damages for breach of this statute it is difficult to see in the light of the defence filed what answer the appellant would have had. However, it is not necessary on the view we take to put the matter to the test.

For the reasons stated, this appeal is dismissed. There has been no appeal against the quantum of damages and the judgment of the Court below in favour of the respondent against the appellant is confirmed. The appellant must pay to the respondent his costs of the appeal.

Appeal dismissed.

Solicitor for appellant: *H.C.B. Humphrys.*

B.G. RESTAURANTS, LTD. *v.* COM. INCOME TAX

BRITISH GUIANA RESTAURANTS LIMITED,

Appellants,

v.

COMMISSIONERS OF INCOME TAX,

Respondents.

(1949. No. 293 —DEMERARA)

BEFORE WORLEY, C.J., IN CHAMBERS.

1949. OCTOBER 14; DECEMBER 24.

Income tax—Assessment—Appeal against—Condition precedent to—Income Tax Ordinance, Chapter 38, *sections* 44, 45.

A person who has not applied to the Commissioner under section 44 of the Income Tax Ordinance, Chapter 38, by notice of objection, to review and to revise the assessment made upon him has not the right to appeal under section 45 to a Judge in Chambers against the assessment.

APPEAL by British Guiana Restaurants Limited under section 45 of the Income Tax Ordinance (Chapter 38) against an assessment for income tax made upon the company by the Commissioners of Income Tax.

J. Carter, for appellant.

E. M. Duke, Solicitor-General, for the respondents, the Commissioners of Income Tax.

WORLEY, C.J.: The appellant company sought to appeal under section 45 of the Income Tax Ordinance (Chapter 38) against an assessment to tax notice of which was duly served on them in pursuance of section 44(1) of the Ordinance on April 20th, 1949. I upheld a preliminary objection by the respondents based on the appellant's failure to comply with the provisions of section 44 and dismissed the appeal with costs.

So far as the facts are concerned, the appellants admit having received the notice of assessment and having omitted, within the fifteen days prescribed by sub-section (3) of section 44, to make application for a revision of the assessment by notice of objection in writing, as prescribed by sub-section (2) of the same section. Counsel for the appellant company, speaking on his instructions, stated that after receipt of the notice of assessment, the Secretary of the Company had a series of interviews with two Deputy Commissioners in the Income Tax Office which lasted over fifteen days and that during those interviews the Secretary put the appellant's objections before these officials, but did not get a decisive answer from them until June 2nd.

On June 4th the Secretary accordingly wrote to the Commissioner as follows: —

> "Regarding our assessment for the year 1947, we desire to inform you that after the decision given by Mr. Stoll and Mr. Bourne during last week that they cannot find it possible to grant the expenses claimed, we are appealing against the assessment.
>
> We do not think you will regard this procedure as late as we on receipt of the assessment, immediately contacted Mr. Bourne who was giving it his attention and it was only on the 2nd inst. that they arrived at a final decision.
>
> We shall be very pleased if you could advise us when it will be convenient to hear the appeal as we will have to notify our legal adviser so that he will be able to attend".

On June 8th the Commissioner replied.

"Your letter of 4th June, 1949, stating that you are appealing

against Assessment 125D/48 which fell due for payment on 4th June, 1949, is out of order.

2. Under Section 44 (3) of the Income Tax Ordinance, Chapter 38. applications shall state precisely the grounds of objection to an assessment and shall be made within fifteen days from the date of the service of the Notice of Assessment.

3. Your agent spoke to the Inspector of Taxes, Mr. Bourne, about the assessment early in May and was informed that the cost of structural improvements and alterations to the property was of a capital nature and that no allowance could be made.

4. The tax assessed, $650.10, should be paid immediately, failing which an additional 5% will be added'.

On June 23rd, the appellants lodged a notice of appeal "against the decision given on the 8th day of June 1949 by the Commissioners confirming assessment."

The learned Solicitor-General who appeared for the respondents pointed out that, by virtue of the provisions of section 3 of the Income Tax Ordinance, as amended by the Income Tax (Commissioners' Functions) Ordinance 1931, the statutory power to review and revise an assessment under section 44 of the Ordinance could, in Georgetown where there are three Commissioners, only be exercised by two of them acting together. In other words, that although the assessment may be made by one Commissioner, if it is disputed by notice of objection in writing it can only be reviewed and revised by a special statutory tribunal consisting of two Commissioners. For this and other reasons the Commissioners wish to discourage persons from seeking informal interviews with members of their staff and to insist on strict compliance with the statutory provisions for lodging objections.

It was clear that the appellant company had not complied with the prescribed procedure. No notice of objection or application to review was made in writing within the fifteen days prescribed by subsection (3) of section 44 nor was any application made for an extension of the period for filing such notice or application. Consequently, the provisions of subsections (4) and (5), under which the Commissioner (in this case the special tribunal of two Commissioners) may inquire further and agree on a revised assessment with the objector never came into operation. The appellant company therefore is not qualified to appeal under section 45 in that, although it is aggrieved by the assessment, it is not "a person who has failed to agree with the Commissioner in the manner provided in sub section 5" of section 44.

The Full Court of this Colony has held, in more than one case, that where a right of appeal is conferred by statute, it is incumbent on a would be appellant to comply strictly with the statutory procedure prescribed for bringing an appeal. In the instant case there was a total failure to comply. It may be, that, as was urged in behalf of the appellant company, it is common practice for taxpayers to make informal representations instead of lodging a formal objection to the assessment. But it is well for them to understand clearly that if they do not get satisfaction in this way, and later wish to appeal they may find themselves out of Court unless they have safeguarded their position by lodging a written notice within the prescribed time.

Appeal dismissed.

Solicitors: *H. B. Fraser; V. C. Dias.*

GASSIT *v.* J. E. D. RAMDEHOLL

GASSIT, Appellant (Defendant),

v.

J. E. D. RAMDEHOLL, Respondent (Plaintiff).

[1948. No. 661—DEMERARA.]

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

MANNING, J. (ACTING) .

1949. JANUARY 4, 29.

Landlord and tenant—Tenancy from year to year—Notice to quit—Breach of condition in tenancy agreement—Determination of tenancy by landlord's action for possession —Waiver of breach of condition by receipt of rent with knowledge of breach.

The appellant was a tenant of the respondent. The tenancy was one from year to year commencing on the 1st July of one year and ending on the 30th June of the next succeeding year. On the 25th June, 1947, the respondent served on the appellant a notice to quit expiring on the 1st January, 1948.

Held: (1) That the notice purported to terminate the tenancy half-way through the year of the tenancy, and was therefore bad.

Demerara Company Limited v. Sadaloo
(1938) L.R.B.G. 129, applied.

(2) There is a final determination of a tenancy under a lease when the lessor, by some final and positive act which cannot be retracted, treats a breach of covenant by the lessee as constituting a forfeiture. The bringing of an action claiming possession is such a final and positive act.

Except where limited by particulars, an action by a landlord for the recovery of possession of land from his tenant is considered to be brought in respect of the landlord's right to re-enter for any previous breach of covenant which could be proved, and the bringing of the action is an act which asserts the right of possession upon every ground that may turn out to be available to the landlord.

Serjeant v. Nash, Field & Co. (1903)
2 K.B. 304, 311.

(3) Where a forfeiture has been incurred by the breach of any covenant or condition and the lessor, knowing that such forfeiture has been incurred, does any act whereby he acknowledges the continuance of the tenancy at a later period, he thereby waives such forfeiture.

The acceptance of rent accruing due after a forfeiture operates, as a matter of law, to waive all forfeitures then known to the lessor.

Appeal by the defendant from an order of the Magistrate of the West Demerara Judicial District ordering him to give up possession to the plaintiff of an area of land about twelve acres in extent.

A. M. Edun, for the appellant.

P. A. Cummings, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows:—

This is an appeal against an order of the Magistrate of the West Demerara Judicial District ordering the appellant (defendant in the Court below) to give up possession to the respondent on the 1st November 1948 of an area of land about 12 acres in extent.

On 27th June 1942 the appellant by a simple contract in writing, not under seal, agreed to "lease and occupy" the land in question from the respondent as owner, at a rental of $40 a year. Appellant took possession under the agreement on 1st July 1942. The learned Magistrate held that the contract in writing created a term of five years but his attention had not been drawn to the provisions of section 6, sub-sections (1) and (3) and section 4 of the Landlord and Tenant Ordinance 1947 (Ordinance No. 26 of 1947). On the appeal counsel agreed that the tenancy was one from year to year reckoning from the 1st of July to the 30th June of every year.

The appellant intended to and did use the land for pasturing cattle and the agreement contained the following conditions relevant thereto: —

4. "To maintain and keep in order the said fence to the satisfaction of the ranger of the estate at my expense."
5. "To refrain from trampling the middle walk dam by the regular use of the same dam with my cattle to and fro."
6. "To keep the said cattle within the enclosure provided for same and not to be seen grazing in other tenants' Rice Field or Beds."
7. "That in the event of a breach of the conditions No. 4, 5 and 6 to accept a notice to quit and give up possession of the said lot of land within 6 months from that date."

On 25th June 1947 the respondent served on the appellant a notice to quit expiring on the 1st January, 1948, and gave in the notice the reason that he had decided to put the land under cultivation. The appellant did not comply with the notice and, on the 6th August 1948, the respondent brought his action, alleging that the tenancy had been determined by the notice on the 1st January 1948 and claiming possession, mesne profits and costs.

The only ground of appeal which it is necessary to consider is that the Magistrate's order was erroneous in point of law in that the notice was bad, the alleged defect being that it purported to terminate the agreement half-way through the current year. (Demerara Company Ltd. v. Sadaloo 1938 B.G. L.R. 129).

Counsel for the respondent admitted that the notice was bad if it rested solely upon the intention of the landlord to put an end to the tenancy and. resume possession. But he contended that on the trial of an action for possession, the landlord is entitled to rely upon any and every cause of action available to him and that since, at the trial, evidence had been given of breaches of conditions 4 and 6 of the agreement, he could justify the notice under condition 7.

This argument is based on sound principle. In Serjeant v. Nash, Field & Co. 1903 (2 K.B., 304) in the Court of Appeal, Collins M.R. said (at p. 310 & 311):

> "There is a final determination of a tenancy under a lease when the lessor, by some final and positive act which cannot be re-

> tracted, treats a breach of covenant by the lessee as constituting a forfeiture."

The learned judge goes on to express the opinion that the bringing of an action claiming possession was such a final and positive act and then adds:—

> "The point was decided by authority in the year 1872 in the case of Grimwood v. Moss in an important judgment by the late Willes J. The learned judge pointed out that the action was one to try the right of possession only, and that under the Common Law Procedure Act it was considered that, having regard to difficulties as to title that might arise, it was better not to provide for any statement of title which, by reason of its specific character, might endanger the right of a person entitled to recover; that the defendant could apply for particulars, but until he did so the action was at large, and was considered as brought in respect of the landlord's right to re-enter for any previous breach of covenant which could be proved. Under the modern practice, up to the issue of the statement of claim the position of the parties is the same as that indicated by the learned judge. The learned judge added, with reference to the case of Jones v. Carter; 'I entirely agree that the true principle upon which that decision was founded was, that the bringing of the action of ejectment is equivalent to the ancient entry. It is an act unequivocal in the sense that it asserts the right of possession upon every ground that may turn out to be available to the party claiming to re-enter…….It is quite clear if the landlord, instead of bringing ejectment, had entered, he could have justified in an action of trespass by reference to any act of forfeiture which he could prove."

For the purposes of this appeal the material question is whether any breaches of covenant or conditions were proved and were available to the respondent. The first point for consideration is that the Statement of Claim did not plead any alleged breach and no amendment was made or applied for. This omission might have been remedied and what is more material therefore is the question whether the breaches, even if pleaded and proved, were available to the respondent.

The learned Magistrate found as a fact that during the existence of the agreement the appellant allowed his cattle to stray and was condemned in damages in Court on more than one occasion. This finding was based on the evidence of the respondent's manager who said "His cattle have been a nuisance and there has been litigation between him and other tenants in the estate. He has to my knowledge had several cases in this Court for damages with respect to his cattle." The plaintiff's ranger also swore "To my knowledge his cattle have been impounded for trespassing and doing damage to other tenants. I have spoken to him on several occasions on the matter."

There is no indication in this evidence as to when these alleged breaches of the conditions occurred. The respondent's evidence was that the last rent he received from the appellant was received on 13th November 1947 in respect of the half-year ending on 31st December 1947. It is trite law that, where a forfeiture has been incurred by the breach of any covenant or condition and the lessor, knowing that such forfeiture has been incurred, does any act whereby he acknowledges the continuance of the tenancy at a

later period, he thereby waives such forfeiture. The acceptance of rent accruing due after a forfeiture operates, as a matter of law, to waive all forfeitures then known to the lessor (see Woodfall's law of Landlord and Tenant 23rd Ed. 406 and the cases there cited).

It follows that the respondent could not avail himself of the breaches occurring prior to 13th November 1947 of which he had knowledge and he signally failed to prove that any of the alleged, breaches were either subsequent to that date or, having occurred prior to that date were unknown to him when he received the rent. The attempt to rest the notice upon condition 7 of the agreement therefore fails.

The appeal is allowed with costs and the order for possession set aside.

Appeal allowed

E. A. GUNRAJ *v.* SUN FLOWER F. SOCIETY

ERNEST ADOLPHUS GUNRAJ,

Appellant,

v.

SUN FLOWER FRIENDLY SOCIETY,

Respondent.

(1949. No. 607 — DEMERARA)

BEFORE WORLEY, C.J. IN CHAMBERS

1949. NOVEMBER 14; DECEMBER 31

Rent restriction—Commercial building—mainly used for business purposes—Meaning of "business purposes"—Rent Restriction (*Amendment*) *Ordinance,* 1947 (*No.* 13), *section* 2 (c).

On the application of the respondent made under section 4B (1) of the Rent Restriction Ordinance, 1941, as enacted by section 5 (1) of Ordinance No. 13 of 1947, the Rent Assessor issued a certificate as to the standard rent, and the maximum rent, of premises occupied by the respondent as a statutory tenant of the appellant. The Rent Assessor decided that the premises were "mainly used for business purposes" and were a "commercial building" within the meaning of the definition in section 2 (c) of the Rent Restriction (Amendment) Ordinance, 1947 (No. 13); and that they were premises to which the Rent Restriction Ordinance, 1941, applies.

There was no evidence that the respondent society has its office and conducts its business, as specified in section 3 (a) of the Friendly Societies Ordinance (Chapter 214), on the premises.

The only evidence as to the use to which the premises are put was that the respondent society and three other societies of a similar nature share the premises for meetings and dances and that from time to time other societies, who wish to give dances, hire the premises from the respondent.

Held (1) that there was no evidence on which the Rent Assessor could reasonably find that the premises were being "mainly used for business purposes".

(2) that the evidence given before the Rent Assessor did not established that the premises were a "commercial building" within the meaning of the definition in section 2 (c) of the Rent Restriction (Amendment) Ordinance, 1947 (No. 13).

(3) that it was not established that the premises were premises to which the Rent Restriction Ordinance, 1941, applies, and that therefore the Rent Assessor's certificate must be set aside as having been made and. given without jurisdiction.

Semble that if there were any evidence that Sun Flower Friendly Society had its office and conducted its business (as defined in section. 3 (a) of the Friendly Societies Ordinance, Chapter 214) on the premises, this would be a business purpose within the meaning of the definition of "commercial building" in section 2 (c) of the Rent Restriction (Amendment) Ordinance, 1947 (No. 13).

APPEAL by the landlord Ernest Adolphus Gunraj from the decision of the Rent Assessor given on the application of Sun Flower Friendly Society, the tenant, made under section 4B (1) of the Rent Restriction Ordinance, 1941, as enacted by section 5 (1) of Ordinance No. 13 of 1947 to have the standard rent of premises occupied by the tenant ascertained and certified, and the maximum rent of the premises assessed fixed and certified.

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

H. A. Bruton, solicitor, for respondent.

Cur. adv. vult.

WORLEY, C.J.: This is an appeal brought by a landlord (respondent in the Court below) from a certificate issued by the Rent Assessor Georgetown in consequence of an application made in March, 1949 by the respondent society under the provisions of subsection (1) of section 4B of the Rent Restriction Ordinance 1941, as amended by Section 5 of the Rent Restriction (Amendment) Ordinance, 1947 (No. 13 of 1947). The tenant occupies the first floor or upper flat of a two-storey building known as Lot 43, Robb and Light Streets, Georgetown, of which the appellant is the owner. The ground floor is used as a shop and dwelling-house: the upper floor comprises one large room, known as the Frolic Hall, which is used for meetings of Societies, dances and other entertainments. After hearing evidence and argument, the Rent Assessor certified the standard rent at $14.00 a month, and assessed increases under section 6 (1) (b) and section 6 (1) (c) at $5.54 and $3.50 a month respectively, giving a maximum monthly rental of $23.04.

There are several grounds of appeal but in this judgment I am only considering the first ground, namely that the premises are not premises to which the Ordinance applies. Mr. Bruton Solicitor for the respondent Society conceded that this must depend upon whether the upper flat of the house is a "commercial building" within the definition in Section 2 of the Rent Restriction Ordinance 1941, as amended by Section 2(c) of the amending Ordinance of 1947, that is to say, whether it is a part of a building separately let, or a room separately let, which is used mainly for business purposes: he conceded that it was not being used for trade or professional purposes.

The facts relevant to this issue are that the respondent Society is a friendly Society registered under the provisions of the Friendly Societies Ordinance Chapter 214. On January 5th, 1944. the Society by its trustees and secretary made a written agreement with the previous owners of lot 43 Robb Street to lease the upper flat at a rental of $50 a month for a period of two years from the 15th January 1944 with a right of renewal for a further two years "for the purpose of keeping meetings and entertainment of any kind". The appellant bought the premises in April 1945 and the respondents attorned tenants to him. On 9th January, 1946 the Society exercised its right of renewal; at some subsequent time which does not appear on the record the appellant gave notice to quit but the Society remained in possession after the expiration of the further period of two years and claim to be statutory tenants.

The only evidence as to the use to which the premises are being put was that of the Secretary of the respondent Society who said

"Three other Societies share the premises. All pay $6.50 each per month. They are entitled to use the building for one evening per week and the use of furniture and lights. Applicants rent out the Hall for dances at $16 per night to 2.00 a.m. up to January. From February to date the price is $18.00. Sometimes there are two dances per month usually on Fridays. This is apart from dances the other Societies give who do not pay the applicants for their dances".

If the Legislature had not itself defined the term "commercial building" there would, I think, have been no difficulty in construing the meaning of that expression. "Commerce" in everyday language means the ordinary transactions of merchants and traders carried on with a view to profit, and the expression "commercial building" would be construed to mean premises in which commerce is conducted. Trade purposes clearly come within the same category and imply transactions carried on with a view to profit. But there is good authority for the view that what may be called "the profit motive" is not a necessary adjunct to business or professional purposes.

In Doe & Wetherell v. Bird (1834) 2 Ad. & El. 161 at p. 165 Lord Denham said "Every trade is a business but every business is not a trade: to answer that description it must be conducted by buying and selling". See also Rolls v. Miller (1883) 25 Ch. D. 206 and (1884) 27 Ch. D.71, in which it was held that it was not essential that there should be payment or the hope of profit to constitute a business. So likewise, a man may use a place for professional purposes without the incentive of profit as in the case of an honorary consultant physician to a public dispensary or hospital, which was the illustration given by Jessel M.R. in Portman v. Home Hospital Association 1879, reported in L.R. 27 Ch.D. at p. 81.

Where a legislature has intended to limit the meaning of the expression business to businesses carried on for profit it has often done so by the introduction of appropriate words: see for example the Companies Act, 1862 Section 4 (reproduced in the Companies Consolidation Ordinance Section 2 (2) Chapter 178) and the Customs and Inland Revenue Act 1878 Section 13.

In the absence of any such limitation, I think that the Legislature must be taken to have used the term "business" in the sense in which it has been judicially interpreted on more than one occasion (see Webb v. Outrim (P.C.) 1907 A.C. 81 at p. 89).

The objects of a friendly Society as prescribed by Section 3(a) of the Friendly Societies Ordinance Chapter 214 are to provide by subscription of the members or by donations, for relief and maintenance during sickness, old age, widowhood and infancy: for life insurance and death benefits: relief in times of unemployment or distress, endowment insurance and annuities and so on.

These purposes constitute the business of the Society and, if there were any evidence that the Society has its office and conducts its business on the premises I should be prepared to hold that this was a business purpose within the meaning of the definition.

But the only evidence is that the respondent Society and three other Societies of a similar nature share the Hall for meetings and dances and that from time to time other Societies, who wish to give dances, hire the Hall from the appellants. These functions may assist the finances and provide an attractive method of retaining and recruiting members, but they are essentially social functions and are not part of the business of the Society, as I understand the Legislature to have used that expression. In my view, therefore, there was no evidence on which the learned

assessor could reasonably find that the premises were being "mainly used for business purposes".

I should further observe that even if it were shewn that the business of the Society was being conducted in the premises, the question would arise whether such user would be within the terms of the covenant of the lease, by which the respondents as statutory tenants are still bound.

Where the terms of the tenancy provide for or contemplate the use of the premises for some particular purpose, that purpose is the essential factor, not the nature of the premises or the actual use made of them. (See Epsom Grand Stand Association, Ltd. v. Clarke 1919 35 T.L.R. 525 at P. 526: and Barrett v. Hardy Brothers (Alnwick) Ltd. 1925 2 K.B. 220 at p. 227). The respondents are bound by their agreement to use the Hall only "for the purpose of keeping meetings and entertainment of any kind." To my mind this covenant contemplates social and cultural activities which may be admirable in themselves but are not the business of a friendly Society as I understand it. Doubtless the respondent Society does from time to time hold business meetings and, though there is no evidence of this, probably holds them in these premises. But an occasional meeting of this nature would not justify a finding that the premises are used mainly for business purposes. Such evidence as there is shows it is used mostly for dances.

For these reasons I hold that the appeal succeeds and set aside the Assessor's certificate as having been made and given without Jurisdiction.

Appeal allowed.

FURMAN & CO. LTD. *v.* L. RAFFERTY, S. GOUVEIA A. & S. MAJID AND R. STONE

FURMAN & COMPANY, LTD.
Appellants,

v.

LEONARD RAFFERTY, SHEILA GOUVEIA, A. & S. MAJID, and ROSE STONE,
Respondents.

(1949. Nos. 541, 542, 543, 544 and 592—DEMERARA).

BEFORE WORLEY, C.J., IN CHAMBERS:

1949. November 11, 29 and 30; December 31.

Rent restriction—Decision of Rent Assessor—Appeal from—Power of Judge on appeal—Rent Restriction Ordinance, 1941 (*No.* 13), *section* 4*E* (5); *Ordinance No.* 13 *of* 1947, *section* 5 (1).

Rent restriction—Premises erected after 8th March 1941*—Discretion of Rent Assessor to ascertain and certify standard rent at a lesser amount than the rent at which the premises were first let—Principles for exercise of discretion—Rent Restriction Ordinance,* 1941 *No.* 13) *section* 4*B* (1A); *Ordinance No.* 30 *of* 1948, *section* 4.

Under paragraph (a) and (b) of subsection (5) of section 4E of the Rent Restriction Ordinance, 1941 (No. 13), as enacted by section 5 (1) of Ordinance No. 13 of 1947, the Judge hearing an appeal from the decision of the Rent Assessor may himself hear any further evidence that the parties wish to adduce, but he is not empowered to remit the matter to the Assessor merely for the purpose of taking further evidence, as if he were taking evidence on commission. If the matter is remitted, the Assessor is required to make a fresh investigation into the facts, though subject to any direction of law the Judge may give.

The discretion conferred by subsection (1A) of section 4B of the Rent Restriction Ordinance, 1941, as enacted by section 4B of the Rent Restriction (Amendment) Ordinance, 1948 (No. 30) must be exercised judicially and not arbitrarily. It does not confer on the Assessor a "roving commission" to re-open a tenancy contract and he must find the agreed rent is unfair before he is justified in certifying the standard rent at a lesser amount. How far is he entitled to interfere with a bargain freely made between landlord and tenant? The answer is to be found in the general purpose of the Ordinance, that landlords should not take advantage of the prevailing shortage of accommodation to demand excessive rentals. In order to give effect to this purpose, and since the prevailing shortage does to some extent limit the freedom of the tenant to contract, the Rent Assessor is entitled to have regard, *inter alia,* to the factor of the net percentage of profit or annual return on the landlord's capital investment. If this appears unduly high on a comparison with other investments of a like character and with general interest rates in the Colony, the agreed rental may be considered unfair and reduced accordingly. Vice *versa,* the fairness of the reduced certified standard rent, which may have been determined wholly or partly by other factors, such as rents prevailing in the locality, may be measured by the same test.

APPEALS by Furman & Company, Ltd., against certificates of standard rent and maximum rent given by the Rent Assessor in consequence of applications made by the company's tenants Leonard Rafferty, Sheila Gouveia, A. & S. Majid and Rose Stone, under section 4B of the Rent Restriction Ordinance, 1941, as

enacted by section 5 (1) of Ordinance No. 13 of 1947, and as amended by section 4 of Ordinance No. 30 of 1948.

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

H. A. Bruton, solicitor, for respondents Leonard Rafferty, A. & S. Majid, and Rose Stone.

A. G. King, solicitor, for respondent Sheila Gouveia.

Cur. adv. vult.

WORLEY, C.J.: These five appeals which relate to the same premises were heard together by consent. No. 541 the appeal of the tenant Leonard Rafferty was abandoned leaving four appeals by the landlord against certificates of standard rent and maximum rent given by the Rent Assessor, Georgetown, in consequence of applications made by the tenants under Section 4B of the Rent Restriction Ordinance 1941, as amended by section 5 of the Rent Restriction (Amendment) Ordinance 1947 (No. 13 of 1947). The premises in question are situated at the south-east corner of Camp and Charlotte Streets; each of the respondents Majid, Rafferty and Gouveia occupies a shop facing Charlotte Street. Mrs. Stone occupies an upper flat at the corner which she uses as a boarding house. All the premises concerned are therefore "commercial buildings" within the meaning of the Ordinance.

The Rent Assessor found on the evidence adduced and inspection of the premises that the portions occupied by the respondents, Rafferty, Gouveia and Majid respectively, have been so substantially reconstructed that they can fairly be treated as "new premises" within the meaning of the Ordinance, i.e. as having been erected after 8th March, 1941. The relevant certificates were therefore issued in pursuance of sub-sections (1A) and (IB) of Section 4B of the principal Ordinance as further amended by section 4 of the Rent Restriction (Amendment) Ordinance 1948 (No. 30 of 1948).

With respect to the portion occupied by the respondent Stone, namely, the upper flat of the corner building, the Rent Assessor rejected the appellants' contention that this had been so completely remodelled or reconstructed that it should also be treated as a new building; but found there had been extensive repairs: he therefore dealt with the application as one under sub-section (1) of section 4B and issued a certificate accordingly. I have been invited on appeal to reverse this finding and for that purpose heard further evidence on this point, but, in the result, I am persuaded that the learned Assessor's finding was correct.

Before leaving this point, I think it well to put on record my construction of paragraphs (a) and (b) of sub-section (5) of section 4E of the Principal Ordinance, enacted by section 5 of the Amending Ordinance of 1947, which prescribe the powers of the Judge on appeal. As I read these two paragraphs, the Judge may himself hear any further evidence that the parties may wish to adduce, but he is not empowered to remit the matter to the Assessor merely for the purpose of taking further evidence, as if he were taking evidence on commission. If the matter is remitted the

Assessor is required to make a fresh investigation into the facts, though subject to any direction of law the Judge may give. This appears to me to mean that the whole matter can be re-opened and the findings of the Assessor thereon questioned by a fresh appeal.

The application of sub-sections (1A) and (1B) to the premises occupied by the respondents, Majid, Rafferty and Gouveia meant that the Rent Assessor could, having regard to all the circumstances, ascertain and certify the standard rent at a lesser amount, but not at a greater amount, than the rent at which the premises were first let.

These rents were respectively $50, $35 and $65 a month. Prior to the coming into force of the Amending Ordinance No. 30 of 1948 these rents were or would have been the standard rents of those premises. The Rent Assessor exercising his jurisdiction under this Ordinance certified the standard rents at $35, $20 and $28 respectively: he assessed increases under section 6 (1) (b) of the Principal Ordinance of $4.10. $2.87 and $5.34 and therefore certified the maximum rents at $39.10, $22.87 and $33.34 respectively.

In the case of Mrs. Stone, the Assessor found as a fact that the standard rent was $20 per month being the rent at which her flat was let in 1938 and assessed increases under section 6 (1) (a) (b) and (c) totalling $20.85 making a maximum rent of $40.85. I heard further evidence on the question of the standard rent of this flat and am satisfied that the Assessor's finding thereon was correct.

The question of law which arose upon the appeal was as to the manner in which the Rent Assessor should exercise the discretion vested in him by subsection (1A) of Section 4B. Mr. Stafford contended that the history of the relevant legislation and the principles upon which such legislation is based shew that this discretion is an extraordinary power intended to be used in favour of a tenant only when some special circumstance warranting its use is shewn to exist. The respondents contended that the words of the sub-section contain no such limitation on the discretionary power.

Mr. Stafford developed his argument by means of a careful and lucid exposition of the gradual development of the Rent Restriction legislation since 1941 but I shall attempt to condense and summarize it as follows. Immediately prior to the coming into force of the Amending Ordinance No. 30 of 1948 a "new building" (i.e. premises in the course of erection on or erected subsequently to the 8th March 1941) was controlled by ascertaining its "standard rent" which was defined as the rent at which it was first let. It may be assumed that in framing the definition of standard rent, the Legislature intended to accept as reasonable and fair to the tenant a rental fixed by consensual agreement at a time and in circumstances which gave full play to the normal bargaining factors in this matter, such as the supply of and demand for accommodation, the landlord's charges in respect of capital and

recurrent expenditure and the tenant's view of the value to him of the particular tenement in conjunction with his ability to pay. As regards buildings in existence on 3rd September 1939 and brought under the control of the 1941 Ordinance, that date may be taken as the last date on which these factors functioned normally. But as regards buildings subsequently erected and let at an agreed contractual rental, it must be inferred that the Legislature, by defining such rental as the standard rent, assumed that these factors would still operate fairly and that the parties, in making their bargain, would be influenced by the prevailing state of the market by the landlord's necessary expenditure (both of which might be abnormal), by the tenant's ability to pay and, in the case of business premises, the expectation of the amount of business.

Granted these assumptions, then the extraordinary power introduced by sub-section (1A) is not to be used merely to make for the tenant a better bargain than he could make for himself but should only be used when the tenant can shew circumstances from which the Assessor can reasonably find that there is something extraordinary, unconscionable or oppressive in the bargain made of which the landlord ought not to be allowed to take advantage.

I find myself in agreement with this argument to a certain extent. The discretion conferred by the section must be exercised judicially and not arbitrarily. It does not confer on the Assessor a "roving commission" to re-open a contract and I would agree that he must find the agreed rent is unfair before he is justified in certifying the standard rent at a lesser amount. But what is to be understood by unfair? If there has been fraud, mistake or coercion the Assessor's task may be easy; but where, as in the instant case, none of these are shewn to exist, how far is he entitled to interfere with a bargain freely made between landlord and tenant?

I think the answer is to be found in the general purpose of the Ordinance, which I take to be that landlords should not take advantage of the prevailing shortage of accommodation to demand excessive rentals. In order, to give effect to that purpose, and since the prevailing shortage does to some extent limit the freedom of the tenant to contract, the Assessor is entitled to have regard, *inter alia,* to the factor of the nett percentage of profit or annual return on the landlord's capital investment. If this appears unduly high on a comparison with other investments of a like character and with general interest rates in the Colony, the agreed rental may be considered unfair and reduced accordingly. Vice versa, the fairness of the reduced certified standard rent, which may have been determined wholly or partly by other factors, such as rents prevailing in the locality, may be measured by the same test.

Further evidence material to these considerations was led before me. Mr. Royer, a certified accountant and auditor to the appellant company produced balance sheets which shewed the appellants' capital investment in these premises at $24,630.37,

made up of $16,061.18 purchase price and expenses of transport and $8,569.19 capitalised expenditure on re-building. Mr. Edghill a director of the appellant company deposed that the rentals of the premises were planned to produce a gross return of about 14%. He valued the land, apart from the buildings, at $6,000. The whole property is subject to a mortgage, now standing at $12,000 at 6%. Under cross-examination he stated that he considered 5% nett would be a fair return on a capital investment of this nature but later amended this to 8%.

Figures submitted on behalf of the appellants shewed that on the basis of the agreed rentals the annual return would be $3,756 giving a gross return of 15.24% on the capital investment of $24,630. The Assessor's certified maximum rents, totalling $2,791.32 (inclusive of the appellants occupancy of the corner shop assessed at $45 per month and Mr. Furman's tenancy of two upper flats at $50.00 per month), would give a gross return of 11.33%, But from this revenue of $2,791.32 the appellants claim to deduct: —

Municipal taxes at 17% on $2,100.00	$ 357.00
Municipal rates at 10.5% on $2,100.00	220.50
Fire Insurance premium at 11/2% of $20,000...	300.00
Depreciation 5% on $20,000	1,000.00
Total	$1,377.50

This leaves a nett revenue of $913.82, giving a nett return of 3.7% on the capital. On the footing of these deductions the agreed rentals would yield a nett return of approximately 6%.

Mr. Edghill was closely cross-examined on these figures and admitted that in the deduction for fire-insurance he had made no allowance for return of profits by the insurance company. He would not admit that this might be more than 50%, but, accepting that figure, the item of $300 should be halved. That would give a nett return of slightly over 4%.

He also agreed that 5% per annum for depreciation was a generous allowance and that, if $6,000 is the value of the site the value of the buildings should be taken at $18,630. He agreed that formerly the percentage allowed for depreciation by the Income Tax Commissioners was 3% but did not accept this as a fair rate. If, as a compromise, I allow 4% on $18,630 there is a reduction to $745 per annum, by which the nett return is increased to 5%. On the evidence before me that would appear to be a fair rate of interest on a capital investment of this nature.

I would add that there is an atmosphere of unreality about these figures as the potential site value of this corner lot has increased and Mr. Edghill estimates that if he were selling now for a quick profit he would expect to get $38,000. But it is admitted that house and shop property in Georgetown is changing hands today at prices which bear no relation, or little relation, to foreseeable profits on the capital investment. This is a factor which can be left out of account in the present case, but might be material in a case where aft inflated price had been paid for the property. The appellants have also adduced evidence that they have

been offered as much as $120 per month for the corner shop which they themselves occupy. This shews that the site is valuable and perhaps increasing in value; but if the Assessor assessed rentals upon the basis of what the highest bidder was willing to pay, he would largely defeat the purpose of the Ordinance as I conceive it to be.

I conclude therefore that the total of the assessed rentals will give the appellants a fair return on their investment. The only other question is whether the individual rentals have been fairly assessed. On a comparison of the floor space which they respectively occupy there seem to be inequalities: the figures being: —

Majid	717	sq. ft.	=	5.450 c a	sq. ft.
Rafferty	306	sq. ft.	=	7,474 c a	sq. ft.
Gouveia	672	sq. ft.	=	4,961 c a	sq. ft.

Mrs. Gouveia's premises being nearest Camp Street are presumably the best site for business and prima facie the most valuable. But the Assessor visited the premises, and may have been influenced by factors which are not apparent upon the record. I do not think I should be justified in interfering with these assessments.

With regard to Mrs. Stone's premises, the Assessor has allowed the maximum permissible increases on the standard rent.

For these reasons, I dismiss the appeals and confirm the certificates.

Appeals dismissed.

Solicitor for appellant: *H. C. B Humphrys*

AMIN SANKAR and AHMAD SANKAR,
Appellants (Defendants),

v.

G. D. RAMPAT, District Commissioner,
Respondent (Complainant).

[1948. No. 647.—DEMERARA.]

BEFORE FULL COURT: WORLEY, C.J.,JACKSON, J. (ACTING), MANNING, J. (ACTING) .

1949. JANUARY 3, 4, 29.

Weights and Measures Ordinance, Cap. 263 *Section* 13 (3)—*Charge for possessing unjust weighing machine—Goods exposed or kept for sale on premises—Lawful entry on premises for examination of scale under section* 13 (1).

Appeal from a decision of the Magistrate, Essequibo Judicial District convicting the appellants for being in possession of an unjust weighing machine contrary to section 13 subsection 3, Cap. 263 the Weights and Measures Ordinance. The respondent entered the appellants' rice factory and examined a weighing machine and found it unjust. It was contended that his entry was authorised by virtue of Section 13, sub-section 1.

Held: Before a person may be convicted of possessing an unjust weight or unjust weighing machine there must be a lawful entry under sub-section 1. The entry is lawful only when the place entered is one wherein goods are exposed for sale or are weighed for conveyance or carriage.

Decision of Magistrate reversed.

Decision of Arindell C.J. in Whyte v. Brummell, Review Court Cases (1859) Vol. I p. 38 followed.

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

A. C. Brazao, Acting Solicitor-General, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows:

On the 15th April, 1948, the respondent entered the rice factory of the appellant at Affiance in Essequibo and on an examination of a certain weighing machine found it to be unjust. He took proceedings against the appellants in a Magistrate's Court and after he had closed his case the solicitor for the appellants submitted that there was no case to answer as it had not been proved that goods were exposed or kept for sale in the rice factory. The learned Magistrate did not agree with this submission. The charge had been brought under section 13 (3) of the Weights and Measures Ordinance; and he held that under this sub-section it was not necessary to prove that in the place where an unjust weighing machine is found goods were exposed or kept for sale. The manager of the factory then gave evidence. That closed the proceedings. The appellants were convicted and have appealed to this Court.

Mr. Humphrys for the appellants urged that the learned Magistrate was wrong in holding that there was no necessity to show that the factory was a place in which goods were exposed or kept for sale. It is therefore necessary to analyse the provisions of section 13. It is divided into 3 sub-sections. Sub-section 1 authorises certain persons to enter certain places "wherein goods are exposed or kept for sale, or are weighed for conveyance or carriage, and there examine all weights, measures, steelyards) or other weighing machines." Sub-section 2 provides "If, on the examination, it appears that the weights or measures are light and otherwise unjust", they may be forfeited and the persons in possession of them may be convicted and fined. Then comes subsection 3, which reads "Everyone who has in his possession a steelyard or other weighing machine which on the examination is found incorrect or otherwise unjust" may be convicted and fined. A perusal of the Ordinance in the 1873 edition of the Laws of British Guiana shows that when it was enacted section 13 was not divided into sub-sections; it was one complete section; and the word "such" appeared before the word "examination" where the word "the" occurs. This leaves no doubt as to the construction of the section as a whole. Before a person may be convicted of possessing an unjust weight or an unjust weighing machine there must have been a lawful entry under sub-section 1. The entry is lawful only when the place entered is one "wherein goods are exposed or kept for sale, or are weighed for conveyance or carriage."

In the present case there was no evidence that any goods were exposed for sale at the time when the respondent entered the factory. Nor was there any evidence that any goods were being kept for sale there at the time. In their present form, however, the words are open to the construction that if the factory was ,a place where goods were kept for sale from time to time, as it undoubtedly was, then the entry of the respondent would have been lawful. The authority of Whyte vs. Brummell, Review Court Cases, Vol. 1, p. 28, decided by Arindell, C.J., in 1859, was in this connection cited on behalf of the appellants in the Court below, and by Mr. Humphrys here. That was also a case of the possession of an unjust weighing machine. There was no

evidence that goods were either exposed for sale or being kept for sale at the time the authorised officer entered the shop; and on this ground the learned Chief Justice quashed the conviction. If one looks again at the 1873 edition of the Laws of British Guiana one finds out that the operative words then were "wherein goods shall be exposed or kept for sale, or shall be weighed for conveyance or carriage." It is in this form that they were quoted by the learned Chief Justice in 1859, and it may be presumed that they were the actual words used when the Ordinance was enacted in 1851. The words "shall be" appeared in he 1895 and subsequent editions as "may be"; and in the current edition they have been altered to "are". These verbal alterations cannot be taken to involve any change of meaning. In view of these considerations the above decision ought to be followed. It must be held that the entry of the respondent into the factory was not justified by law and that the subsequent convictions of the appellants cannot be sustained.

As the Ordinance stands it is no offence to possess or to use unjust weight or scales except within the conditions prescribed in sub-section (1) of section 13. Since the year 1851 when the Ordinance was enacted, the growing of rice has become one of the principal industries of the Colony and it is common practice for the small rice-farmer to sell his padi to a miller, who is often also his landlord. If, on such a sale, the padi is weighed on the miller's scales (which is, we believe, the usual practice) and the scales or weights are found to be unjust the miller will incur no penalty under the Ordinance unless it is proved that the scales or weights were found under the circumstances prescribed. The need is obvious for protecting the grower against the opportunity for fraud thereby offered to an unscrupulous miller and it is to be hoped that this question will receive the early attention of the Legislature. It may be useful to draw attention to sections 25 and 48 of the English Weights and Measures Act, 1878, which impose penalties for the use or possession of unjust weights or scales "for use for trade."

Appeal allowed.

BOODHAM SING *v.* GANESH PERSAUD

BOODHAM SINGH,
Appellant (Defendant),
v.
GANESH PRASAD, Police Constable No. 5133,
Respondent (Complainant).

[1948. No. 627.—DEMERARA.]

BEFORE FULL COURT: WORLEY, C.J., JACKSON, J. (ACTING), MANNING, J. (ACTING) .

1949. JANUARY 3, 29.

Defence Regulations—Control of Prices Order 1947*—Notice No.* 941 *of 10th January* 1947*—charge for selling above maximum retail price—proof that sale was by wholesale—amendment—proof of actual cost of sale by retail—no proof of actual cost of sale by wholesale.*

In view of the interpretation of "actual cost" in the Control of Prices Order 1947 it does not follow that because a sale is above the permitted retail price it is also above the permitted wholesale price.

There is no objection to a police officer other than the officer who prosecuted at the trial addressing the Magistrate.

D'Ornellas v. *Hill* A.J. 18.3.10 applied.

Appeal by the defendant who was convicted by the Magistrate for the Georgetown Judicial District. *L. M. F. Cabral*, for the appellant. *A. C. Brazao,* Acting Solicitor-General, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

The appellant appeals from a conviction for selling 5 lbs of garlic (a price controlled article) for $4.40 a price exceeding the maximum wholesale selling price prescribed in the Control of Prices Order 1947 (Notification No. 941 in the Gazette of 1st July 1947).

The relevant facts, as found by the Magistrate, are that on March 2nd, 1948, the appellant at his stall in the Stabroek Market, Georgetown, sold to one Lachmi Persaud the 5 lbs. of garlic for $4.40. Persaud was sent to make the purchase in pursuance of a police "trap" and immediately after the sale a police constable accompanied Persaud back to the appellant's stall and asked the appellant for his bill relating to the garlic. The appellant produced a cash sale bill issued by a firm of wholesale and retail provision merchants which shewed he had purchased 395 lbs of garlic for $107.06 i.e. at 27.09 cents a pound.

On this evidence, a complaint was laid charging the appellant with selling above the maximum retail price, and the trial proceeded on this charge.

The maximum permissible retail price is calculated by ascertaining the "actual cost" (i.e. in the case of a sale by retail, the purchase price paid by the retailer) and adding thereto the permissible percentage under the Order (which in this case was 20%). The prosecution took the cash bill produced as shewing the appellant's actual cost and proved that, in fact, the price charged exceeded the prescribed maximum.

Now the purchaser, Persaud, is the owner of a licensed grocery

shop and therefore a person coming within clause (a) of the definition of "wholesale" in paragraph 2 of the Order. Appellant was aware of this fact and there had been previous transactions between him and Persaud.

At the conclusion of the trial, counsel for the defendant-appellant submitted that the facts shewed that the transaction was a sale by wholesale, as defined in the Order, and contended that the case of Chung Tiam Fook v. Slater 1942 B.R.L.R. 415 was authority for the proposition that the defendant charged with selling above the maximum retail price could not be convicted of selling above the maximum wholesale price. At a further hearing the learned Magistrate considered further submissions by counsel and heard a reply thereto by Mr. Slater, a police officer other than the one who had conducted the prosecution. The Magistrate reserved judgment and, when promulgating his decision, stated that he found that the sale was a wholesale transaction, amended the charge accordingly and convicted the defendant-appellant of selling at a price exceeding the prescribed maximum wholesale price.

The grounds of appeal are numerous but only four need be considered. They are that the decision was erroneous in point of law because

1. the amendment of the complaint to charge the defendant with a sale at a price exceeding the prescribed maximum wholesale price was improper and not legal in the circumstances of the case.
2. that the defendant did not have a proper opportunity of meeting the said amended charge.
3. that there was no proof that the alleged sale price exceeded the prescribed maximum wholesale price.
4. that the learned Magistrate improperly permitted himself to be addressed by Mr. Leslie Slater on the matter and took into consideration what was said by the said Leslie Slater.

The first ground was abandoned by the appellant's counsel. In the case above cited, the Full Court held that the paragraph (now paragraph 12) of the Order under which the appellant was charged creates one offence only, as far as selling is concerned, that is, selling a price-controlled article at a price exceeding the maximum price prescribed by the Order. Whether the transaction is a wholesale or a retail one is a matter of particulars and proof only. We entirely agree with the learned Magistrate that the evidence in the instant case disclosed a wholesale transaction and we do not think that the appellant was in any respect deceived or misled by the variation between the complaint and the evidence adduced in support thereof since his counsel contended throughout that the transaction was a sale by wholesale.

It still remains to consider however whether the prosecution proved all the elements of the charge on which the appellant was convicted and this brings us to the main ground of appeal, namely, that there was no proof that the sale price exceeded the prescribed maximum wholesale price.

In the case of a sale by wholesale the maximum price is to be determined by ascertaining the "actual cost" and adding thereto the permitted percentage, which, in this case, would have been

16 2/3%. The "actual cost" in the case of a sale by wholesale is, by definition in clause (a) of paragraph 2 of the Order, "the value of the article as declared in the Customs bill of entry including duty and bill of entry tax with the addition of not more than 5 per centum."

Counsel for the respondent conceded that there was no evidence of the actual cost as so defined. That admission really concludes the matter.

The learned Magistrate took the view that whether the transaction was wholesale or retail the defendant had clearly offended. This conclusion involves the assumption that the retail price must necessarily and in all cases be higher than the wholesale price but such an assumption is one that is not necessarily true and cannot be made in a criminal matter where the onus is on the prosecution to prove beyond reasonable doubt all the necessary elements of the offence. It is, for example, possible that the original importer might sell off a portion of spoiled goods or a remnant of surplus stock at a price below the "actual cost" and in such cases the purchaser reselling by wholesale would be entitled to calculate his percentage on the "actual cost" as defined and not merely on the price he paid.

It remains to consider briefly the fourth ground of appeal. Section 64 of the Constabulary Ordinance provides that where a member of the Police Force lays an information or makes a complaint against anyone, any officer or sub-officer may appear before the Magistrate and shall have the same privileges as to addressing the Court and examining the witnesses as the member who laid the information or made the complaint would have had.

In D'Ornellas v. Hill (A.J. 18.3.1910) Bovell C.J. held that any officer who appears in exercise of the right conferred by this section takes the place of the nominal complainant and is not simply a person present along with him conducting the case on his behalf. In that case the nominal complainant did not appear at all but another officer took his place throughout the case. In the case before us, it appears from the record that the nominal complainant did not appear. The evidence was led by a Sergeant-Major and Mr. Slater, a Superintendent of Police, addressed the Court on the legal issues raised by the defence. The wording of the section is very wide and in our view there is no justification for the contention that only the officer or sub-officer who first appears has the right of audience. This ground of appeal therefore fails but the appeal succeeds for the reason that there was no sufficient evidence of the maximum permissible wholesale price of the article sold.

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

Appeal allowed.

IN THE WEST INDIAN COURT OF APPEAL

On appeal from the Supreme Court of British Guiana

(1946. No. 223 Demerara)

Between: —

HIRALALL, Appellant (Defendant),

and

ELIZABETH FRANK, LAVINIA STEWART, LENA LOVELL and NATHANIEL MOORE called Aaron Moore,

Respondents (Plaintiffs).

W.I.C.A. No. 1 of 1948.—BRITISH GUIANA.

BEFORE FURNESS-SMITH, PRESIDENT (C.J. TRINIDAD AND TOBAGO); COLLYMORE, C.J. BARBADOS; AND MALONE, C.J. WINDWARD ISLANDS AND LEEWARD ISLANDS.

1949. MARCH 4.

West Indian Court of Appeal—Jurisdiction—Supreme Court of Judicature Ordinance, Cap. 10.

Preliminary objection was taken to the hearing of this appeal on the ground that the amount claimed or the value of the property in respect of which the action was brought did not exceed, two hundred and fifty dollars as required by paragraph (b) (1) of section 94 (1) of the Supreme Court of Judicature Ordinance, Chapter 10.

Held: The burden of proving that the Court has jurisdiction rests upon the appellant and in the absence of any finding by the Trial Judge or of satisfactory evidence on the record concerning it, the question of value must be determined by the Court of Appeal upon evidence furnished by the appellant by way of affidavit and on consideration of any contrary affidavits furnished by the respondent.

The appeal was adjourned for filing of the necessary affidavits and at a subsequent sitting of the Court the affidavits were considered and the Court not being satisfied that the value of the property in dispute exceeded $250 the appeal was dismissed.

Appeal by the defendant from a judgment of the Supreme Court of British Guiana awarding $150 as damages for trespass.

S. I. Cyrus for the appellant.

H. C. Humphrys K.C. for the respondents.

Cur. adv. vult.

The short question for decision here is whether this Court has jurisdiction to hear the present appeal having regard to the provisions of paragraph (b) (i) of section 94 (1) of the Supreme Court of Judicature Ordinance (Chapter 10) the relevant part of which reads as follows : —

> "Notwithstanding the provisions contained in section three of the Act no appeal shall lie to the Court of Appeal from any judgment or order in any action where the amount claimed or the value of the property in respect of which the

action is brought does not exceed two hundred and fifty dollars."

On behalf of the appellant it *was* argued that there is evidence on the record that the value of the property in dispute exceeded the amount specified in the section. Attention was invited to certain passages in the evidence from which it was submitted that such a conclusion might be derived but it appears to us that these are insufficient to enable us to reach that conclusion which is a condition precedent to the hearing of this appeal.

The burden of proving that proposition rests upon the appellant, and counsel on neither side was able to cite authority in regard to the means by which that burden of proof may be discharged in the absence of any finding by the trial judge or of satisfactory evidence on the record concerning it. We have since found enlightenment in the case of *Falkners Gold Mining Company v. McKinnery* (1901) *A.C.* 581. It is clear from the judgment of the Privy Council in that case that it is the duty of this Court in such circumstances to determine the question of value upon evidence furnished by the appellant by way of affidavit and on consideration of any contrary affidavits furnished by the other side. The appellant must therefore furnish for our consideration the necessary affidavits as to value, and the respondents are at liberty to furnish counter-affidavits.

Solicitors : *M. A. Charles,* for appellant;
R. G. Sharples, for respondents.

IN THE WEST INDIAN COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA

(1948. No. 533.—Demerara).

Between: —

THE TOWN CLERK OF GEORGETOWN,

Appellant (Respondent)

and

ZINAT TULNISHA also known as JANET INSANALLY,
a married woman.

Respondent (Applicant).

[W.I.C.A. No. 1 of 1949 —BRITISH GUIANA.]

BEFORE FURNESS-SMITH, PRESIDENT (C.J. TRINIDAD AND TOBAGO); COLLYMORE, C.J. BARBADOS; AND MALONE, C.J. WINDWARD ISLANDS AND LEEWARD ISLANDS.

1949. MARCH 17.

Immovable property—section 129 *Town Council Ordinance Cap.* 86—*Building By-Laws—Fencing of Lots By-Laws.*

Section 129 sub-section 1 of the Georgetown Town Council Ordinance, Chapter 86 is as follows:—"No transport shall be passed upon any portion of a lot of land in the city less than a whole lot, except

upon production to the judge of a certificate signed by the Town Clerk that the provisions of this Ordinance will not thereby be contravened."

Section 126 is as follows:—"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."

The Town Clerk, acting under Section 126 refused to issue his certificate for the S1/2 of a lot because the building on the N1/2 extended onto the S1/2 for a distance of 12 feet and thereby contravened the Building By-laws and, Fencing of Lands By-laws. It was conceded that the provisions of section 126 were complied with by the Respondent.

A Judge in Chambers granted the respondent an order to compel the Town Clerk to issue his certificate.

The Town Clerk appealed.

Held: The expression "this Ordinance" used in section 129 must necessarily include the by-laws made under the Ordinance.

There was not, on the admitted facts, any contravention of Section 126 of the Ordinance or of the Building or Fencing of Lots By-laws. Appeal dismissed.

Appeal by the Town Clerk of Georgetown from a judgment of the Supreme Court of British Guiana.

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

Respondent in person.

Cur. adv. vult.

The judgment of the Court was as follows: —

The Respondent in this appeal sought from the Town Clerk of Georgetown a certificate under section 129 subsection 1 of the Georgetown Town Council Ordinance Chapter 86 in respect of the proposed transport of the South half of lot No. 192 Charlotte and Wellington Streets, Lacytown, Georgetown. This certificate was refused, and on appeal she obtained from the judge in Chambers an Order to compel the Town Clerk to grant his certificate. The respondent had by contract agreed to buy the lot in question and wished to sell the South half of it with its two-storeyed building to aid her in financing the project. On the north half of the lot there is also a large two storeyed building which extends over the East-West middle line of the lot and continues for a distance of about 12 feet on the South half.

This latter building is immovable property standing on ten foot piers. Thus, the proposed demarcation line between the two halves of the lot would pass through this immovable property.

The question therefore is: should the Town Clerk have granted his certificate or, put in another way, was he justified in his refusal.

It was urged for the Respondent that her compliance with the requirements of section 126 of the Ordinance, which compliance is now admitted by the Appellant, entitles her as of right to obtain the certificate, whilst on the other side it is argued that in addition to complying with the requirements of section 126 there must be no contravention of the provisions of the Ordinance generally without limitation to any specific section; that the proposed transport would infringe the provisions of the Georgetown Building

By-laws, 1945, and the Fencing of Lots By-laws 1917, made under section 215 of the Ordinance; that such by-laws have the force and effect of law, and that the Town Clerk was justified in his action.

In our view the learned trial judge rightly held that it was an indisputable general proposition that rules, orders and by-laws properly made in accordance with the provisions of a statute "become part of the statute" (*Dale's case* 1881 6 *Q.B.D. p.* 455).

Further "An order made under a power given in a statute is the same thing as if the statute enacted what the order directs or forbids."

(per Lush J. in *Reg. v. Walker* 1875 *L.R.* 10 *Q.B.D.* 358).

In our view, therefore, it follows that the words "this Ordinance" used in section 129 include all by-laws properly made in accordance with the Ordinance and this is so whether or not in addition there appear the words "or the by-laws," as is the case in certain other sections of the Ordinance.

The learned judge proceeded to explain his view in the following words:—

> "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, is 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 (Spencer v. Metropolitan Board of Works (1882) 22 Ch. D. 142)."

Although we pay due respect to this observation, the language used in section 129 is not ambiguous. The words have a plain and simple meaning and it was unnecessary for the judge to make the presumption which he did and have recourse to the consideration of other sections of the Ordinance. It must be borne in mind that under section 12 of the Interpretation Ordinance "Every section of an Ordinance shall have effect as a substantive enactment without introductory words."

The Court in interpreting a statute will ascertain the meaning as it can be gathered from the words used. It is no part of the function of a Court to speculate as to the meaning of the Legislature, to do so would be to replace the statute under consideration for one of the Court's making. "The Legislature must be taken to

> have intended to say what they have in fact said and not what the Court thinks they wanted to say."

(See Ex parte *Chick, in re Meredith* (1879) 11 *Ch. D.* 731).

"It is only in regard to phrases of doubtful import" said Lord Hewart C. J. in *Spillers, Ld. v. Cardiff (Borough) Assessment Committee,* 1931 2 *K.B.* 21, "that this Court is called upon to apply

> a toilsome scrutiny.....It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that that rule has been

broken the burden of establishing their proposition lies heavily."

The expression "this Ordinance" used in section 129 cannot, it seems to us, be regarded as a phrase of "doubtful import", for as we have pointed out it must necessarily include the by-laws made under the ordinance whether the words "or the by-laws" follow or not.

But the Town Clerk is empowered to withhold his certificate for the transport of any portion of a lot of land less than a whole lot if the provisions of the Ordinance are likely to be contravened. It is therefore necessary to see if any of these provisions will be contravened.

> The Georgetown Building By-laws define "building" to include "any house, structure, kitchen, store-room, garage, outhouse, fence, rail, palings or other erection of whatsoever material and for whatsoever purpose constructed and any part of a building", and under by-law 17 certain operations set out in that by-law are deemed to be the erection of a new building.

The expression "new building" includes

> "every such re-erected building, converted or re-converted dwelling-house or building, addition, alteration, projection, roofing, covering, enclosure or removed or raised building". Building By-law 24 to which the Appellant referred reads as follows: —
>
> "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."

And Building By-law 25 is in the following terms: — "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 the alteration or addition to an existing building or other construction shall stand or be less than twelve feet from any part of any other building on the same lot."

It was submitted for the Appellant that the erection of a fence on the middle-east-west line of lot 193 would be in contravention of by-law 24. But it seems to us that the word building when used in that by-law and in by-law 25 is not intended to and cannot reasonably include "fence rail palings," and as there is some ambiguity, the heading of the section may be resorted to elucidate its true meaning (*Martins v. Fowler* (1926 *A.C.* 746). The heading reads "open spaces about buildings and ventilations of buildings." If the words "fence rail palings" are substituted for the word "building" in by-laws 24 and 25 these two by-laws are meaningless, but when the word building is read in its context, and when regard is had to the heading it becomes obvious that these two by-laws do not deal with the erection of fences rails or palings, but with houses and structures of a similar kind. Similarly an examination of by-laws 16—22 under the heading "New Buildings" will show that it is not intended to include fences, rails

and palings in the expression "new buildings" used in those bylaws. Nor can it be said that the erection of a fence comes within the term "building operations" as defined in the by-laws with regard to which a plan must be submitted for the approval of the city engineer before the work is commenced. In our view there will be no contravention of these or any other of the Building Bylaws if the proposed fence is erected along the middle east-west line of lot 192.

We pass now to consider whether there will be any contravention of the Fencing of Lots By-laws if this certificate is granted. By-law 2 of these by-laws requires boundary palings to be erected between all lots or portions of divided lots owned by separate persons, and it is contended that if the respondent be permitted to pass transport for the South half of lot 192, and a boundary paling is erected between the two half lots this paling will pass under and through the immovable structure standing on the north half of the lot. It is submitted that although it would be feasible to erect such a paling, not exceeding 8 feet in height, yet it is impossible to see how the erection of a paling passing through immovable property belonging to one person can form a boundary between his property and that of the owner of adjoining land.

The object of the Fencing of Lots By-laws is to provide measures for marking off by means of fences and palings the boundary lines between lots and half lots, without affecting any conditions relating to sanitation and hygiene. They are not aimed at adjusting the rights of adjoining owners of immovable property; and as neither expressly nor impliedly can they be regarded as restricting the right which a subject has of selling or otherwise disposing of his property they should not in our view be construed in a manner which will in effect bring this about. To refuse the certificate applied for on the ground that these by-laws will be infringed would result in this case in a restriction, not contemplated by the law, of the respondent's right to dispose of a portion of her property. It is true that the paling which it is proposed to erect between the two half lots would pass under an immovable building (the property of the owner of the north half) overhanging the South half, but any difficulties which might be occasioned by so doing would seem to concern the respective owners of each half lot and would not be a valid reason for the Town Clerk to withhold his certificate.

We observe that the by-law does not say that the fencing shall be continuous throughout the line of division between the two portions of the lot. If, as might well be the case, the existing building were a solid structure not raised upon piers and extended only to the proposed boundary line and not beyond it, as the present building does, we do not suppose that it could be argued with any conviction that the gap in the fencing which would be filled by the solid wall of the building would constitute a breach of the by-law. It appears to us that both in such circumstances and in the circumstances now under consideration, the meaning and intention of the by-law would be fully served by erecting the fencing in such a manner as to provide a clear line of demarcation between the two lots. Whether this would necessarily involve the continuation of the fencing below the existing building,

is a question which can only be determined with knowledge of the actual construction of the building, but it is unnecessary for the purposes of the present decision to determine this. Admittedly it is not desirable to place a paling under this overhanging building, but the real question is would its erection in this position contravene any of these by-laws. We do not think that it would, and therefore the Town Clerk should not refuse his certificate. By-laws of the kind referred to are made in the general interest of the community and they may restrict the rights of an individual but any such restriction to be effective must be expressed in plain language.

Inasmuch as it has been admitted in the present case that there will be no contravention of section 126 of the Ordinance, and as in our view there will be no contravention of the Building Bylaws nor of the Fencing of Lots By-laws, this appeal must be dismissed and the decision of the Chief Justice, ordering the Town Clerk to issue the certificate applied for must stand. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitor for appellant: *Francis Dias.*

IN THE WEST INDIAN COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Between: —

DANIEL A. CHARLES, Appellant (Plaintiff),

and

ETHELBERT BATTOO AND EDWARD BATTOO
(Trading under the style or firm of BATTOO BROS.),
Respondents (Defendants).

[1948. W.I.C.A. No. 1.—TRINIDAD and TOBAGO]

BEFORE FURNESS-SMITH, President (C.J. Trinidad and Tobago); MALONE, (C.J. Windward Islands and Leeward Islands; and WORLEY, (C.J. British Guiana).

1949. MARCH 23.

West Indian Court of Appeal—Question of fact—Principles governing Appeal Court—Costs.

The appellant claimed from the respondents the sum of $925 for work and labour done. The respondents denied indebtedness and counter-claimed for the sum of $489 alleged to be overpaid. The question was one of fact and judgment was entered in favour of the respondents for $263 with costs on the counterclaim and the claim dismissed with costs. On appeal it was argued that the trial Judge had made certain arithmetical miscalculations and that the judgment on the counter-claim on his own calculations should have been for $1.00. It was contended in these circumstances that the appellant and not respondent should have had his costs. The appellant further contended that there was no evidence to support the Judge's finding of fact with respect to one item.

Held: Furness-Smith C.J. (dissenting).

There may be occasions when a Judge in the Court below goes wrong on questions of fact and in this case on a consideration of the oral and documentary evidence the trial Judge was wrong in disallowing one item claimed by the appellants and should have entered in favour of the appellant on his claim for $239 and dismissed the counter-claim.

In any event owing to a miscalculation the respondents could only have recovered $1.00 on their counter-claim. Had that judgment been upheld they would have been entitled to their costs.

Appeal by plaintiff from a judgment of the Supreme Court of Trinidad and Tobago giving judgment for the defendants on the claim with costs, and on the counterclaim for $263.00 and costs.

Cur. adv. vult.

The judgment of the Chief Justice of the Windward Islands and Leeward Islands in which the Chief Justice of British Guiana concurred was as follows: —

In this case the appellant, who is a builder and contractor, brought an action against the respondents, who are garage proprietors, claiming on a specially indorsed writ, as amended at the hearing, the sum of $925.00 being the balance of money alleged to be due to the appellant from the respondents for work and labour done by the appellant for the respondents pursuant to agreements dated respectively the 8th March and 28th August, 1945, and on certain verbal agreements. In the particulars of claim the following items were specifically claimed by the appellant: —

Balance due on contract dated 8th March, 1945	...		$228.00
Amount of contract dated 28th August, 1945	...	$1,950.00	
Less Advances . .	.	$1,680.00	270.00
Building and erecting Valley Gutter	...	..	240.00
40 feet excess on columns for Office Building	...	..	40.00
Balance due on building latrines ...	..	..	123.00
Services for 2 days buying steel sheeting	...	..	24.00
			$925.00

The respondents denied any indebtedness to the appellant. They admitted having agreed to pay to the appellant in respect of the contract of the 8th March, 1945, the sum of $2,316.00 and in respect of the contract of the 28th August, 1945, the sum of $1,950.00, but stated in their defence that these two sums had been paid to the appellant before action brought. As to the claim for "building and erecting valley gutter" they said that this item was included in the contract of the 28th August, 1945, and as to the appellant's claim of $40.00 in respect of "columns for office building" they said that these columns had been supplied by the respondents and in order to save the expense of cutting them it was arranged that they should be erected intact. With regard to the appellant's claim for $123.00 "balance due on building latrines" the respondents said that they contracted verbally with the appellant to pay him the sum of $125.00 and had paid him; and as to the claim for "services for two days buying steel sheeting" the respondents said that if such services were performed by the appellant they were, incidental to and a part of the contracts of the 8th March, 1945, and the 28th August, 1945. They also counterclaimed from the

appellant repayment of a sum of $489.00 alleged to have been overpaid by them to the appellant. The allegations of fact contained in the defence were denied by the appellant.

The appellant was supplied by the respondents with a statement of the amounts paid to him by the respondents between the 15th March, 1945, and the 15th February, 1946. These payments which the appellant admitted to be correct as to the amounts, totalled $4,880.00, and it will be observed that they exceed the total sum payable by the respondents to the appellant in respect of the contracts of the 8th March and the 28th August, 1945, by $614.00. From this sum of $614.00 the respondents admitted that $125.00 should be credited to the appellant as the agreed price for work done building latrines, leaving the balance of $489.00 for which the respondents had counterclaimed.

By the written contract of the 8th March, 1945, the appellant agreed, for the sum of $2,316.00. "to supply all labour necessary for the assembling and erecting of a steel building at No. 70 Sackville Street, Port-of-Spain, in accordance with plans No. 5745 approved by the City Council."

Included in the construction were

"Building and erecting 16 trusses:
"Preparing and erecting 16 columns:
"1,800 feet purling:
"Covering 1800 feet of roof:
"Foundation, wind braces, columns brace beam, cross sections
"and tie braces."

The respondents agreed to supply all materials necessary for the work, also welding torches and other tools, and to make weekly advances to the appellant to the amount of two-thirds the value of the work completed.

Under the contract of the 28th August, 1945, the work which the appellant agreed to do was set out clearly in writing and opposite each item was a sum of money representing the charge made by the plaintiff for doing that particular piece of work. These items totalled $1,984 but the appellant agreed to accept $1,950. This memorandum was initialled by the plaintiff and one of the defendants.

The items referred to are as follows: —

Preparing materials and fabricating and building 8 lattice trusses at $138.00 each	$1,104.00
Preparing and welding 8 columns	240.00
Taking levels, digging and casting foundations to 8 columns	250.00
Erecting 8 trusses	160.00
Erecting 8 columns	90.00
Purling and covering same extension	140.00
	$1,984.00"

It is not disputed that the appellant did all the work required to be done by him under these two contracts and that the amounts he has admitted to have received, if paid solely in respect of these two contracts, exceed the agreed prices by $614.00. The appellant however claimed that, apart from the work done by him on an oral agreement for building latrines, he also did work for the

respondents on certain oral agreements altogether outside the written contracts and that payments amounting to $640.00 were made in respect of such work. (The difference between $640.00 and the $614.00 is accounted for by $26.00 short paid on the first contract, according to appellant's figures, but not claimed by him)

The claims of the appellant on oral agreements made by him with the respondents include (1) a sum for work done by him in building latrines, etc.; (2) a sum of $228.00 for converting 57 pieces of channel iron into angle iron for use in connection with the work which the appellant had undertaken to do under the con-tract of the 8th March, the respondents having failed to supply, as they had agreed to do, the angle iron beams required for the work. This sum of $228.00 is in fact the first item claimed in the particulars of the Statement of Claim under another guise; and (3) a sum of $240.00 for building and erecting a valley gutter between the building erected by the appellant in pursuance of the contract of the 8th March and the building erected in pursuance of his contract of the 28th August.

At the hearing the appellant gave evidence and called one witness. Neither of the respondents gave evidence nor did any witness testify on their behalf. They relied, as they were entitled to do, on any admissions made by the appellant and on what they contended was the general weakness of his case.

It is quite obvious from the judgment of the learned trial judge that he found it by no means an easy matter in this case to arrive at a fair and just decision according to law. For on the one hand he was faced with the fact that "the defendant" (to use the judge's own language) "has not thought it fit to explain to the Court the extraordinary prodigality of his company with its funds." — He was here referring to the alleged overpayment of $489.00 for which the respondents had counterclaimed — and on the other hand it is clear that he placed little, if any, reliance upon the evidence given by the appellant — Indeed the respondents' counsel submitted that the learned judge rejected the evidence of the appellant entirely save where he was supported by admitted circumstances or legal interpretation. While we do not accept this submission in its entirety, it is probably not far from being a correct statement. The trial judge, however, expressed himself as being satisfied that the appellant had undoubtedly done work outside the two contracts of the 8th March and the 28th August, 1945, for which he was entitled to be paid. He then proceeded to ascertain the sums which in his view were payable to the appellant on the oral contracts, and in respects of certain items appearing in the particulars of his claim, and he allowed the following: —

Balance due on building latrines $123.00

In allowing the sum of $123.00 he made this comment. "He (appellant) must be paid for his work with respect to latrines. The job he says was for $385.00, which has not been seriously disputed: he admits receiving $262.00, and he is entitled to the balance — $123.00."

For converting 57 pieces of channel iron into angle iron $228.00

The learned judge held that this work was done and was not

within the terms of the first contract and should be paid for separately. He therefore allowed appellant the amount claimed on this item.

Accordingly, he found that the appellant was entitled to a sum of $351.00 in respect of his claim, and deducting this sum from the amount of $614.00 shown to have been overpaid by the respondents on the contracts of the 8th March and 28th August, he gave judgment for the respondents on the claim with costs, and on the counterclaim for $263.00 and costs. Against this judgment the appellant has appealed.

Before considering the grounds of appeal it should be observed that an arithmetical error was made by the trial judge in calculating and arriving at the amount of $263.00 for which he gave judgment on the counterclaim. He decided that the appellant should be paid $385.00 for the work he did on building latrines, and he then deducted from this sum $262.00 which the appellant admitted having received on account of this work, but the learned judge overlooked the fact that this sum of $262.00 had already been brought to account, having been included in the overall payments of $4,880.00 to which reference has been made, and therefore should not have been deducted from the amount of $385.00. Counsel for the appellant and for the respondents agree that this error has been made and that when it is corrected the judgment of the learned judge, if it follows the line he indicated, should be judgment for the respondent on the counterclaim for $1.00 (instead of $263.00) and costs.

The judgment was, however, attacked on other grounds, thirteen in number; three of these grounds numbered 1, 2 and 4 relate to the form of the judgment which was. "There will be judgment for defendant on the claim with costs, and on the counterclaim for $263.00 and costs." It was contended on behalf of the appellant that as he had succeeded on part of his claim he was entitled to judgment for the amount so found and for his costs on the claim, and that it was inequitable not only to deprive the appellant of his judgment and costs but also to give the respondents the whole costs of the action. On the other hand it was contended on behalf of the respondents that the form which the action took indicated clearly that the real issue for the Court to decide was whether the appellant had been overpaid or underpaid in respect of certain work, which he had agreed in writing and orally to perform, and that in this case the counterclaim though in form a counterclaim was really available as a defence, and was not analogous to one in which a wholly independent cause of cross-action is pleaded by way of counterclaim. Having regard to the provisions of Order XXII rule 16 it seems to us that the trial judge, having come to the conclusion that the difference between the claim and the counterclaim resulted in a balance in favour of the respondents, was acting within his rights in giving judgment for the respondents for the balance. The case of *Lowe vs. Holme and another* (1883) *L.R.* 10 *Q.B.D.* 286) supports the view contended for by counsel for the respondents, and if we were to find that the difference between the amount found to be payable to the appellant on his claim, and the amount found to be payable to the respondents on their counterclaim resulted in the balance being

either in favour of the appellant or the respondents it would be competent for this Court, in the circumstances of this case, to give judgment for the appellant or for the respondents for such balance with the costs of action.

We turn now to consider the remaining grounds of appeal. The submissions with regard to these are that the learned trial judge, in disallowing certain items of the appellant's claim, came to conclusions which were not warranted by the evidence and, the admissions made, and acted upon suggestions made by counsel for the respondents in his cross-examination of the plaintiff, and not upon the evidence which was actually before the Court. The respondents' counsel on the other hand submitted that it was manifest from the judgment of the trial judge that he rejected the evidence given by the appellant, and having rejected it there was no evidence before him to justify the finding that the appellant was entitled to the sums of $123.00 and $228.00, or to any of the sums which he claimed.

The principles upon which a Court of Appeal will act in considering the findings arrived at by a Judge in the Court below are well known and need not be repeated here, but although the trial judge has had the advantage which is denied the Court of Appeal of seeing the witnesses and watching their demeanour he "is not the possessor of infallibility and, like other tribunals, there may be occasions when he goes wrong on a question of fact" *(Powell and wife vs. Streatham Manor Nursing Home,* 1935 *A.C.* 243).

It seems to us, in the present case, that the trial judge approached the issues which he was called upon to decide from the proper view point, and endeavoured on the material before him, although hampered by his lack of confidence in the appellant's credibility and by the respondents' failure to give evidence, to come to a conclusion as to what work had been done by the appellant on any oral agreements he had made with the respondents outside of the written contracts of the 8th March and the 28th August, and as to the amount he was to be paid under these oral agreements for doing this work. It must be borne in mind that he was "satisfied that the plaintiff had undoubtedly done work outside the two contracts for which he is entitled to payment," and there was ample evidence upon which he could make this finding. He then found that the appellant was entitled to be paid for his work with respect to latrines and that for this work he should receive $385.00. To support this finding there was the admission in the Statement of Defence that the respondents had contracted verbally with the appellant to pay the sum of $125.00 for the building of latrines, thought it was stated that this sum had been paid before action brought. The only questions which remained for consideration on this item of the claim were the amount of the contract price and whether this price had been paid or not. After hearing the appellant's evidence the trial judge fixed the sum to be paid to the appellant at $385. It seems to us that no exception can be taken to this finding, particularly as no evidence was given by the respondents as to the amount agreed upon for the work, and that during the currency of this oral agreement they did in fact pay the appellant $262. The learned trial judge also found that the appellant was

entitled to payment of the sum of $228 for converting 57 channel iron beams into angle iron beams. Under the contract of the 8th March the respondents agreed "to supply all materials necessary for the construction of a steel building to be erected at No. 70 Sackville Street." Part of the materials necessary was angle iron. They did not supply angle iron but supplied channel iron which in its then condition was not suitable for the work. The witness Turpin testified that it was not part of a builder's work to convert channel iron into angle iron, and there is evidence that the work of rendering channel iron suitable for use on the building was done by the appellant. It is not disputed that the appellant did the work and we can see no reason for disturbing the trial judge's finding that this work was "not within the terms of the first contract" and that the appellant is entitled to be paid the sum of $228.00 which he claimed for doing it.

The learned judge, however, disallowed the appellant's claim of $240 for "building and erecting valley gutter." The respondents in their Statement of Defence admitted that this work had been done by the appellant, but they said that it was part of the work which the appellant had undertaken to do under his contract of the 28th August, 1945, and the learned trial judge so found on the ground that "it was in the plan and comes within the terms of his second contract: 'Purling and covering extension'." The question therefore as to whether or not the appellant is entitled to be paid the sum of $240 for this work, in addition to the payment of $1,950 agreed upon between the appellant and the respondents under the contract of the 28th August, does not depend, in our opinion, upon whether the learned trial judge regarded the appellant as being a witness of truth or not, nor upon whether or not the appellant "recognised his difficulty in proving this part of his claim and falsified his books to this end," but upon whether the expression "purling and covering same extension — $140" which appears in the contract of the 28th August, covers or includes the work entailed in "building and erecting valley gutter." In other words it is a question of the proper construction to be placed upon a term in a written contract and one which we, sitting as an appellate Court, are as well placed as the learned trial judge to determine.

It is true that the appellant submitted a plan of the proposed extension of the building, and that this plan showed a "valley gutter," but the plan is not evidence that the appellant undertook to erect all that is shown thereon. The respondents in their pleadings do not rely upon the plan but plead that this work was included in the contract of the 28th August. This contract was not made when the plan was submitted but was made when the parties agreed upon the price to be paid for the work to be done by the appellant. The best evidence of what this work was is to be found in the memorandum bearing the date 28th August, which sets out the details of that work and the price agreed upon and was initialled by the appellant and by the respondent Ethelbert Battoo. "Building and erecting valley gutter" cannot possibly come under the head of "purling" nor in our view can it come under the head of "covering same extension" which seems obviously to be intended to relate to the work of fixing the roof-

ing material, namely asbestos sheets, to the roof. It must be borne in mind that the appellant had contracted at different dates to build and erect two separate buildings, that the parties to these, contracts had been careful to put in writing the details of the work to be performed by the appellant, and further, there was evidence that the building of a valley gutter of galvanized iron would ordinarily be the work of a plumber and would be separately paid for. Unless we can be satisfied, and we are not, that the work of building and erecting a valley gutter must necessarily be included in the work of "covering the same extension" we think that this would not be part of the work which the appellant contracted to perform under his contract of the 28th August, 1945. It is admitted by the respondents that the work was done by the appellant at the request of the respondents and no evidence has been given in contradiction of the appellant's claim to be paid the sum of $240 for the work. We think therefore that the learned trial judge was wrong in disallowing it, and that in the circumstances he should have awarded to the appellant the sum of $240 which he claimed.

Claims were also made by the appellant of $40 for erecting columns in excess of the height agreed upon and $24 for his services in buying steel sheeting. Both these claims were disallowed by the trial judge, and we can see no reason to interfere with his findings. The claim for $270 due on the second contract is absorbed in the general payments made.

We have come to the conclusion therefore that the appellant is entitled to succeed with regard to the following items of his claim.

(1)	Converting channel-iron beams into angle iron referred to as Balance due on contract dated 8th March, 1945 ..	$228.00
(2)	Building and erecting valley gutter	240.00
(3)	Building and erecting latrines	385.00
		$853.00

From this sum of $853.00 there must be deducted the amount found to have been overpaid by the respondents to the appellant, namely $614. this sum being the difference between the payments made by the respondents to the appellant from 15th March, 1945, to 15th February, 1946 ($4,880), and $4,266.00, the total of the two written contracts of the 8th March, 1945 ($2,316) and 28th August, 1945 ($1,950).

The result is that this appeal must be allowed, and the judgment of the learned trial judge must be reversed, The respondents will recover nothing on their counterclaim and judgment will be entered for the appellant for $239.00 with the costs of the appeal and the costs of the action in the Court below.

FURNESS SMITH C.J.

I am in general agreement with the conclusions reached by my learned brothers in regard to the difficult issues of fact which are raised by this appeal, except that which concerns the construction by the plaintiff-appellant of what has been referred to as the "valley gutter". This the appellant maintains was constructed at the request of the defendants-respondents as an addi-

tion to the work of constructing the roof-extension which was the subject-matter of the second contract dated 28th August, 1945, and was wholly independent of that contract.

It was assumed during the hearing of this appeal by counsel on both sides, and I think by the learned trial judge, that the terms of this second contract in their entirety are to be found in the document marked exhibit DA.C.5 which reads as follows —

"Preparing materials and fabricating and building 8 lattice trusses at $138.00 each	$1,104.00
Preparing and welding 8 columns	240.00
Taking levels, digging and casting foundations to 8 columns	250.00
Erecting 8 trusses..	160.00
Erecting 8 columns	90.00
Purling and covering same extension	140.00
	$1,984.00

Men and Yourself ... .. $120 weekly
28.8.45 D. A. Charles
Total $1,950.00 D. A. C.
E.B.

In my opinion the assumption to which I have referred is not warranted either by the terms of the document itself or by the evidence given by the appellant at the trial. It will be observed that all that part of the document which appears over the signature of the appellant is concerned with the cost of a number of items of work which are entailed in the construction of something which is not specified. The nature of the thing to be constructed cannot be ascertained by reference to the document itself, but the words' "same extension" which occurs in the last item, and nowhere else in the document, indicate that all the items of work mentioned therein are incidental to the construction of something; in the nature of an extension. Indeed, without knowledge of the nature of the extension which is referred to therein, the document is meaningless, and cannot be regarded as evidencing a binding contract between the parties. Moreover, it will be seen that the total cost of the particulars appearing over the appellant's signature is $1,984 whereas the total agreed to by both parties, and witnessed by their initials is $1,950. On the face of the document it appears to mean no more than that the appellant is submitting a written estimate showing particulars of the various items of cost in the construction of some work in the nature of an extension to an existing building which he is to undertake, and the initials of the parties to a total which is less than that proposed by the appellant evidences their agreement as to the consideration for the performance of that work. It would appear that the true contract is concerned with the construction of that extension and not of the items of work particularised in this document which are incidental to that construction, and this is borne out by the evidence of the appellant who says (at page 30 of the record) —

> "Battoo asked me to consider an expansion of the building 32 feet to cover the yard and to design a roof for the expansion. I drew the design in my book (shows Court) and he asked me to make it plain on a piece of paper to be given to his draftsman. I did so and gave it to him and he took it away. He returned after

> lunch with the draftsman who questioned me and I made explanations. He said he was satisfied with it and would submit it to the City Council. This is the plan (D.A.C. 4). He asked me to submit figures to him for this and I did so the next day. This is it. It is dated 28th August. Total $1,984. Man and self $120 weekly. Battoo wrote this. On left $1,950 in Battoo's writing and both initialled."

Later under cross-examination he says (page 40)—

> "I did not have drawing on the 28th August. I made estimate of a second contract before plans were prepared."

This is inconsistent with his earlier statement that after the plan was prepared and approved, he submitted his estimate "the next day" (i.e. 28th August). The plan (D.A.C.4) clearly shows the valley gutter, and he was evidently then seeking to escape from the inference that this was in the contemplation of the parties when the nature of the work as exhibited in the plan was agreed and when the total amount to be paid by the respondents for it was agreed on the 28th August and initialled by them both. To my mind it is abundantly clear from this evidence and from the terms of exhibit D.A.C.5 that the contract which was concluded, on the 28th August was for the construction of the roof-extension in the manner shown in the plan and not merely for the various items of work included in the appellant's estimate, and that the consideration for this was the total amount agreed upon, namely $1,950. If in preparing his estimate, as exhibited in D.A.C.5, the appellant omitted to include the valley gutter item he must still complete the construction as agreed upon and for the agreed consideration, and cannot claim more.

Quite apart from the existence of the valley gutter in the plan prepared by the appellant and approved by the respondents, the construction of the gutter was an essential part of the work which the appellant agreed to do under the second contract. The whole purpose of the work was to construct a covering over the space between two buildings already in existence, so that the respondents' motor vehicles could be sheltered beneath it. If the valley gutter were to be eliminated from the plan, there would be a gap between the roof of the extension and the sloping roof of the building which it was intended to join, through which the rain would fall and frustrate the purpose of the extension. To my mind it is manifest, both from the appellant's evidence and from the plan, that the parties mutually intended that the extension should be complete.

In regard to this issue the trial judge has expressed himself as follows—

> "I disallow his claim for the valley gutter. It was in the plan and. comes within the terms of his second contract: 'purling and covering extension'. He was required, according to his evidence, 'to consider an expansion of the building 32 feet to cover the yard and to design a roof for the expansion'. He says, 'I drew the design and gave it to him. He took it away. He returned after lunch with his draftsman who questioned me, and I made explanations; he said he was satisfied and would submit it to the City Council'. Plan D.A.C. 4 put in. This plan provides for a valley gutter to be made of galvanize. The fact that it was made of wood makes no difference. Plaintiff recognized his difficulty in proving this part of **his** claim and falsified his books to this end."

As I have indicated I think that the judge's conclusion was correct, although it is open to question whether the construction of the valley gutter was intended to be covered by the expression "purling and covering extension" which appears in the final item of the appellant's estimate in DA.C.5. That, however, as I understand this matter, is immaterial. The final sentence of this passage in the judgment requires some explanation. The plaintiff says (page 41 of the record) —

> "Valley Gutter—I told him this would take two weeks. I took no longer and he said, he would pay me $120 a week and he did pay me. Paid me $240, and when he came to pay me second contract he said Valley Gutter in this and short paid me."

This means that the appellant actually received $240 in payment for the construction of the valley gutter which he (the appellant) says was not included in the second contract, and this sum was improperly deducted by the respondents from the total amount due to him on that contract. And for the purpose of persuading the court that this was so, the appellant produced his counterfoil receipt book where he had written "valley gutter" on the counterfoils of two receipts (Nos. 13 and 14 in D.A.C. 11) for $120 each, and explained that these words were written in the respondents' office (page 44 of the record) and, by inference, that they were written with the defendants' knowledge and consent. The trial judge clearly thought that this explanation was false, and I have no doubt that he was right.

My conclusion is that the judgment appealed from needs correction only as respects the amount of the balance due to the respondents, which, as is now agreed, has been miscalculated, and as respects costs. Since the respondents are to recover $1.00 only on that balance, and the over payments which they made were obviously due to the slip-shod methods of their own accountancy, I do not consider that they are entitled to costs either of the appeal or in the court below. Each party should, in my view, bear his own costs throughout this vexatious litigation.

RE—H. T. REID, DECEASED

Re—HENRY THEOBALD REID, Deceased.

[1949. No. 51.—DEMERARA.]

BEFORE MANNING, J. (Acting), in Chambers.

1949. FEBRUARY 14; MARCH 28.

Will—Application for Probate—Entry of caveat but no further proceedings by caveator—Whether application for probate in common form is maintainable without warning to caveator—Section 2 *of Ordinance No.* 13 *of* 1932*—Probate practice in England whether applicable—Order XLA. r. 8* (*Local Rules of Court* 1932).

An executor applied for probate on April 12, 1948 and on. April 22, 1948 a caveat was entered. No further proceedings were taken until the 24th December, 1948 when the executor applied for probate in common form. The Registrar refused to certify the application for probate on the ground that the caveat had not been cleared off. It was contended that the executor should have issued a warning to the caveat and as he did not do so the caveat remained valid.

Held: An application for probate is not bound to issue a warning to a caveat within a particular time and a caveat is cleared off at the expiration of six months renewed.

Application by Josiah Henry Moore for grant of probate in common form of the will of Henry Theobald Reid, deceased.

J. Edward de Freitas, Solicitor, for the applicant.

T. Lee, for the Caveator.

Cur. adv. vult.

MANNING, J. (Acting): This is an application for grant of probate in common form of the will of Henry Theobald Reid, who died on the 5th December, 1947. The application is made by Josiah Henry Moore, the executor named in the will. He previously applied for probate on April 12th, 1948. On April 22nd, 1948, a caveat was entered by Theophilus Lee, barrister-at-law, acting as solicitor for one Samuel Augustus Reid. There were no further proceedings until the 24th December, 1948, on which date Moore made this application ex parte for probate in common form. The Registrar refused to certify the application for probate.

2. The application came before me in Chambers on February 7th, 1949, Mr. H. C. B. Humphrys appearing for the applicant. I decided that it should not proceed ex parte and adjourned it to February 14th, 1949, ordering notice of the application to be served on the caveator and the Registrar. On the latter date the matter was argued before me in Chambers by Mr. J. E. de Freitas for the applicant, the caveator in person, and the Registrar.

3. Up to May 3rd, 1932, the practice as regards these applications was set out in section 26 of the Deceased Persons Estates' Administration Ordinance, Chapter 149. The relevant part of the section read as follows:—

> "Whenever any deceased person has by will duly appointed any person to be executor, the registrar shall, upon his written application and on order of the Court, forthwith grant probate to him as soon as the will, as hereinbefore provided, has been deposited as required in the registry:
> Provided that—
> (a) if it appears to the registrar, or if any person by writing

filed with the registrar shall object, that any will, by virtue whereof anyone claims to be the testamentary executor of a deceased person, is not in law sufficient to warrant and support that claim, probate may be refused by the registrar until the validity and legal effect of that will have been determined by the judgment of some competent court, or until the objection aforesaid is withdrawn by the person taking it, or until he has failed within ten days of filing his objection to apply to the Court for an order restraining the issue of probate;"

Then Ordinance No. 13 of 1932 was enacted and by section 2 the whole of proviso (a) was repealed and a new proviso (a) was substituted

(a) probate shall not be granted where a caveat is entered until that caveat shall be cleared off.

4. Mr. de Freitas argued that the effect of the amendment in 1932 was to bring into force the English practice, i.e. the Principal Registry Rules (See Tristram and Coote's Probate Practice, 19th Ed., p. 929). Rule 60 (p.945) reads: —

"A caveat shall bear date on the day it is entered, and shall remain in force for the space of 6 months only, and then expire and be of no effect; but caveats may be renewed from time to time."

He also referred me to Tristram and Coote (op. cit.) p. 387, 388 where it is stated

"When a caveat has been issued no grant can issue until it has been removed in one of the following ways

(4) by the non-renewal of the caveat on the expiration of 6 months.'

This caveat has therefore been cleared off and probate may be granted.

5. The caveator referred me to rule 63, which reads

"All caveats shall be warned from the Principal Registry. The warning is to be left at the place mentioned in the caveat as the address of the person who entered it."

He said that in this case no warning had been issued. This left him under the impression that the application for probate had been abandoned, and he consequently did not renew the caveat.

6. The Registrar stated that the local practice was to the effect that a caveat remains in force until a warning is issued. The applicant was bound to issue a warning; not having done so, he is in default; and he should not be allowed to take advantage of his default. Before making this application he should have applied that the caveat be cleared off. He referred me to Order XLA (Rules of Court, 1932) rule 8; the relevant parts of which read as follows:

"A respondent to an originating summons in Probate matters relating to applications for grant notwithstanding caveat shall not be required to enter an appearance."

This shows he said, that applications for a grant notwithstanding caveat may be made by originating summons and this is what the applicant in this case should have done and not made an ordinary application by affidavit.

7. Mr. de Freitas, in reply, said the applicant for probate was not bound to issue a warning. He referred me to Tristram and Coote (op. cit.) p. 388, Note (a)

"In the case of non-renewal, where a writ or citation has issued,

> the grant will not issue. The caveator should, however, see that the caveat in such a case does not lapse."

He deduces from this that a grant will issue if there has been no writ or citation and if the caveat has not been renewed. This is what has happened in the present case.

8. A perusal of the repealed proviso discloses that any person desiring to oppose probate had to file an objection in writing with the registrar; and, if he wished to persist with his objection he had to apply within 10 days for an order restraining the issue of probate. This procedure was swept away by the 1932 Ordinance and nothing was enacted in its place. In the substituted proviso the word "caveat" appears instead of objection. The proviso assumed that there were rules in existence providing for the entry of caveats. It has been noted above that Order XLA (Rules of Court, 1932) rule 8, mentions the word caveat; and in another part of the rule there is a reference to an application to withdraw a caveat after warning. In 1932 the legislature and the rule-making authority seem to have been under the impression that there were, either in force or in immediate contemplation, rules providing for caveats, warnings, appearances etc.; or rules providing that the English practice should be applicable in future proceedings.

9. There were no such rules in existence in 1932. Nor have any been made since to prescribe the practice to be followed.

10. It has been said that when there are no local rules dealing with some particular subject matter then the Court may apply the English rules applicable thereto. I can find no authority for this proposition; and in form it is inconsistent with section 44 (1) (a) of the Supreme Court of Judicature Ordinance.

> "The practice and procedure of the Court in its general civil jurisdiction shall be regulated by this Ordinance and by rules of Court, and where no provision is made by this Ordinance, by rules of Court, or by any other statute, the existing practice and procedure shall remain in force."

"Existing practice" must mean the practice existing on 12th March, 1915, the date of the commencement of the Supreme Court of Judicature Ordinance. Whatever this existing practice was, it ceased to exist on January 1st 1920, the date of the commencement of the Deceased Persons Estates' Administration Ordinance. Section 26 of this Ordinance laid down a definite practice and procedure governing applications for probate. This practice and procedure was repealed by the 1932 amending Ordinance. This repeal could not revive anything not in force in 1932. (See the Interpretation Ordinance section 29 *(*a). It seems that the Colony was left without any rules as to practice and procedure in probate matters and without guidance as to what practice and procedure should apply in such an event.

11. It has already been pointed out that the word "caveat" is used in the Deceased Persons Estates' Administration Ordinance, 1920, as amended in 1932; and that the words "caveat" and "warning" are used in the Rules of Court, 1932.The use of these words had led to the assumption that the English Practice and Procedure in Probate matters are part of the Law in force in the Colony since 1932. This is an excusable assumption; it was obviously the intention of the Legislature that it should be so. But if the

English Rules are to govern all applications for Probate; they must apply in their entirety. Grounds, not entirely satisfactory, may be urged for their application as a whole; but no valid ground can exist for any selection from them of certain rules to the ex-elusion of others, or for any modification of those that have been selected, or for any grafting on to them of additional provisions, The Registrar asserted the existence of a local practice at variance with the English rule as to the duration of a caveat. There is no justification for any such practice. The word "caveat" in the Rules of Court, 1932, means a caveat as described in the English rule, that is a caveat still in force and which has not expired. If it has expired and not been renewed there is no need for an applicant for probate to apply for grant notwithstanding caveat, or to apply that the caveat be cleared off. Further, an applicant for probate in England is not bound to issue a warning to a caveat within any particular period of time. There cannot, therefore, be any local practice compelling him to issue a warning and deciding that he is in default if he does not do so. A caveat is not a notice to him; it is a notice to the Court. On the other hand a caveator, if he wishes to preserve his right must see that his caveat is renewed at the appropriate times. If he does not do so, it is he who is in default.

12. In this case the caveat expired on the 21st October, 1948. On the 24th December, 1948, when the application was made, the caveat was of no effect. It had been cleared off in one of the modes by which caveats may be cleared off. There was therefore nothing to prevent the grant.

13. There has been much uncertainty as to procedure and, without any sanction, some local ideas, inconsistent with English practice, have been allowed to take root. For this reason the caveator ought to be given an opportunity of preserving his right. The order will be that the grant is to issue but not until after the expiration of 14 days. During these 14 days the caveator may enter a fresh caveat, and if he does so, the grant is not to issue.'

Application granted.

BOOKERS DEMERARA SUGAR ESTATES, LTD.,
v. THE COMMISSIONER.

BOOKERS DEMERARA SUGAR ESTATES LIMITED,
Appellants,

v.

THE COMMISSIONER,
Respondent.

1948. No. 585.—DEMERARA

BEFORE WORLEY, C.J.

1949. JANUARY 18 AND MARCH 30.

Excess profits tax—Income tax—Company incorporated in U.K.—Income tax paid in U.K.—Whether deductible for purpose of assessment of—Excess profits tax.

The appellants are a company incorporated in England and registered in the Colony and carrying on business in the Colony. The appellants paid United Kingdom income tax in respect of income earned in the Colony and sought to deduct the sum so paid from the income chargeable with Excess Profits tax.

Rule 3 in Part I of the First Schedule to the Excess Profits Tax Ordinance (No. 1 of 1941) reads: "The provisions of paragraph (g) of section 12 of the Income Tax Ordinance (which disallows deductions on account of the payment of United Kingdom and Empire Income tax) shall not apply."

The appellant contended that the effect of rule 3 was an affirmative direction that, in the computation of Excess Profits Tax a deduction should be made far United Kingdom and Empire income tax paid or payable on the income chargeable with Excess Profits Tax.

The respondents' ease was that rule 3 means that the relevant income tax principles have to be ascertained by reading the Income Tax Ordinance as if paragraph (g) of section 12 had, never been enacted and to see whether there was in that Ordinance any affirmative provisions under which deduction of United Kingdom income tax was available.

Held: In the computation of income for Excess Profits Tax a deduction can only be justified if it can be shown to be an outgoing or expense incurred in the production of the income. Appeal dismissed.

Appeal by Bookers Demerara Sugar Estates Limited, against an assessment for Excess Profits Tax made by the Commissioner.

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

A. C. Brazao, Acting Solicitor-General, for the respondents.

Cur. adv. vult.

WORLEY, C.J.—The Appellants are a company incorporated in England and registered in the Colony and have been carrying on business in the Colony for a number of years including the year 1939. They appeal against an assessment of $12,600 for Excess Profits Tax for the chargeable accounting period 1st September 1939 to 31st December 1939. The standard period for the purpose of the assessment is the year 1938. The whole of the income in respect of which the Appellants' have been assessed is income accruing in or derived from the Colony.

The only question raised by this appeal is the correctness or

otherwise of the disallowance by the Commissioner of the amount paid by the Appellants in respect of United Kingdom income tax on their income when ascertaining the income for the purpose of assessment of Excess Profits Tax and the answer turns upon the correct construction of the relevant provisions of the Excess Profits Tax Ordinance 1941 (Ordinance No. 1 of 1941) and of the Income Tax Ordinance (Chapter 38).

Section 4 of the Excess Profits Tax Ordinance charges the tax on profits arising from any trade or business, to which the section applies, in excess of the standard profits and section 6 (1) of the Ordinance provides that "for the purposes of this Ordinance the profits arising from a trade or business in the standard period or in any chargeable accounting period shall be separately computed and shall be so computed on income tax principles as adapted in accordance with the provisions of Part 1 of the First Schedule to this Ordinance."

For the purposes of this subsection the expression "income tax principles" in regard to a trade or business means the principles on which the profits arising from the trade or business are computed for the purposes of income tax under the Income Tax Ordinance or would be so computed if income tax were chargeable under that Ordinance in respect of the profits so arising.

Part 1 of the First Schedule sets out a number of rules prescribing certain adaptations of income tax principles to the computation of profits. Rule 6 provides "No deduction shall be made on account of liability to pay or payment of income tax or excess' profits tax." It was conceded by the respondent that this rule relates only to taxation imposed by the laws of this Colony and has therefore no relevance to the present appeal.

The real issue in this matter is the proper interpretation to be placed upon Rule 3 which reads as follows: —

> "The provisions of paragraph (g) of section 12 of the Income Tax Ordinance (which disallows deductions on account of the payment of United Kingdom and Empire income tax) shall not apply."

The case for the Appellants is that the effect of and the only meaning to be given to the rule is that it is an affirmative direction that, in the computation for Excess Profits Tax, a deduction shall be made for United Kingdom and Empire income tax paid or payable on the income chargeable with Excess Profits Tax.

The case for the respondent is that Rule 3 means that the relevant income tax principles have to be ascertained by reading the Income Tax Ordinance as if paragraph (g) of section 12 had never been enacted and to see whether there are in that Ordinance any affirmative provisions under which deduction of United Kingdom income tax is allowable.

It is necessary therefore to ascertain the principles contained in the Income Tax Ordinance. The scheme of the Ordinance is (1) to impose a tax upon the chargeable income of any person "accruing in or derived from or received in the Colony" (I quote section 5 as it stood at the material time and before the amendment effected by Ordinance No. 6 of 1947) and (2) for the purpose of ascertaining the chargeable income, to particularise cer-

tain deductions which are inadmissible, but (3) to allow as deductions items which are proper to be debited against the in-comings of the trade or business.

> "In determining whether a particular item may or may not be deducted from profits it is necessary to enquire whether the deduction is expressly prohibited by the Act and then if not so prohibited to consider whether it is of such a nature that it is proper to be charged against incomings in a computation of the balance of profits and gains for the year." (Per Lord Cave in British Insulated and Helsby Cables v. Atherton 1926 A.C. 211).

The admissibility of a deduction not expressly prohibited or allowed is one of fact for the determination of the Commissioner and his decision is conclusive so long as there is evidence to support it and he has applied the proper test.

Section 10 (1) of the Income Tax Ordinance provides that for the purpose of ascertaining the chargeable income of anyone there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year immediately preceding the year of assessment by that person in the production of the income. The section then sets out a number of particular items which shall be so allowed but the catalogue is not exhaustive. It does not in-elude any allowance for local, United Kingdom or Empire income tax.

Section 12 then prescribes certain deductions which are not to be allowed of which the material one is " (g) Any amounts paid or payable in respect of the United Kingdom income tax or super tax or Empire income tax as defined in sections 48 and 49 of this Ordinance."

It is quite clear therefore that if the present computations were being made for the purpose of income tax the deduction claimed by the Appellants could not be allowed but Mr. Humphrys contended that the repeal or non-application of paragraph (g) of section 12 was intended to and could only have the effect of giving the tax payer the right to have the deduction made as a matter of law in the computation of Excess Profits Tax. He laid some stress upon the omission from Rule 3 of the First Schedule to the Excess Profits Tax Ordinance of any reference to United Kingdom super tax, but in my view nothing turns upon this omission. The words in parentheses in the rule are merely a description to aid memory and the effect of the rule is to make non-applicable the whole of the provisions of paragraph (g) of section 12.

On the other hand, the Respondent contended that for the computation of income tax the principle contained in section 5, read with section 12 (g), is that "income" means the full amount of the income accruing in the place where it arises and without deduction of any amount there paid or payable in respect of income tax. But, in the computation for excess profits tax, the effect of the repeal of section 12 (g) is that income tax paid or payable on the income becomes an allowable deduction if it is an outgoing or expense incurred in the production of the income; and that, as regards income *accruing in or derived from* the Colony, United Kingdom or Empire income tax is no more such an outgoing or expense than *is* Colony income tax. As regards in-

come *received* in the Colony, it may be so considered and, in such case, the income to be charged is the net income or the actual amount received in the Colony after deduction of income tax paid or payable in the country where the income arose.

The proper canon of construction to be applied to the omission in a later statute of a negative provision contained in an earlier one was laid down by the Privy Council in Union Steamship Company of New Zealand Ltd. v. Mary Robin (1920 A.C. 564) where Lord Buckmaster delivering the judgment of the Judicial Committee said

> "The mere omission in a later statute of a negative provision contained in an earlier one cannot by itself have the result of effecting a substantive affirmation. It is necessary to see how the law would, have stood without the original proviso and also the terms in which the revised clauses are subsequently re-enacted."

Mr. Humphrys argued that this principle was confined to cases, such as the one then before the Judicial Committee, in which words had been omitted and that it could not be applied to the present case where there is an express enactment that a specified prohibition should not apply. I am unable to agree with this. In my view, the effect of Rule 3 is to provide that in applying the enactments of the Income Tax Ordinance which contain the income tax principles, paragraph (g) of section 12 is to be omitted. Or, to put it in another way, if the relevant income tax principles had been set out in extenso in the Excess Profits Tax Ordinance instead of being incorporated by reference, paragraph (g) would not be included; but there would be no express positive enactment prescribing the deduction of United Kingdom and Empire income tax.

Applying this principle therefore to the relevant provisions of the Income Tax Ordinance I accept the contention of the Respondent that there is no affirmative provision authorising the deduction of United Kingdom income tax in the computation of income for Excess Profits Tax and that such a deduction can only! be justified if it can be shown to be an outgoing or expense incurred in the production of the income.

Reference was made during the argument to the corresponding provisions of English statute law charging Excess Profits Tax (Finance Act (No. 2) 1939 sections 12, and 14 (1) and the Seventh Schedule, Part I, rule (5). This rule reads "The provisions of subsection (4) of section 27 of the Finance Act 1920 (which disallows deduction on account of the payment of Dominion income tax) shall not apply." The rule appears to have provided the model for rule 3 of the Colony Ordinance. It should be noted that the expression "Dominion" here denotes any overseas possession of His Majesty.

In this connection I was referred to a number of text-books on the subject of the United Kingdom Excess Profits Tax, most of which contain a categorical statement that Dominion income tax is a proper deduction for Excess Profits Tax purposes. A similar statement with a reference to rule 5 is to be found in Halsbury's Laws of England (Hailsham Edition) Supplement 1947 p. 1403.

Counsel for the Appellants contended that these references indicate that, in the United Kingdom, rule 5 is interpreted as a substantive affirmation and that Dominion income tax is deducted, in the computation of the Excess Profits Tax, from profits accruing to a Dominion trading company from its business carried on in the United Kingdom.

For the respondent it was contended that such an inference is too wide and not justified by the relevant enactments, nor is it in accordance with the practice of the Inland Revenue authorities.

The argument in support of this is that section 27 (4) of the Finance Act 1920 relates only to cases coming within Cases IV and V of Schedule D of the Income Tax Act 1918, and the rules applicable thereto. Cases IV and V only deal with income arising in the Dominions and, as to Case V rule 2, which covers income accruing from a trade or business, actually received in the United Kingdom. In such cases, a deduction for income tax suffered in the Dominions is allowed as a measure of relief from double taxation (i.e., the amount of tax paid or payable is not "added back"). Section 27 (4) modifies these rules in cases where the particular Dominion concerned itself grants reciprocal relief (see Halsbury Statutes Vol. 9 pp. 561, 575 to 577 and 625).

It follows, therefore, that the effect of the non-application of section 27 (4) must be limited to income arising in the Dominions and there are no grounds for the inference that it extends the deductibility of Dominion income tax to income accruing in the United Kingdom.

The only text-book available to me which gives any comment on or exposition of this point is "The Excess Profits Tax" by H.E., Seed A.C.A. A.S.A.A. (London, Gee & Co. 1940). Under the heading "Dominion Income Tax" (p. 58}), the author refers to the provisions of Section 27 of the Finance Act, 1920, for giving relief from British income tax on account of Dominion income tax "in respect of the same part of the tax-payer's income." (It is a condition of relief that the claimant should have paid or should be, liable to both United Kingdom income tax and Dominion income tax in respect of the same part of his income: Halsbury — Statutes Vol. 9 p. 625, note). The author points out that it would obviously not be right to allow the taxpayer to deduct Dominion income tax as an expense in computing his profits for income tax purposes, in addition to giving him the special relief from British income tax provided by the section: hence the prohibition in subsection (4) of section 27.

He then continues: — "This is another point which is irrelevant so far as Excess Profits Tax is concerned and hence paragraph 5, Part I of the Seventh Schedule provides that subsection (4) of section 27 shall not apply. The effect is that any Dominion income tax paid (relating to the profits of the accounting period concerned) will be deductible in computing profits for the purposes of Excess Profits Tax. This is a reasonable provision since the Dominion income tax paid will represent an expense incurred in earning the profits which have become liable to Excess Profits' Tax."

As I understand these comments, they refer only to income arising in a Dominion and support the contention of the Respond-

ent as to the true effect of rule 5. The author's final comment appears to me both correct and reasonable if it relates to Dominion concerned. But if the profits have been earned in the country which is charging Excess Profits Tax on them, I can see no reason why income tax paid or payable in another country, where the tax payer is resident or is incorporated, should be regarded as an expense incurred in earning those profits.

At the time when the appeal was argued counsel were not able to refer me to any decision exactly on the point in issue, but; I was referred to a decision of the Court of Appeal of Palestine in Consolidated Near East Co. Ltd. v. The Assessing Officer of Haifa (reported in Palestine Income Tax Cases 1945 at pp. 119 and 142) which turned on a question of construction closely analogous to that in the present appeal. After the conclusion of the argument, my attention was drawn to a decision of the Court of Appeal of the Colony of Jamaica in the case of The West Indies Sugar Company Ltd. v. The Assessment Committee: 14th January, 1949. A sealed copy of that judgment is now included in the appeal record.

The Palestine case was, in one way, the converse of the instant case for the question was whether the appellant company was authorised in law to deduct United Kingdom Excess Profits Tax for the purpose of ascertaining its income chargeable in respect of Palestine income tax. The questions put before the Court of Appeal in the case stated were:—

(a) Is the deductibility of United Kingdom Excess Profits Tax introduced into the Palestine income tax law by the Income Tax (Amendment) Ordinance No. 10 of 1942?

(b) Is the amount paid by the company in respect of United Kingdom Excess Profits Tax an outgoing wholly and exclusively incurred by it in the production of its income and is it deductible for the purpose of ascertaining the chargeable income of the company?

Before the enactment of the amending Ordinance of 1942, section 13 (g) of the Palestine Income Tax Ordinance provided that for the purpose of ascertaining the chargeable income no deduction should be allowed in respect of United Kingdom Excess Profits Tax. By the amending Ordinance the words "United Kingdom Excess Profits Tax" were deleted from section 13 (g). For the Appellant it was submitted that the amendment meant that every person could, as of right, deduct United Kingdom Excess Profits Tax. For the Assessing Officer, the respondent, it was submitted that the amendment simply meant that the absolute embargo imposed by section 13 (g) was lifted and that, in a proper case, United Kingdom Excess Profits[1] Tax might be deducted and it would be for the Assessing Officer to decide what was a proper case. The Court of Appeal, construing the Palestine enactments as they stood, upheld the latter contention and said

> "Before the amendment no relief at all was allowed in respect of United Kingdom Excess Profits Tax and it is not difficult to imagine that occasions might arise in the case of firms which do business both in the United Kingdom and Palestine where circumstances would call for the deduction of United Kingdom Excess Profits Tax but it is not at all easy to see why every person should

> have the benefit of such a deduction. If that were the case we would not have expected the Legislature to impose an embargo in the first instance. On the contrary, we would have expected the Legislature to say in terms that United Kingdom Excess Profits. Tax was deductible. Moreover when the Ordinance was amended it would have been a simpler matter for the Legislature to have provided for the deduction of United Kingdom Excess Profits Tax in every case. It did not do so. We think that the only reasonable conclusion is that the Legislature intended the United Kingdom Excess Profits Tax to be deducted only in cases where such deduction would be warranted, and,, although the duty of deciding when a deduction should be allowed may involve the exercise of a very high degree of responsibility by the Assessing Officer, we do not think that the Legislature could therefore not have intended to entrust this duty to him. We would observe that the list of deductions in section 11 of the Ordinance is not exhaustive and presumably the Assessing Officer can allow deductions in analogous cases where they appear to be warranted."

This conclusion was supported by a reference to the Union Steamship Company case cited above.

Question (b) was answered in the negative. The Court of Appeal held that the amount paid by the appellant company in respect of United Kingdom Excess Profits Tax was not an outgoing wholly and exclusively incurred by it in the production of its income and fortified its opinion with quotations from the speeches in the House of Lords in the case of L.C. Ltd. (In liquidation) v. G.B. Olivant Ltd. & ors (1944 I A.E.L.R. p. 510).

Finally, the Court considered whether, upon the facts in the case before them, the Assessing Officer had failed to use his discretion properly when he decided that the appellant company could not have the benefit of the amendment of section 13 (g). The appellant company was incorporated in England and registered as a foreign company in Palestine. The activities of the company were carried on both in the United Kingdom and in Palestine and the profits were made in Palestine. On this point, the opinion of the Court was: —

> "Even if we regard the company as trading both in the United Kingdom and in Palestine the fact remains that Palestine provides the market where the profits are collected and it would seem quite reasonable that Palestine should have its market dues in the form of income tax……We think that this is a case in which the appellant should pay the Palestine income tax and then ask in the United Kingdom for remission of an equivalent part of Excess Profits Tax."

In my view the reasoned arguments set out in this judgement apply, mutatis mutandis, to the appeal before me.

In the Jamaica case, the West Indies Sugar Company Ltd. was an English company having its head office and place of management in England and it was agreed that the profits from that part of its business which is carried on in the Colony were subject to Excess Profits Tax. The relevant law of Jamaica as set out in the judgment of the Court of Appeal corresponds to the provisions of the law of British Guiana, except that regulation 2 of Part 1 of the Excess Profits Regulations (as quoted in the judgment) reads:—

> "The principles of income tax law under which deductions are not allowed on account of the payment of United Kingdom or Empire income tax shall not be followed."

The arguments before the Court were in substance the same as those advanced by counsel before me. The Court however refused to accede to the argument that the effect of the repeal of the prohibition of deduction in respect of United Kingdom and Empire income tax was that the income tax law remained what it would have been if the prohibition had never been enacted and that a deduction in respect of United Kingdom and Empire income tax could be made only if it were a permissible deduction or allowance authorised by a provision in the Income Tax law.

The reasoning which led the Court to this conclusion is set out in the following passage in the judgment.

> "It does not appear to us that income tax payable in the United Kingdom can be said to fall within the provisions of any section of the Income Tax law except possibly sub-section (1) of section 9, that is to say, as an expense wholly and exclusively laid, out or expended in acquiring the income upon which tax is payable; and if it can not be said to do so it is difficult to understand why (the prohibition) was ever enacted, for independently of the express prohibition the deduction, in Crown Counsel's argument, could not have been made. If (the prohibition) had been merely repealed, by the Legislature it may have been possible for Crown Counsel to have argued that a deduction of United Kingdom or Empire income tax could be made only if it were a permissible deduction or allowance; and then the only remaining question would have been whether it was disbursement or expense wholly and exclusively laid out or expended in acquiring the income on which tax is payable. The prohibition however of the deduction of United Kingdom or Empire income tax must be taken to be one of the principles of income tax law on which profits are computed and as regulation 2 enacts that this principle shall not be followed, the Legislature must be taken to have intended that for the purpose of computing profits for Excess Profits Tax purposes United Kingdom and Empire income tax were deductible."

This conclusion disposed of the appeal but the judgment goes on to set out certain other considerations which led the Court to think that the view taken was the right one, and from these it appears that the profits of the company, in respect of the shipments of its products to and the sale of its products in England, accrued in England.

> "In these circumstances the profits of the company which are notionally regarded as having accrued in Jamaica are the profits which are capable of being remitted to Jamaica on their realisation in England, and these profits are not the gross profits realised in England but those profits less the income tax payable on them in England. It will be seen that United Kingdom income tax is on this view of the matter a proper debit item which falls within, section 9 (1) of the Income Tax law."

In the Jamaica case, therefore, the position as regards the place of origin of the profits was the converse of the Palestine case and of the instant case. It was, in fact, the type of case in which, according to the view I have taken above, income received in the Colony is to be treated for the purpose of computing Excess

Profits Tax as the actual amount received in the Colony after payment of United Kingdom income tax.

On the point of the construction of regulation 2 on which the case was decided, I find it difficult to reconcile the reasoning of the Jamaican Court of Appeal with that of the Palestinian Court, except on the hypothesis that the Jamaican regulation, being framed in more general terms, is of wider import than the Palestinian enactment. On this view, the Jamaican case is distinguishable from the Palestinian one, and also from the present appeal, in which, if I am right, the question of construction is governed by the principle laid down in the Union Steamship case.

For the reasons set out above, I have come to the conclusion that the Commissioner's decision in this matter was correct, and I therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *H. C. B. Humphrys,* for appellants;
V. C. Dias, Crown Solicitor, for respondent.

RANDOLPH PARRIS,

Plaintiff,

v.

JAMES FRANCIS BURTON,
by his attorney Rose Matilda Williams,

Defendant.

1948. No. 194.—DEMERARA.

BEFORE MANNING, J. (ACTING).

1949. MARCH 21, 22, 31.

Immovable property—Payment on account of purchase price—Failure to complete purchase within stipulated time—Amount paid on account forfeited.

Under a written agreement for the purchase of immovable property by the plaintiff from the defendant, the plaintiff paid a certain sum on account of the purchase price, and the balance was to be paid on the passing of transport within three months. At the end of the agreement, it was stated that "on failure on the part of the purchaser through any fault of his all sums paid in connection therewith to be the bona fide property of the vendor and to be treated as liquidated damages for breach of agreement."

Held: These words indicated the intention of the parties that the sum paid was to be a guarantee by the plaintiff of the due performance of his part of the agreement, and accordingly when the plaintiff failed to complete the purchase the defendant was entitled to forfeit the sum so paid even if he sold the property subsequently at a higher price.

Action by the plaintiff to enforce an opposition to a transport and for specific performance of an agreement: The defendant counter-claimed. The necessary facts and arguments appear from the judgment.

John Carter, for the plaintiff.

S. I. Cyrus, for the defendant.

Cur. adv. vult.

MANNING, J. (Acting):

On the 6th October, 1947, the plaintiff agreed to purchase from the defendant certain immovable property in Georgetown. The price was fixed at $9,000 and the plaintiff paid $300 on account. A memorandum in writing was drawn up. The balance of the purchase money was to be paid on the passing of transport, and possession was then to be given to the plaintiff. Transport was to be passed within 3 months from 6th October, 1947.

2. On the 28th February, 1948 the defendant advertised transport of the said property to one Nascimento. The plaintiff entered opposition on March 13th, 1948, and instituted his action on the 22nd March, 1948. He claimed the usual order; an injunction; and specific performance of the agreement of October 6th, 1947. In the alternative he claimed the refund of his $300.

3. The defendant pleaded that the plaintiff was unable to comply with the terms and conditions of the agreement and that he (the defendant) therefore rescinded it. He counter-claimed for $300 as damages for breach of contract.

4. It will be seen that the plaintiff had to find the sum of $8,700 before the 6th January, 1948. It was clear from his evidence that he never had the slightest prospect of being in possession of such a sum by that date or within any reasonable time thereafter. Mr. Carter, who appeared for him, realised this, and expressed his willingness to abandon all the claim save and except the refund of $300. For some reason, in spite of the opposition, transport had been passed to Nascimento before the trial; so, there was little object in pressing either for an injunction or specific performance. Mr. Cyrus, for the defendant, resisted the refund of the $300, and persisted in his counterclaim. On the evidence I had no doubt that the plaintiff was unable to fulfil his agreement and that the defendant was justified in rescinding it. The only issue remaining was as to the plaintiff's claim for the return of his $300.

5. Mr. Cyrus, for the defendant, cited the authorities Doobay v. Moulai, 1942, B.G.L.R. 411, and Anter v. Valverde, 1942. B.G.L.R., 422. Mr. Carter, for the plaintiff, cited Hutchins v. Allen, 1931-37. They all agree as to the principles to be applied. The Antar case was a decision of the West Indian Court of Appeal. The law was laid down as follows:—

(a) If a payment is expressed to be made on account and there is nothing to show that it was the intention of the parties that it partook of the nature of a guarantee for due performance by the purchaser, the amount is recoverable less any loss sustained by the vendor.

(b) If it is clear that it was the intention of the parties that the payment should be a guarantee for due performance by the purchaser, then, even though the words "on account" are used, the amount is not recoverable on failure by the purchaser to perform his agreement.

(c) In this latter case it is immaterial that the vendor has not sustained any loss owing to the breach. He may retain the amount even if he has made a profit; as in the present case, where the sale for Nascimento was for $9,500.

6. The $300 was described in the agreement as "amount on account of $9,000, purchase price;" but at the end of the agreement

were the following words "Failure on the part of purchaser through any fault of his all sums paid in connection therewith to be the bona fide property of the Vendor and to be treated as liquidated damages for breach of agreement." These words indicate the intention of the parties that the $300 was to be a guarantee by the plaintiff for the due performance of his part of the agreement. If he purchased the property the $300 would be regarded as a payment on account; but if, through his own default, as actually happened, he failed to complete the purchase, then the $300 was to be treated as a deposit and forfeited to the defendant. On this construction of the agreement it must be decided that the plaintiff's opposition was neither just, legal nor well-founded and that his claim for the return of the $300 fails.

7. The counterclaim is misconceived. The defendant had received a sum of money from the plaintiff as a guarantee for due performance and to be retained by him in the event of breach.

8. There will be judgment for the defendant on the claim with costs and for the plaintiff on the counterclaim with costs.

Judgment for plaintiff on counter-claim and for defendant on claim. Solicitors: *W. D. Dinally,* for plaintiff;
H. V. vanB. Gunning, for defendant.

IN THE WEST INDIAN COURT OF APPEAL
On appeal from the Supreme Court of British Guiana.
(1945. No. 248.—DEMERARA)

Between: —

HANUMANDAS, also called Hanooman, Jurakhan, and Outar,
Appellants (Plaintiffs),

and

THE COUNTRY AUTHORITY OF CLONBROOK and THE CANADIAN MISSION COUNCIL IN BRITISH GUIANA,
Respondents (Defendants).

(W.I.C.A. No. 3 of 1948.—BRITISH GUIANA.)

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

1949. APRIL 4.

West Indian Court of Appeal—Local Government Board—Ultra vires—Central Board of Health—Public Health Ordinance. 1934.

In 1900 the Colony of British Guiana acquired the whole of Plantation Clonbrook and in 1909 the front lands were laid out for building purposes. The Local Government Board approved a plan showing the mode of subdivision and a certain area was marked "Dam" and was not sub-divided into lots.

HANUMANDAS AND THE COUNTRY AUTHORITY OF CLONBROOK & ANR.

By the Public Health Ordinance No. 15 of 1934. the Central Board of Health became, so far as this appeal is concerned, the statutory successors of the Local Government Board with the same powers of control over areas for building purposes.

In 1945 the Central Board of Health approved a plan in which part of the area originally designated as a "Dam" was laid out for building purposes.

The appellants claimed that this action on the part of the Central Board of Health was ultra vires.

Held: The Central Board of Health had the power to give approval to the first respondent for the lay out of the area for building purposes.

Appeal by the plaintiffs from a judgment of the Supreme Court of British Guiana dismissing their claim for a declaration and injunction.

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

A. C. Brazao. Solicitor-General, for the first named respondents.

Sir Eustace Woolford, K.C., for the second-named respondents.

Cur. adv. vult.

The judgment of the Court was as follows: —

This is an appeal from a judgment of Boland J. dismissing the claim of the appellants (plaintiffs) for

(a) a declaration that the first-named respondents (defendants) are not entitled to lay out for building purposes the Dam immediately South of the Mahaica Canal in District of Clonbrook, East Coast, Demerara, and that they are not entitled to sell and/or lease any portion of the said Dam.

(b) an injunction to restrain both respondents (defendants) their servants, agents or anyone permitted by them, from building on, destroying or otherwise committing any act of trespass and/or of nuisance in respect of the entire said Dam; and further as against the first-named respondents to restrain them from all and/or any breaches of their statutory rights and powers in respect of the said Dam; and/or in infringement of the rights, prescriptive and otherwise, of the proprietor of the District; and/or to the endangering of the protection afforded by the Dam to the said proprietors.

(c) a declaratory order that the appellants are entitled to the exclusive use of the Dam by reason of user nec clam, nec vi, nec precario, for over 35 years. Damages and further or other relief were also claimed.

The learned trial judge found that the appellants had not established their claim to have enjoyed uninterrupted user of the Dam, during the period of prescription, either for pasturage or layerage of cattle or as a protection for drainage and irrigation. He gave judgment for the respondents and discharged an interlocutory injunction restraining the respondents from proceeding as specified in paragraphs (at) and (b) of the appellants' claim.

The notice of appeal motion contains several grounds of appeal but the only one argued before us was that the learned trial judge had not decided the issue as to whether it is ultra vires the statu-

tory powers and rights of the first-named respondents to lay out the said dam for building purposes or to sell or lease any portion of the said Dam to anyone for any purpose whatever and therefore illegal for the second-named respondent to take the benefit of any such action on their part.

The area in question, known as the South canal dam at Clonbrook, was transported to the Country Authority of Clonbrook by the Colony of British Guiana in 1944. It is therefore vested in the Country Authority and under its control and management (sections 86 and 89 of the Local Government Ordinance No. 14 of 1945).

Section 90 (1) of this Ordinance empowers the local authority of a village or country district to let "any undivided lands, undivided empolders, pasture lands, woods or any portion thereof, for the time being under the control and management of the local authority." It is to be noted that whereas section 89 includes dams as being under the control of the local authority, section 90 omits any reference to a dam when giving power to the authority to let property which is under their management and control. Further, section 140 of the Ordinance provides that every local authority shall

> "(a) cause to be made, and shall at all times maintain in good order, the dams and trenches and main drains, having the outfall and with the kokers or sluices necessary for effectually draining the authority's district for sanitary purposes."

The appellants argue that the effect of these provisions is that the local authority has no power to let any dam or portion of a dam or to do anything which might conflict with their positive duty to maintain at all times every dam which is necessary for the effectual drainage of their district.

As an interpretation of the general principles contained in the statutory provisions above referred to, this proposition cannot be disputed.

But the real issue is whether, in the circumstances of this particular case, the area in question is properly to be considered a dam within the meaning and for the purposes of the Local Government Ordinance.

So far as we are aware there is no definition in any Ordinance of the Colony of the term "dam". In local usage the accepted meaning of the term includes a raised bank, dyke, or embankment running alongside a canal, drain, ditch or water-course.

The evidence shows that the area in question is part of an embankment parallel to the southern edge of the Mahaica Canal and was probably formed by the spoil from the canal and the cross-trench to the South. The area is about 70 feet wide, 1,200 feet in length, and is, at its highest point, about 2 feet above the level of the adjacent lands. Doubtless this area has always been and still is known as and called South Canal Dam Clonbrook but the question whether it is a dam within the meaning of the Local Government Ordinance cannot be decided by that circumstance alone but must be determined by consideration of all the facts and circumstances of the case.

In 1900 the Colony of British Guiana acquired the whole of

Plantation Clonbrook which had previously been a sugar estate. In 1909 the front lands were laid out for building purposes and, in pursuance of the provisions of section 27 of the Local Government Board Ordinance No. XIII of 1907 (section 27 of Chapter 84 of the Revised Edition 1930), the Local Government Board approved a plan (Ex. E) showing the mode of sub-division, the streets, roads and means of access to each lot and the provision for the drainage thereof. In this plan the area we are now considering is marked "Dam" and is not sub-divided into lots.

If we correctly understand the submission made on behalf of the appellants it amounted to this: that since in the exercise of statutory powers the whole of the area under discussion was thus allocated by the statutory controlling authority for use as a dam, as evidenced by the approved plan, the local authority is bound by this allocation and has no power to treat it otherwise or to lease or otherwise dispose of any part of it. This submission, though correct as far as it goes, does not go far enough as it fails to take into account subsequent legislative changes and the subsequent official acts of the authorities charged with the control of this area.

Section 27 of the Local Government Board Ordinance was repealed and re-enacted as section 135 of the Public Health Ordinance, 1934 (No. 15 of 1934) with the substitution of the Central Board of Health for the Local Government Board as the control-ling authority. Thus the Central Board of Health became for present purposes the statutory successors of the Local Government Board, with the same powers of control over areas laid out for building purposes.

In 1945, the Central Board of Health acting in pursuance of these powers approved a plan of the lay-out of this area in building lots (Ex. M). Even if the whole area was originally in 1909 allocated for use as a dam (which in our view is by no means certain) it is not correct to say that the approval then given by the Local Government Board bound their successors for all time. If the statutory controlling authority had power to approve a lay-out which excluded the appropriation of any part of the land to building, that authority has the power to amend that lay-out so as to include in the area appropriated to building purposes, the part previously excluded. Although it may originally have been considered necessary for the drainage of the lots to reserve a part of the land as a dam yet if the Central Board of Health is now of opinion that such necessity no longer exists, it has power to approve appropriation of that part for building or other purposes.

It cannot therefore be contended that it is ultra vires the statutory powers of the first-named respondents to have sought the approval of the Central Board of Health under the provisions of the Public Health Ordinance 1934 for the lay-out of this area for building purposes; nor that the Board has no power to approve such a lay-out, provided that it is satisfied that proper provision is made for drainage.

It is not necessary for this Court to decide whether the action of the Central Board of Health in approving the proposed lay-out

and letting of the area in question was wrong, that Board not being a party to these proceedings. But, were it necessary to do so, there is abundant evidence to shew that the drainage and irrigation of the District will not be impaired or in any way adversely affected.

At the time this bank was raised and for so long as the Mahaica Canal was tidal it may well have been that the whole of the area in question was essential for the protection of the lands nearby and for purposes of drainage; but since 1919 the level and flow of water in the Canal have been controlled by tidal sluices.

The Drainage and Irrigation Ordinance, 1940 (No. 25 of 1940) established a Drainage and Irrigation Board with sole control and management of all drainage and irrigation works vested in them by section 10 or section 17 of the Ordinance, and, thereunder, the Mahaica Canal and the southern cross-trench at Clonbrook were vested in that Board. By the operation of section 20 of the Ordinance this entailed also the vesting in that Board of a strip of land twelve feet in depth measured from the toe of the dams of the Canal and of the cross-trench. These strips were excluded from the area transported to the first respondents in 1944 and now under discussion.

It is significant that the Drainage and Irrigation Board did not deem it necessary to exercise control over any wider area than this on the South Canal Dam and indeed the expert evidence given at the hearing shewed conclusively that whatever may have been the original position, it is not now necessary to reserve the remainder of the area as a dam.

It must follow from the approval given by the Central Board of Health to the proposals of the first-named respondents that the Board considered that it is not necessary to reserve this area as a dam for the protection or drainage of the Clonbrook Country District and with this view we agree.

The appeal is therefore dismissed and the order of the Court below will stand. The appellants must pay to the first-named respondents their costs of this appeal.

Appeal dismissed.

Solicitors: *S. M. A. Nasir*, for appellants.
V. C. Dias, Crown Solicitor, for first-named respondents.
N. C. Janki, for second-named respondents.

DANIEL BLAIR *v.* RAMSARRAN

DANIEL BLAIR.
Plaintiff,

v.

RAMSARRAN,
Defendant.

[1948. No. 95—BERBICE.]

BEFORE WORLEY C.J.

1949 MARCH 1, 4; APRIL 5.

Money had and received—Total failure of consideration—Judgment in rem—Finding by Magistrate in interpleader proceedings affirmed by Court of Appeal as to property of a chattel being in judgment debtor—Estoppel by record.

During the year 1946 the defendant lent C.A. $142 on the security of a cottage belonging to C.A. but standing on lands belonging to another person. By way of security for this loan a document purporting to be an agreement of sale and purchase was drawn up whereby Defendant bought or purported to buy the cottage. The agreement purported to give to defendant immediate possession, but C.A. remained in occupation. It was a condition in the agreement that if at any time before the 4th February, 1947, C.A. repaid the amount of the purchase price. Defendant would hand over the cottage to C.A. Upon failure of the condition, the property was to become the absolute property of Defendant. On 23rd August, 1947, Defendant representing that the cottage was his own, sold the property for $165.00 to the Plaintiff. On 12th September, 1947, the cottage was taken in execution on a writ issued out of the Magistrate's Court at the instance of a creditor of C.A. who had obtained a judgment against C.A. C.A. was still in occupation. Plaintiff filed an interpleader claim before the Magistrate. The claim was dismissed and the levy declared good. On appeal, the Full Court dismissed the plaintiff's appeal and confirmed the Magistrate's Order.

In an action brought by Plaintiff against Defendant for the repayment of the sum of $165.00 as money had and received and on a total failure of consideration.

Held: That the judgment of the Magistrate's Court in the interpleader proceedings confirmed by the Full Court, being a judgment in rem of a court of competent jurisdiction is conclusive as to the right or title to the property in question and that the defendant being thereby estopped from averring that the ownership was in him at the time of the alleged sale to the Plaintiff, the Defendant had purported to sell a house to which he had no title and consequently that there had been a total failure of consideration and Plaintiff was entitled to the return of the $165.00.

ACTION by the plaintiff against the defendant for money had and received. The facts appear from the judgment.

Mungal Singh, (for *J. O. F. Haynes*), for the plaintiff.

H. Matadial, for the defendant.

Cur. adv. vult.

WORLEY, C.J.: In this case the plaintiff claims from the defendant the sum of $165 money had and received by the defend-

ant to the use of the plaintiff on 23rd August, 1947, as purchase price of a cottage situated at lot No. 2 Plantation Vryheid, West Canje, Berbice on land belonging to one Chewti. The plaintiff pleaded that the defendant agreed to return the sum claimed on the failure of defendant to give possession and in consideration of plaintiff agreeing to cancellation of the contract of sale.

The defendant admitted having on 23rd August, 1947, sold to the plaintiff the cottage in question and received the purchase price $165, but pleaded that the plaintiff entered into possession and that ownership of the cottage passed to the plaintiff on that day. Defendant denied that he agreed to return the said sum or any part of it or that the contract of sale was ever cancelled..

The relevant facts are that on the 7th October, 1946, the defendant, by an agreement of sale and purchase, bought or purported to buy the cottage in question from one Cyrus Alexander for $142. The agreement purported to give immediate possession to the purchaser, but was subject to a condition that the purchaser would "hand over" the cottage to the vendor if at any time before the 4th February, 1947, the latter repaid the amount of the purchase price. Upon failure of the condition, the cottage was to become the absolute property of the purchaser (defendant).

Alexander remained in occupation of the cottage. On 25th August the defendant sold or purported to sell the cottage to the plaintiff. Alexander still remained in possession.

On 12th September, 1947, the cottage was taken in execution on a writ issued out of the Magistrate's Court, New Amsterdam on a judgment obtained by Lochaber Estates Ltd. against Alexander who was still in occupation.

The plaintiff, Blair, interpleaded claiming the cottage as his property by virtue of the contract made with defendant Ramsarran on 25th August, 1947. The claim was dismissed and the levy declared good. The Full Court dismissed the plain-tiff's appeal and confirmed the Magistrate's order (Appeal No. 9 of 1948 Demerara). The appeal record was put in evidence in the present proceedings.

In the interpleader proceedings the present plaintiff, the present defendant and Cyrus Alexander all gave evidence. The plaintiff claimed ownership of the cottage but admitted that before he concluded the agreement with defendant, he had known that the judgment creditor intended to levy on the property. The defendant, Ramsarran, denied that the transaction between Alexander and himself was in truth, and in fact, a loan secured by a nominal transfer of the house. He admitted that there was a dispute between himself and Alexander about the cottage and that he had not told the latter of the re-sale to the plaintiff. Alexander denied he had ever sold the house and alleged that he had repaid to Ramsarran the greater part of the loan and that the agreement between them had been cancelled.

The Magistrate found that "the whole transaction between Blair and Ramsarran reeked of fraud" and that Ramsarran, if he did genuinely sell at all, had no right to do so, and that Blair "had no right to part with his money under such circumstances." It follows from this that the Magistrate must have accepted

Alexander's story that there was no sale of the house by him to Ramsarran.

The judgment of the Magistrate's Court, confirmed by the Full Court, being a judgment in rem of a Court of competent jurisdiction, is conclusive as to the right or title to the property in question and the defendant in these proceedings is estopped from averring that the ownership was in him at the time of the alleged sale to the plaintiff.

The position therefore is that the defendant was purporting to sell the plaintiff a house to which he had no title and that there has been a total failure of consideration (Rowland v. Divall 1923 2 KB. 500).

Nevertheless, counsel for the defendant has contended that the plaintiff is disentitled to recover because the transaction has been found to be fraudulent: ex turpi causa non oritur actio. It is clear that the Magistrate found that the defendant was fraudulent in purporting to sell the house to the plaintiff but it is by no means clear that he considered the plaintiff's conduct was also fraudulent. The Magistrate expressed the opinion that the plaintiff "had no right to part with his money under the circumstances" and therefore had only himself to blame when it turned out that the house was not Ramsarran's to sell.

There is here no finding of fraud on the part of the plaintiff but merely an expression of opinion that plaintiff was ill-advised to part with his money. The admitted fact that plaintiff parted with his money militates strongly against any suggestion of fraud on his part. Where fraud has not been pleaded, I should require very clear evidence from the record before I would disentitle a plaintiff from recovering in these circumstances. There is no such evidence here. I therefore give judgment for the plaintiff for the sum claimed with costs.

Judgment for plaintiff.

RAJENDRANAUTH SHASTRI,
Appellant (Applicant),
v.
LESLIE SLATER, Superintendent of Police,
Respondent (Opposer).

[1949. No. 6.—DEMERARA.]

BEFORE FULL COURTS WORLEY, C.J., LUCKHOO, J. AND MANNING J. (ACTING).

1949. APRIL 1, 4, 23.

Intoxicating Liquor Licensing Ordinance, Cap. 107*—Application for hotel licence—Character of applicant as ground of refusal by Licensing Board—Jurisdiction of the Board—Whether undergoing of sentence by applicant after conviction for an offence is a bar to the conviction being received in evidence by the Board for the purpose of the assessment of the character of the applicant. Right of Appeal.*

An application made to the Licensing Board by the appellant for a certificate for the issue of a hotel licence for premises in Georgetown

was opposed by the police on the ground as stated in the notice of opposition, that "the applicant is a person of bad character." Evidence was adduced before the Board that some years previously, in the year 1935 applicant was convicted for the offence of fraudulent conversion of property belonging to a woman and sentenced to imprisonment for five months with hard labour and on another occasion, in the year 1943, an indictable charge against him for a similar offence was discontinued after he had made a monetary settlement with the prosecutrix. The Board found him to be a person of bad character and refused the application.

It was contended on appeal that as the notice of opposition was limited to the ground specified in section 12(1) (a) (ii) of the Ordinance and was not based on "the character or history" of the applicant under section 12 (iii), the Board in refusing the application had exceeded its jurisdiction, alternatively, had taken extraneous matter into consideration. It was also submitted that the previous conviction was wrongly taken into consideration as evidence of bad character as applicant had purged the offence by undergoing the sentence imposed.

In dismissing the appeal the Court held:

(1) As it is not possible to arrive at a fair estimate of a man's character without considering both his past and his present, the Board was competent to take into consideration applicant's past character.

(2) Though sentence was undergone by applicant, evidence of the conviction was not thereby rendered inadmissible for the assessment of the applicant's character.

(3) The act of a statutory authority in exercising a discretion to grant or refuse a licence is primarily an administrative act and only quasi judicial and no right of appeal lies from that decision unless a right of appeal is expressly conferred by law. A restricted right of appeal is given to the Board by Section 25 of the Ordinance, but there is no power in the Court of Appeal to entertain a ground of appeal which declares that the decision was unreasonable and could not be supported by the evidence.

Appeal by the applicant from a decision of the Licensing Board for the county of Demerara refusing a certificate to the applicant for the issue of a hotel licence for premises situated in Georgetown.

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

A. C. Brazao, Acting Solicitor-General, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

This appeal is brought under the provisions of section 25 of the Intoxicating Liquor Licensing Ordinance (Chapter 107) against the decision of the Licensing Board for the County of Demerara refusing a certificate to the appellant (applicant) for the issue of a hotel licence for premises situated in Georgetown. A police officer opposed the application on the ground that the applicant (appellant) "is a person of bad character."

At the hearing the applicant satisfied the Board that the premises in question complied with the requirements of the Ordinance but admitted that in March 1935 he was convicted of fraudulent conversion of property belonging to a woman and was sentenced to five months imprisonment with hard labour. He also admitted that in the year 1943 he was charged indictably with a similar offence. With respect to this the Licensing Board has found that "he received gold jewellery from a female on the

pretence that he would obtain a tabage to cure her of her illness. This savoured of witch-craft which is a type of offence against the gullible and is also one implying moral turpitude, which naturally affects character." These criminal proceedings were discontinued after the appellant had made a monetary settlement in Court with the prosecutrix. The Board found the appellant to be a person of bad character and refused the application. In course of its reasons for so deciding it made the following remarks. "The Board cannot lose sight of the fact that the last occurrence is only five years ago, and that there is no evidence before the Board of the applicant's good character, or mode of life, since or before that date. Nothing is known of the Applicant. He himself has not offered any evidence of his own good character since 1935 or 1943, or at all, although he knew his application was opposed on the ground of bad character."

The grounds of appeal against this decision are

1. The Board in refusing the application for the licence on the ground that the evidence established that the (Applicant) Appellant had a past record of bad character exceeded its Jurisdiction.

2. The Board in arriving at the conclusion that the (Applicant) Appellant is a person of bad character took extraneous matter into consideration, to wit: —

(a) The conviction against the (Applicant) (Appellant in 1935 for fraudulent conversion, and

(b) The transaction in 1943.

neither of which incidents had any relevancy to the character of the (Applicant)) Appellant at the time of his making the application for the Hotel Licence.

At the hearing of the appeal counsel for the appellant contended that the notice of opposition, being limited to the ground of objection prescribed in section 12 (1) (a) (ii), the objector can only lead evidence to shew that the applicant is at the time of the making or consideration of the application a person of bad character. For such purpose the past history of the applicant cannot be taken into consideration nor are his previous convictions, if any, relevant because conviction and punishment have purged the offence and cannot be cited as evidence of bad character. Counsel conceded that, if the notice of opposition were based on the "character or history" of appellant under sub-section (3) of section 12, evidence of the past life and the criminal record of the applicant would be admissible and relevant.

In support of this argument, counsel cited a decision of the Court of Appeal of Canada in the case of Barker v. Westminster Trust Co. 1941 (3 W.W.R. 473). In that case the Court had to construe a Canadian statute which restricted the freedom of a testator to disinherit a spouse but conferred on the Court a discretion to refuse to make an order in favour of any person "whose character or conduct is such" as, in the opinion of the Court, to disentitle him to the benefit of an order made under the Act. The Court took the view that "character or conduct" must relate to a state of affairs existing at the time of the death of the testator.

We doubt whether the Canadian Court of Appeal meant that consideration of past conduct was necessarily wholly excluded

but, however that may be, we do not think that the interpretation of a phrase in a statute of an entirely different nature is of much assistance to us in this case.

The Licensing Acts in England are in pari materia with the Ordinance we are now considering and reported English cases leave no doubt whatever that the Licensing Justices under those Acts are entitled to take a conviction into consideration on the question whether a man is of good character or not (see Reg. v. Birmingham J.J. 40 J.P. 132: Reg. v. Lancaster J.J. 1891 55 J.P. 580). Evidence of past acts is admissible; even if they formed the subject of a criminal charge which resulted in an acquittal (Latimer v. Birmingham J.J. 1896 60 J.P. 660) or, as Lord Esher M.R. suggested in Reg. v. Lancaster J.J. (supra), might have formed the subject of a criminal charge. In our view, it is not possible to arrive at a fair estimate of a man's character without considering both his past and his present. To hold otherwise would be contrary to common sense and daily experience. To exclude the past and consider only the present is to confuse character with behaviour.

The decision of the Full Court in Anthony Philipe v. Jose Mendonca (Appeal No. 154 of 1946) to which appellant's counsel referred does not assist his case. In that case, the Full Court said: —

> "We are of opinion that the question whether or not a person is of bad character is a question of fact and if the Board, as it did, considered the evidence and. came to the conclusion that the applicant is not a person of bad character this Court cannot interfere as such a conclusion doer, not violate any of the provisions of the Ordinance, or some applicable rule of law, so as to make it a specific illegality."

This passage expresses exactly the limited powers of this Court in appeals brought under the Intoxicating Liquor Licensing Ordinance. The act of a statutory authority in exercising a discretion to grant or refuse a licence is primarily an administrative act and only quasi judicial and no appeal lies from that decision unless a right of appeal is expressly conferred by law (M. de Mendonca & Co. Ltd. v. Hikel 1941 B.G.L.R. 32). In the instant case a restricted right of appeal is given by section 25 of the Ordinance, and jurisdiction to hear an appeal is conferred on this Court by section 26. We are unable to accept the view urged by counsel for the appellant that subsection (1) of this latter section gives this Court power to review findings of fact made by the Licensing Board. The power of this Court to decide questions of fact is limited to facts raised in the appeal and the permitted grounds of appeal do not include the ground that the decision was unreasonable or could not be supported having regard to the evidence. We do not sit as a Court of Appeal from the Board's decision and can only deal with the questions submitted to us in the notice of appeal.

Since the conclusion of the argument in this matter, counsel for the appellant has drawn our attention to the provisions of section 3 of 9 Geo. IV Cap. 32 (Civil Rights of Convicts Act, 1828), which has been enacted in this Colony as sectionl80 of the Criminal Law (Procedure) Ordinance (Chapter 18) and also as section 7 of the Criminal Law (Offences) Ordinance (Chapter 17).

These sections enact that the undergoing of sentence consequent on a conviction for felony shall have the like effects and consequences as a pardon under the public seal as to the felony whereof the offender has been convicted.

There appears to be some doubt whether by reason of this enactment the endurance of punishment has the same effect as a pardon in relation to the removal of a statutory disqualification following on conviction: see Halsbury — Laws of England Vol. IX para. 368 and note (i) at p.260 and the cases there cited.

But, whatever may be the correct view on that point, the cases referred to give no support to any suggestion that the conviction is thereby rendered inadmissible or irrelevant in the assessment of an applicant's character: there are indeed direct pronouncements in the contrary sense.

In Leyman v. Latimer 1878 (3 Ex. Div. 352) the Court of Appeal considered the construction of 9 Geo. IV C 32 s.3. Bramwell L.J. thought the question did not arise but Brett and Cotton LL.JJ. both held that, by the operation of that section, a person convicted of felony who has endured the punishment is no longer in law a felon but Brett L.J. concluded his judgment with these words (p.357)

> "I only wish to add that nothing in our judgment has a tendency to limit the power of inquiry into the previous character of a person tendering himself as a witness: questions may then be put from a justifiable motive and the occasion is proper."

Cotton L.J. said (p.358)

> "I need hardly say that the statute does not prevent a full inquiry into the past history of any man whenever it is a matter of duty to form a right estimate of his credibility or character."

We agree with these dicta and in our view therefore the sections of the local Ordinances to which we have been referred do not assist the appellant's case.

For these reasons we hold that the appeal fails and must be dismissed with costs.

Appeal dismissed.

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

L. N. LYNCH *v.* S. A. LYNCH AND A. HARRIS

LEONARD NATHANIEL LYNCH,
Petitioner,
v.
STELLA AGATHA LYNCH,
Respondent,
and
ALONZA HARRIS,
Co-respondent.

[1948. No. 347—DEMERARA.]

BEFORE WORLEY, C.J.

1949. APRIL 4, 25.

Divorce—Decree nisi granted—Co-respondent not served—Fact not brought to Court's attention—Application for decree absolute—Failure to serve co-respondent with citation considered—Rules of Court (*Matrimonial Causes*) 1921, *rule* 12 *applied—No jurisdiction to make decree nisi—Set aside.*

A husband filed a petition for dissolution of marriage on the ground of his wife's adultery with a co-respondent. The respondent was served with a citation but did not enter appearance but the corespondent was never served. It was not brought to the Judge's notice that the co-respondent was not served and a decree nisi was granted. When the application for a decree absolute was made the non-service on the co-respondent was discovered.

Held: The previous proceedings were a nullity and must be set aside.

Application to make absolute a decree nisi for dissolution of marriage.

Sir Eustace Woolford, Kt., K.C., for the applicant (petitioner).

The respondent and co-respondent were in default of appearance.

WORLEY, C.J.: This is a husband's petition for dissolution of marriage on the ground of the respondent wife's adultery with the co-respondent. The prayer of the petition included, inter alia, a claim for damages to be paid by the co-respondent. The respondent was served with a citation on 14th June, 1948 but did not enter appearance. No citation against the co-respondent was extracted for service nor has he ever been served with any process in this matter. The petition came on for hearing on the 27th September 1948 and the following order was made on the 1st October 1948: —

"The Judge having on the 27th day of September, 1948, taken the oral evidence of the petitioner in support of the petition filed in this cause the respondent not appearing and not defending the suit and having heard Counsel thereon, pronounced that the petitioner has sufficiently proved the contents of the said petition and decreed that the marriage had and solemnised on the 22nd day of November, 1932, at the Wesleyan Methodist Church, in the Mahaica Marriage District, in the county of Demerara and colony of British Guiana, between LEONARD NATHANIEL LYNCH, the Petitioner, and STELLA AGATHA LYNCH, born NURSE, spinster, the Respondent, be dissolved by reason that since the celebration thereof the said

respondent has been guilty of malicious desertion and adultery with Alonza Harris, the co-Respondent, unless sufficient cause be shown to the Court why this decree should not be made absolute within six months from the making thereof."

The petitioner now applies for the, decree nisi to be made absolute, the application being supported by the customary affidavit of search.

The question for consideration is whether or not the failure to serve the co-respondent with a citation and certified copy of the petition as prescribed by rules 9 and 10 of the Rules of Court (Matrimonial Causes) 1921 is an irregularity of the class which is curable by the application of rule 76 and Order LI of the Rules of Court, 1900; in other words, whether the order of 1st October 1948 is voidable or whether it is null and void.

For the general principle I cannot do better than cite the following passage from the judgment of the Court of Appeal in Everitt v. Everitt (1948 2 All E.R. 545: 65 T.L.R, 121 at p.122).

"It is well settled that a judgment obtained against a party in his absence owing to his not having been served with the process is not merely voidable for irregularity but is void as a nullity; see Craig v. Kanssen (1943 1 K.B. 256) and the cases therein cited. Manifestly this general principle applies with full force to a judgment affecting the status of the party: Marsh v. Marsh (1945 A.C. 271)."

In Craig v. Kanssen (supra) Lord Greene M.R. in the Court of Appeal said it was

"beyond question that failure to serve process where service of process is required, goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex parte* proceedings the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country."

In that case, too, it was held that the Court can set aside such an order in its inherent jurisdiction and it is not necessary to appeal from it.

In Marsh v. Marsh, (supra) the Privy Council held that while no decisive test has been laid down for distinguishing between procedural irregularities which render a judgment or order void or only voidable, one test is to inquire whether the irregularity has caused a failure of natural justice and Lord Goddard pointed out the obvious distinction between obtaining judgment on a writ which has never been served and one in which there has been a defect in the service but the writ had come to the knowledge of the defendant (p.284).

An example of the application of this principle is to be found in the case of Samsundar Singh v. Lillian Singh (No. 265 of 1944 Demerara), which was a petition for divorce on the ground of malicious desertion. There was no service of a citation or copy petition on the respondent, but a decree nisi was granted, the Court being apparently misled by the terms of an affidavit of search for entry of appearance. Subsequently on the petitioner applying to have the decree made absolute, the respondent filed an affidavit stating that though she had not been served with any process, she offered no objection whatever and would not contest the application. The Bail Court Judge (Jackson, ag. J.), on the

application of petitioner's counsel, ordered that the decree nisi be rescinded.

In the present case, therefore, if the decree nisi can properly be said to affect the co-respondent, it is a nullity, at least so far as he is concerned, and he is entitled ex debito justitae to have it set aside. The co-respondent is a party to the proceedings and there has been a finding that the respondent has committed adultery with him although there has been no award of damages or order for costs against the co-respondent.

A finding that the respondent has committed adultery with the co-respondent does not necessarily involve a finding that the co-respondent has committed adultery with the respondent. In a proper case (e.g. where the only evidence is a confession by the respondent) a decree nisi may be pronounced against the respondent and the co-respondent be dismissed from the suit (see Rayden on Divorce 4th Ed. p.91 para. 108 and the cases there cited); but I am not aware of any case in which such an order has been made when there has been no service on the co-respondent.

In my view it is impossible to hold that the respondent will not or may not be affected by the decree. Although he may not suffer financially, he may suffer in reputation or in other ways and, if he applied to have the decree set aside, I cannot suppose that any Court would refuse his application.

Apart from this, however, it is the duty of the Court to ensure that in matrimonial causes all the necessary parties are before it or have proper notice of the proceedings (see Rules 6 to 10 and rule 12 of the Rules of Court (Matrimonial Causes) 1921). In these matters, the parties are not domini litis and have not the same power of dealing with proceedings at their will as they have in other Courts. Proceedings are in the discretion of the Court (Rutter v. Rutter (No. 2) 1921 P.421 at p.423) and the Court is concerned primarily with matters of public policy and the status of the parties rather than with the particular quarrel between individuals. It is concerned to see that any order it makes is based on the true facts. (see Tucker v. Tucker 64 T.L.R. 613).

In my view, having regard to the provisions of rule 12 of the Rules of Court (Matrimonial Causes) 1921, there was no jurisdiction to make the decree nisi and it must be wholly set aside.

Counsel for the petitioner has suggested that even if the decree nisi is null and void as against the co-respondent it should still stand as regards the respondent. It would seem, however, from the authorities that, where a new trial is applied for on the notice of one respondent, it will be ordered in respect of all respondents; see Walker v. Walker, Nicall and Craig (1861) 31 L.J. (P.M. &A.) 26: Stone v. Stone and Appleton (1864,) 34 L.J. (P.M. & A.) 33: Worsley v. Worsley and Worsley 1904 20 T.L.R. 171. I think the same rule should be applied in the present case.

I may add that I have referred this matter to the learned Judge who made the decree nisi. He informs me that the order would not have been made had his attention been drawn to the failure to serve the co-respondent and concurs in the view that the order should be set aside.

Application dismissed.
Decree Nisi set aside.

Solicitors: *V. D. P. Woolford.* for applicant (petitioner).

V. L. DONALD *v.* O. T. DONALD.

VIRGINIA LORETTE DONALD,

Petitioner,

v.

OSCAR THEODORE DONALD,

Respondent.

[1948. No. 550.—DEMERARA]

BEFORE WORLEY, C.J.

1949. FEBRUARY 2; APRIL 6; MAY 10.

Dissolution of marriage—malicious desertion—burden of proof—right of choice as to—matrimonial home—effect of unreasonable refusal to reside at matrimonial home.

In a petition by a wife for divorce on the ground of malicious desertion, the husband brought a counter charge of desertion without cause. The parties were married in 1937 and lived and cohabited in Georgetown until 1944 or 1945 when the husband who had been transferred to Triumph, East Coast, Demerara in 1943 wished to remove the matrimonial home to Paradise, East Coast, a village about four miles from Triumph. The wife refused to live at Paradise and continued to reside in Georgetown. The husband lived alone at Paradise until May 1946 when he returned to live with his wife in Georgetown. In July 1947, six months after a serious quarrel with his wife, the husband left the matrimonial home in Georgetown and went to live at Paradise. His wife did not accompany him. The husband continued to send regularly adequate sums for maintenance of his wife and four children.

Held: To establish a charge of malicious desertion, there must at least be proved or properly inferred from the evidence, a deliberate definite and final repudiation of the marriage state by one spouse against the will of the other and without just cause or excuse.

Matthews v. Matthews 1931—1937 B.G. L.R. followed.

There was no evidence of any intention on the part of the husband to put an end to the matrimonial state and the petition must be dismissed.

Since the husband did not request his wife to accompany him to Paradise in 1947 he must be held to have acquiesced in her earlier refusal in 1945 to live there and the cross-petition must be dismissed.

Cases referred to: Jackson v. Jackson 1924 p. 19; Pulford v. Pulford 1923 p. 18; Cook v. Cook 1949 1 All E.R. 384. Pardy v. Pardy 1939 3 All E.R. 779; Buchler v. Buchler 1947 1 All E.R. 319. Dunn v. Dunn 1949 p. 98.

Petition for dissolution of marriage on the ground of malicious desertion.

A. M. Edun, for the petitioner.

P. A. Cummings. for the respondent.

Cur. adv. vult.

WORLEY, C.J.: This is a wife's petition for divorce brought on the ground of malicious desertion. The respondent husband by his answer denies the charge and brings a counter-charge of desertion without cause. The petitioner denies this allegation. Both parties ask for custody of the children of the marriage. The

respondent also asks for costs out of the petitioner's separate estate.

The parties were married in the Marriage District of Georgetown on December 22nd 1937: the husband was born in the Colony and is domiciled here. After the marriage the parties lived and cohabited at lot No. 208 Almond Street, Queenstown, which is the petitioner's property. There are four children of the marriage, one son and three daughters, now aged respectively, 10, 9, 8 and 6 years: all are at present living with the petitioner at 206 Almond Street.

The respondent is a Government servant and was at the time of the marriage and subsequently stationed in Georgetown. In November 1943 he was offered and accepted a transfer to the Public Works Department office at Triumph, East Coast Demerara. This transfer secured for him on an increase of $20 per month in salary and was, furthermore, a mark of confidence in his ability and integrity because he was sent to Triumph as a result of a series of frauds in the village offices of the Department. I mention these facts because it was suggested to him in cross—examination that he should have refused the offer of the transfer on account of the inconvenience which the petitioner might thereby suffer. In my view the suggestion was unreasonable. It is generally a condition of employment in the public service that an officer may be required to serve wherever the exigencies of the service require and, apart from this; no officer could consistently refuse to accept transfers without prejudicing his prospects of promotion.

The respondent owns a farm and a house at Paradise, a village three or four miles from Triumph. In order to be near his work he went to live at Paradise but did not ask the petitioner to go there with him because she was then enceinte (the fourth child was born in November 1943). Petitioner and the children continued to live at 206 Almond Street and the respondent returned home at frequent intervals.

In 1944 or early 1945 the respondent wanted to move the matrimonial home to Paradise but the petitioner would not agree. Her reasons for refusal are clear from her letter of 29th January 1945. Her objections were that there would be no accommodation for her mother and sisters if they should come to visit her, and that there was no water closet. She also objected to living next door to the respondent's aunt. There is no doubt that these were her real reasons for refusal. In the witness box she alleged that she refused because of the respondent's cruelty and because of the difficulty of obtaining a good education for the children. Apart from one incident which occurred in 1947 to which I shall refer later, there is no evidence to support any allegation of cruelty and I do not think that the question of education really motivated her refusal at that time.

About May 1946 the respondent returned to live at the matrimonial home 206 Almond Street and went daily to his work at Triumph. He travelled to and fro by car, train or occasionally by bicycle leaving early to be at his work at 8 a.m. There can be no doubt that this arrangement was inconvenient to him and I see no reason to doubt his evidence that his official superiors

eventually objected to it as detracting from his efficiency and intimated to him that he should live in the district where his work is.

It would appear from the evidence that the parties had mutual recriminations and quarrels from time to time but marital relations continued until February 1947 when there was a quarrel which ended in the respondent hitting the petitioner with a stick. As is only to be expected their accounts of what happened do not agree but I think the respondent was the more truthful and frank in his evidence. The petitioner in the witness box was resentful, sullen and evasive: she would only grudgingly admit anything in the respondent's favour and, in my opinion, sought to exaggerate the wrong done to her. Although the respondent's conduct was inexcusable he was provoked by the petitioner's conduct in locking him out of the matrimonial home, which she had no right to do. The petitioner had a haemorrhage three weeks later, on February 22nd, and claims that she had a miscarriage as a result of the ill treatment she had received. The respondent asserts that the doctor he called in attributed the haemorrhage to fibroid growths and denied any knowledge of the petitioner's pregnancy at the time. I cannot regard the petitioner's allegations as proved in view of her general unreliability and the absence of medical evidence.

In any case I do not think that this incident was the real cause of the differences between the parties though it no doubt exacerbated the petitioner's feelings.

From this time onwards, there was no resumption of marital intercourse; the respondent did not suggest it and the petitioner indicated her attitude plainly by locking her bedroom door. I think the respondent was sincerely sorry for what had occurred and did what he could to shew this but the petitioner was unforgiving and they were hardly on speaking terms.

This state of affairs continued until July 1st 1947 when the respondent returned to live at Paradise, where he still is. He has continued to send regularly adequate sums for maintenance of the petitioner and the children and has regularly visited the matrimonial home on Sundays to take the children out.

The petitioner bases her charge of malicious desertion on the respondent's action in leaving the home on 1st July and the respondent bases his counter-charge on the petitioner's failure to follow him. It is therefore necessary to examine closely the attendant circumstances.

Before doing so it is convenient to consider what has to be proved to establish such a charge. There must at least be proved or be properly inferred from the evidence a deliberate, definite and final repudiation of the marriage state by one spouse against the will of the other and without just cause or excuse and the Court will not lightly determine the marriage bond where there is no clear and convincing evidence of such final repudiation. (see Matthews v. Matthews B.G. L.R. 1931-37 459).

The refusal or abandonment of marital intercourse does not amount to desertion apart from any other circumstances that may be considered in connection with it. (Jackson v. Jackson 1924 P. 19). Nor does physical withdrawal from the matrimonial home,

for desertion is withdrawal not from a place but from a state of things (Pulford v. Pulford 1923 P. 18: Cook v. Cook 1949 1 All E.R. 384)

> "For the act of desertion both the factum of separation and the animus deserendi are required. A de facto separation may take place without there being an animus deserendi, but if that animus supervenes, desertion will begin from that moment" (see Pardy v. Pardy 1939 3 All E.R. 779: Buchler v. Buchler 1947 1 All E.R. 319).

There are two further propositions relevant to the consideration of the present case which I take from the judgments of the Court of Appeal in Dunn v. Dunn (1949 P. 98). That was a case of a husband's petition for desertion and the judgments are phrased accordingly, but I take the propositions there enunciated to apply equally to a charge brought by a wife. These propositions are: —

(1) the legal burden of proof where a spouse petitions for a decree of divorce on the ground of desertion is on the petitioner to shew that he or she was deserted without cause. Even if the respondent spouse does not affirmatively prove just cause, the Court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has the petitioner proved desertion without just cause?

(2) there is no proposition of law that a husband (or a wife) has the right to say where the matrimonial home should be. The decision where the home is to be is one affecting both parties and their children and, it is the duty of the parties to decide it by agreement, each having an equal voice. If such an arrangement is frustrated by the unreasonableness of one or the other and this leads to a separation, then the party who has produced the separation by reason of his or her unreasonable behaviour is guilty of desertion.

To this I would add the comment that, at common law the obligation of the husband to maintain his wife is *prima facie* discharged by the provision of a home for her. In normal circumstances the choice where the matrimonial home shall be will rest with the husband, but he must not act unreasonably. As Denning L.J. said in the case above cited "It is simply a proposition of ordinary good sense arising from the fact that the husband is usually the wage earner and has to live near his work."

It is in accordance with these principles that I approach the consideration of the charge and counter-charge in the present case.

I accept the respondent's evidence that he decided to move back to Paradise because he found it highly inconvenient to live in Georgetown and that his superior officer had intimated that he should live in the district where his work was. He admits that he did not ask the petitioner to go with him at that time but I accept his explanation that there had been previous discussions on the question in which the petitioner had raised the objection given in her letter of 29th January 1945 and that he knew it would be useless to ask her again. I think he is sincere in his expressed desire to have his wife and children with him at Paradise and to improve the accommodation and amenities of his house there. When the petitioner was ill in hospital in June 1948, he visited her daily for a week. The petition was filed in September 1948.

Since then the respondent has made efforts to get a transfer back to Georgetown but so far without success.

I cannot find in any of these facts, evidence of any intention on the part of the respondent to put an end to the matrimonial state. His removal to Paradise was, in my view, justified by the requirements of his employment, and his subsequent conduct shews an intention to maintain the matrimonial home and to remain on as good terms with the petitioner as she would permit.

It follows therefore that the petitioner has failed to discharge the burden of proof which she has undertaken and the petition must be dismissed.

It remains to consider the more difficult problem of the cross-petition, which was brought, as the respondent expressed it, in "self-defence." I have indicated the petitioner's real reasons for refusing to go to live at Paradise in 1945 which in my view were unreasonable but it has to be borne in mind that the respondent accepted the position created by that refusal from 1943 until July 1947. No doubt those same reasons continued to motivate the petitioner in 1947. By that time it is probable that the question of the education of the children had assumed some importance in her mind: the respondent counters this by saying that the present-day facilities for schooling at Triumph are in his opinion adequate and it is one of the unfortunate features of this case that the parents cannot agree on the type of education which is best for their children.

I have given this aspect of the case very careful consideration and have come to the conclusion that the respondent has not proved his counter-charge of desertion without just cause. I think his action in moving back to Paradise without making any request to the petitioner to go with him must be regarded, on this aspect of the case, as a renewal of his acceptance of the position created by the petitioner's refusal to move there in 1944 or 1945. To put it into everyday speech, he was letting his wife have her own way about the house and the schooling, probably, I think, in the hope that time might heal their differences. I cannot therefore declare that the petitioner has maliciously deserted the respondent and the counter-petition must be dismissed.

I should perhaps add that after the conclusion of the evidence I requested counsel to interview me in Chambers with the parties and then indicated my hope that husband and wife might yet be reconciled. I deferred consideration of the matter for a time to afford an opportunity to that end. I understand that some discussion has taken place but that it has up to the present proved fruitless. Possibly the prospects of reconciliation have grown more remote because of these proceedings and it may be that this judgment will please neither party. Nevertheless it is my duty in accordance with the law of the Colony as I understand it to refuse to declare this marriage dissolved. I do however earnestly recommend to both parties a further consideration of their obligations to each other and their responsibility towards their children.

I will consider any application counsel may wish to make as regards costs.

Petition dismissed.

Solicitors: *W. D. Dinally,* for petitioner; *F. I. Dias* for respondent.

ROOP *v.* BOOKERS SUGAR ESTATES, LTD.

ROOP,

Plaintiff,

v

BOOKERS DEMERARA SUGAR ESTATES LIMITED,

Defendants.

1947. No. 340.—DEMERARA

BEFORE LUCKHOO, J.

1949. MARCH 22, 31; MAY 16.

Contract—land let for rice cultivation and adjoining land for cattle agistment—agreement to maintain fence—cattle straying—duty imposed by contract—implied term—consequential effect of breach of duty.

The plaintiff rented from the defendants a piece of land for planting rice. It was a term of the contract that the defendants would supply water and maintain, repair and keep in repair a fence to prevent cattle trespassing on to the rice cultivation. The defendants failed to keep the fence in a proper state of repair and as a result cattle which the defendants had agisted on adjoining land strayed into plaintiff's cultivation and damaged his rice crop.

Held: The nature of the contract and the implied term which arose from the defendants having control of both rice and pasture lands imposed a duty on them to fence in cattle from straying on the rice lands.

Action by the plaintiff against the defendants for damages.

A. M. Edun, for the plaintiff.

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

Cur. adv. vult.

LUCKHOO, J.: Three main questions are involved in this action. What were the terms of the contract, the duty imposed by such contract, the breach and its consequential effect?

Plantation "East Lothian" is in the ownership of the Estate of Hicken deceased and is situate on the Corentyne Coast of the County of Berbice. Prior to 1941 a large portion of it was leased to the proprietors of Plantation Albion an adjoining estate, and in that year the defendants took over on lease a part of Plantation East Lothian for the agistment of cattle by persons serving and living on estates which they control.

When it became necessary for the Colony to produce more food, the defendants conceived the idea of dividing the said lands into a rice cultivation area and a cattle pasture. In order to do this they dug a Canal about 15 feet in width by 4 feet in depth at right angles to what is known in the area as the Grand Canal from approximately north to south thereby forming two separate portions.

The defendants then drove several hundred head of cattle over to the portion on the east which thereafter became known as the "East Lothian" pasture, and erected a wire fence alongside

a dam on the western side running parallel to the Canal they had dug for the purpose of fencing in all cattle in the pasture from the western portion which was divided into three sections numbered 10, 9 and 8 westwards for the purpose of rice cultivation by labourers serving on their estates to aid the "Grow More Food" Campaign. A settlement called "New Dam" lies to the west.

The "East Lothian" pasture comprised 400 to 500 acres on which subsequent to 1941 it is estimated cattle to the number of 800 were agisted at one time: sections 8, 9 and 10 which comprised the rice lands were divided into about 100 beds in each section with a width of 5 rods to each bed.

The Canal which had been dug by the defendants provided the main source of water supply for the cattle. The rice lands were irrigated by means of impounding the water by stop-offs and gravitation and sometimes in dry season by pumping water from the Canal into the rice fields.

Mr. Faulkner who served as Deputy Manager from 1931 to 1944 of Plantation Rose Hall, Canje, Berbice, a sugar estate under the control and supervision of the defendants mentioned in the course of his evidence that when sections 8, 9 and 10 East Lothian were taken in for rice cultivation, the cattle were removed from those sections to the other side of the Canal. This was in the year 1941 or 1942. The fence was erected in that year and it was well constructed with four or five strands of wire for the purpose of keeping cattle going from the pasture into the rice-fields. The defendants also employed four cow-minders for the pasture all the time to look after and prevent cattle straying on to rice-lands.

It is not disputed that this measure was taken to fence in all the cattle in the pasture from the rice-lands. But it would appear from the evidence of Mr. McTurk who served as Overseer under Mr. Faulkner that the defendants allowed the cattle which they took on agistment to enter the rice-fields for the purpose of grazing thereon between the reaping of one and the planting of the following crop. This necessitated the opening of some part of the fence to let them in. And Mr. McTurk further stated that as the defendants gave out the rice-lands (meaning for the new planting) the first thing they did was to renew the fence.

This fence is over a mile in length, and the defendants in the ordinary course of events would have to and did spend large sums of money for its maintenance and upkeep.

Rambhajan a witness called on behalf of the plaintiff, himself a tenant of the rice-lands in section 9, and also employed by the defendants to watch the cows in the pasture, stated that in 1942 Sookra an employee of the defendants and Overseer Malcolm allotted the rice lands to each tenant at the time when Mr. Faulkner was Deputy Manager and that he and many other tenants spoke to Mr. Faulkner concerning the terms of their tenancy. "We asked Mr. Faulkner "how we will get water and what about them cows." Manager said "You will get sufficient water and wire to protect the cows." After this Sookra and Malcolm gave us rice lands."

Boodhoo another witness called on behalf of the plaintiff also planted from the year 1943, three beds in section 9 under the same conditions.

The plaintiff who resides on Plantation Rose Hall and who knew the conditions under which the rice-lands were rented since 1941 said that he rented three beds in section 10 for the first time in 1945 when Sookra, overseer of the rice-lands pointed out to him the three particular beds, and that when he asked Sookra about water supply and fencing, he said, water is guaranteed and fencing is guaranteed. The plaintiff's three beds were those nearest the fence in section 10 and were approximately 96 rods by 5 rods each.

In his Statement of Claim the plaintiff set out a term of the contract with, and the obligation on part of the defendants alleged by him in the following words "The defendant company was and is bound to maintain, repair and keep in repair a fence between the said two fields so as to prevent cattle in the Goldstone Hall (meaning East Lothian as corrected by him in his evidence) pasture escaping from and out of it, into the rice cultivation of the plaintiff in the other field through want of a fence or defects in the said fence."

"The defendant company has not repaired or kept in repair the said fence in accordance with their duty."

The defendants in their defence pleaded to those allegations as follows:—

"The defendants have never at any time entered into any agreement with the plaintiff or any other person whereby they are bound to maintain and keep in repair any fences between the alleged or any fields on land owned, leased or occupied by the defendants."

"The defendants have, although not bound to do so, erected, maintained and kept in repair all such fences which are now and always have been in a proper state of repair."

"If any such fence or fences have been damaged, such damage has been caused not by the defendants or their servants or agents but by the plaintiff himself, his servants or agents or by some third person or persons."

There being a dispute I have first to determine whether the evidence led in support of the plaintiff's case supports an agreement, and if so, the substance of that agreement. There can be no doubt that the defendants did let to the plaintiff in 1945 and again in 1946, three (3) beds of rice lands in section 10, part of Plantation East Lothian at the rate of $4.80 rental per bed for each crop. They undertook by reason of such letting and by the terms of their agreement to guarantee water supply for the purpose of irrigating those lands, and to fence in cattle depastured on the East Lothian pasture from straying upon the said rice-lands.

What therefore was the effect of those terms?

These may be interpreted not only by the terms in which the promise itself is made but other specific facts which the defendants have not only admitted but relied upon in support of their defence. One must look not merely to the words used but to the state of things as known to and affecting the parties at the time of the agreement; including their information and competence with regard to the nature of the matter in hand.

Mr. Faulkner said he was Deputy Manager from 1931 to 1944 and he knew the lands at East Lothian well. Sections 8, 9 and 10 were taken in for rice. Cattle were removed from those sections to the other side of the Canal either in 1941 or i942. The defendants fenced in the portion of the pasture from the rice fields. They had cattle agisted on the East Lothian pasture. The fence was erected alongside the rice beds, section 10 being next to the fence. When fence was erected in 1941 or 1942, it was well constructed with four or five strands of wire. This fence was erected for the purpose of keeping cattle going from the pasture into the rice-fields. We had cow-minders for the pasture ail the time. Fences were sometimes broken and the defendants would send people to repair them. The defendants had control over both the rice-fields and the pasture at East Lothian.

Mr. McTurk who was at Plantation Rose Hall when Mr. Faulkner was Deputy Manager confirmed a great deal of the foregoing. He stated that in August 1946 the rice-tenants complained to him that the fence in certain parts had fallen down. He sent persons to repair same. Defendants had four cow-minders at least in the pasture to look after and prevent cattle straying on to the rice-fields. These cow-minders were there from the inception in 1941 or 1942.

In *Smith v. Hughes* (1871) L.R. 6 Q.B. 597 *Blackburn* J. at p. 607 said

> "I apprehend that if one of the parties intends to make a contract on one set of terms, and, "the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v. Cooke* 2 Exch. at 663. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

The reasonable expectation thus determined gives the legal effect of the promise.

It becomes necessary to consider whether the defendants had any, and if so what, duty to the plaintiff and if they did owe a duty to him, whether they were in breach of it.

Upon two grounds it could be said that they owed that duty —to fence in cattle from straying upon the rice lands at East Lothian—a duty imposed by the nature of the contract entered into between them and the plaintiff at the time of the letting of the tenancy, and also by the implied term which arose from such letting the defendants having control of both the rice and pasture lands.

In approaching consideration of those grounds it is necessary to take account of all the relevant circumstances surrounding the execution of the contract of letting by the defendants in its fulfilment.

I have to consider and accommodate the spheres of operation in the law relating to the agistment of cattle, and that of land-

lord and tenant, both of which are well settled, except in the present case there is that dual control by the defendants.

An agister is not an insurer of the animals taken in by him, but he must take reasonable and proper care of them. He becomes the constructive or notional owner during the time the animals are under his control, and is liable, if they escape and commit a trespass, for such damage as it is ordinarily in their nature to commit.

The liability is independent of negligence, unless the escape or trespass was involuntary or caused by an Act of God, or was due to the act or default of the party complaining or of a third person for whom the agister is not responsible. In practice it usually turns upon the question whose duty it is to maintain the fence between two properties.

See *Hailsham's Edition* of Halsbury's Laws of England, *Volume* 1 page 544 para. 935.

The defendants themselves admitted that they employed cow-minders to watch and prevent the cattle from straying. They at all times retained control of both portions of East Lothian, and recognised their duty to erect and maintain the fence between the two portions.

The evidence supports the plaintiff's contention and I so find that the defendants were under a duty by reason of the terms of their agreement with the plaintiff to erect, maintain, repair and keep in repair a fence between the rice lands and the pasture lands, and I cannot agree with the proposition advanced by the defendants that no such duty was imposed when they let the lands to the several rice farmers including the plaintiff.

Apart from the evidence of the plaintiff and Rambhajan, the defendants themselves recognised that such duty was implicit in their agreement with the rice farmers and endeavoured to carry out their obligation. They not only erected the fence for the purpose of keeping cattle going from the pasture into the rice-fields, but repaired from time to time any breach in it, and placed four cowminders all the time in the pasture to look after and prevent cattle straying on to the rice-fields as deposed to by their witnesses.

There was a faint attempt to put this duty in issue, but Mr. Faulkner was rather guarded in his statement when he said "I did not tell any farmers, to the best of my belief, that I would guarantee the keeping out of cattle."

Boodhoo a witness for the plaintiff said "that during planting season the cows from the pasture would cross the Canal and go right up against the fence. By doing so the fence became weak. I have complained to the manager (Mr. Faulkner). Others also complained, and he would send a ranger to see the fence strengthened. Mr. Faulkner would at times send watchmen at night to watch the cows and prevent them from going into the rice cultivation."

The real difficulty, in questions of this kind, is to decide whether there has been a wrongful act or breach of duty on the part of the defendants vis-a-vis the plaintiff.

At common law the degree required is that expected of the "reasonable man." But when a duty is imposed by the terms of a

contract, if it be absolute the degree required is the fulfilment of the obligation.

An absolute obligation may be imposed as effectively by contract as by statute a breach of which differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another.

The plaintiff's claim as amended is for a breach of duty implied in or evolved from the terms of the contract entered into between him and the defendants for the protection of his rice crop on lands at East Lothian. It imposed on the defendants who had control of the portion where they took cattle on agistment an absolute and continuing obligation and there is nothing I can find from the terms of the contract as interpreted and acted on by them that there should be any qualification of that obligation.

If I am right that there was a continuous duty undertaken by the defendants to keep the fence, as when it was originally installed, in a sound and effective condition, the fact that they maintained it from time to time cannot, in my view of the nature of the contract, the object and circumstances in which it was entered, absolve them from such obligation.

To succeed the plaintiff has to prove the terms of the contract, the absence of any contributory act on his part whereby the fence was damaged or became ineffective for the purpose and, by reason of such damage or ineffectiveness cattle strayed on to his rice lands and loss to him was occasioned.

It is not necessary for plaintiff to establish any negligence on the part of the defendants, and apart from Acts of God or of third parties, it may be that, either the defendants have failed in a duty to main the fence efficiently, or have by their acts provided the means whereby the cattle strayed on to the rice lands in the occupancy of the plaintiff.

The evidence in the case discloses that, after the 1946 crop had been planted, it was noticed that the wires of the fence had fallen in several places. Several farmers complained to Mr. Cahn then acting Manager in the month of May or June about the condition of the fence. In the month of June or July they again saw Mr. Cahn and told him "that now one one cow goes into the rice-field." Nothing seemed to have been done at the time to remedy the defect, and in August or September when the rice was about to burst cows in large numbers forced their way into the rice-field, the fence having fallen down in several places. And the witness Boodhoo related the fact that "when damage began to happen "big big" the estate authorities sent watchmen in the night." The defendants then started to repair the fence in some places and by the spot where Roop (plaintiff) had planted there was a gap in the fence about 8 rods wide. That gap was never repaired up to the time the rice farmers in sections 9 and 8 had cut their padi.

Rambhajan who had been employed by the defendants as one of the cow-watchers spoke of the difficulty he, Haniff, Laloo and another had in preventing the cattle straying into the rice-fields and reported this fact to Mr. Cahn, telling him it was very hard to watch the cows especially on dark nights. It would appear that there were between 800 or 900 head of cattle in the pasture when

a good number crossed the Canal and entered into the rice lands through defects in the fence.

Whilst it is true that the defendants took active steps from time to time to effect repairs and actually placed watchers to keep out the cattle from the rice lands, there is nothing I can find from the evidence led by them or in the nature of the whole of the case to show that the straying of cattle on to the rice lands was inevitable, nor was any such event in the contemplation of the parties when they entered into the contract set out above.

No doubt the contract imposed a heavy burden on the defendants, but the object of the contract was to protect damage to the growing rice of the several farmers to whom that part of East Lothian was let for rice-growing to aid the "Grow More Food" Campaign.

Mr. Cahn stated that the fence was over a mile in length and the defendants spent between June and November, 1946, for maintenance and repairs $893: including labour, materials and watchmen; and that on the whole there has been a considerable loss on the transaction in giving out these lands to rice-growers. No wonder then that after 1946, the rice-fields were no longer let and were abandoned to such a cultivation.

Generally speaking, a person who makes an unqualified promise thereby not only declares his willingness but vouches for his ability to perform it.

Lord Ellenborough C.J. in a classic utterance in the case of *Atkinson v. Ritchie* (1809) 10 East 530 said the rights and duties of the parties to a contract are conclusively fixed and defined by the terms of their own contract.

No exception (of a private nature at least) which is not contained in the contract itself can be engrafted upon it by implication, as an excuse for its non-performance.

And the rule laid down in the case of *Paradine v. Jane* (1647), Aleyn, 26 has often been recognised in Courts of law, as a sound one; i.e. that

> "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity." because he might have provided against it by his con-tract."

I believe the evidence of both Roop (plaintiff) and Rambhajan that the defendants guaranteed the fencing off of cattle by unmistakable language.

The fact that the defendants took all reasonable steps to see that the fence was in an efficient state and in good repairs did not in my opinion absolve them from the liability which they undertook.

The obligation was one which they were called upon to actually fulfil not merely to do their best to fulfil.

I find as a fact that the fence was defective at the time the cattle strayed on to the rice lands, and that such defect gave them the means of entry therein. In other words the fence was not in fact in an efficient state or in good repair at the relevant times when cattle entered upon the rice lands.

In ordinary language one cannot be said to maintain in efficient order, if, on occasion, the fence becomes defective. It is the result to be achieved rather than the means of achieving it.

If the duty is proper maintenance, and maintenance is to keep in repair, then at once it is established that the duty goes beyond a duty to exercise care, the fact that the fence on a particular occasion was not in an efficient order or good repair shows that there had not been proper maintenance.

It is always difficult to define a principle of the law as precisely that its application to every combination of circumstances is beyond question, but if I accept Mr. Humphrys' arguments as to his clients non-liability it would be a startling whittling down of the duties imposed on the defendants who have retained control of both the pasture lands and the rice lands in question.

I would like to refer to the recent case of *Park v. Jobson* N son (1945) 1 A.E.R. 222 "The respondents were dairy-farmers who took a tenancy in 1938 of field 55 belonging to a colliery company. They placed in the field a number of sheep and cows which entered upon the adjoining allotments and destroyed a large quantity of growing produce. The appellant was one of the allotment-holders whose produce was so destroyed. These allotments originally formed part of field 55 and in 1916 a fence was put up separating the allotments from the rest of field 55. The colliery company supplied the material with which the allotment-holders erected the fence. Each allotment-holder was under a duty to the company to maintain that portion of the fence "which ran by his allotment. It was found as a fact that a number of allotment-holders, including the appellant, had damaged their portions of the fence with the result that the respondents' cattle managed to get through the fence to the appellant's allotment, although there was no evidence as to the precise portion of fence through which the cattle entered. The appellant contended that as it was the duty of the respondents to keep their cattle in by means of a fence, the respondents were liable for the damage done by the cattle. For the respondents it was contended that (i) there was an obligation, express or implied, on the appellant to fence his allotment for the protection of his crops and any damage suffered by the appellant was due solely to his own neglect to fulfil such obligation;

(ii) there was evidence that the appellant by his own acts gave leave and licence:—

Held: (i) as between the appellant and the respondents, there was no obligation on the appellant to fence the allotment.

(ii) the appellant was not responsible for the acts of damage by the other allotment-holders. There was no evidence of the cattle entering through a particular portion of the fence damaged by the appellant and, therefore, no leave and licence of the appellant could be inferred."

MacKinnon L.J. at p. 226 in his judgment of a Court composed of Lord Greene M.R., Finlay L.J. and himself said

"I have some sympathy with the defendants. It is "rather a hard case in one aspect of it. I venture to think that it is rather a pity that the colliery company, as freeholder of both the plaintiff and the defendants, having put a specific obligation on the defendants to keep in order the fences round certain parts of their property, and having an arrangement with the allotment-holders under which they were to fence it, did not see that the fence round the allotment was kept in. order, The

defendants may very well, not having a specific obligation to fence, and not being versed in the law, have supposed that they need not bother about fencing up the allotments. But I think the law unfortunately does impose the obligation on them to keep their cattle in."

Finlay L. J. said "The law being quite clear that there is a primary obligation thrown on the defendants to keep in their cattle, the action must succeed unless the defendants show leave and licence."

In the instant case there is not a tittle of evidence that the plaintiff or any other of the farmers on the East Lothian rice lands was responsible for any damage to or any ineffectiveness of the fence, nor was it established through what gaps in the fence the cattle on East Lothian pasture strayed into the rice-fields.

I can find no contributory act on part of the plaintiff, whereby the fence became damaged or ineffective.

The defendants' liability as for breach of the paramount duty already referred to by me is unaffected by the intrusion into the pasture lands of East Lothian of animals which might have strayed into the same.

The plaintiff has established in my opinion a breach by the defendants of their agreement.

There is not much dispute, if any, that the plaintiff in the year 1946 planted three(3) beds in section 10, approximately 41/4 acres in extent and that in the month of August the growing rice had already given grains. This no doubt easily visible across the Canal presented an alluring attraction to the cattle depastured by the defendants. The evidence discloses that by the plaintiff's cultivation which adjoins the fence there was a gap of about 8 rods in the fence which gap was never repaired up to the time some of the rice-farmers in section 9 and those in section 8 had reaped their rice sometime in September or October.

The plaintiff's entire cultivation was destroyed by being eaten and trampled upon by cattle which strayed from the East Lothian pasture and became a total loss to him. He estimated and so were witnesses called by him that at least he would have reaped 110 bags of padi as he did in the previous year. The depredation by cattle seems to have effected the entire cultivation on section 10. Some farmers in section 9 reaped their crop. Section 8 furthest away from the fence escaped damage.

The price of padi in 1946 in that district was $2.10 per bag, but before the plaintiff could obtain that amount he had to pay for cutting, transporting to the Karian, threshing, loading into punts for conveyance to a rice-factory at Rose Hall, discharging and packing in the factory which would cost him approximately the sum of $1,100.30 for 110 bags. Thus leaving him a profit of $130.70 for which sum I enter judgment in his favour.

The plaintiff is entitled to his costs which I certify fit for Counsel.

Judgment for plaintiff.

Solicitors: *W. D. Dinally,* for plaintiff;
H. C. B. Humphrys, for defendants,

M. F. DA SILVA v. B. V. W. ABEL.

M. F. Da SILVA, Appellant (Defendant),

v.

B. V. W. ABEL, Sanitary Inspector,
Respondent (Complainant).

[1948. No. 771.—DEMERARA]

BEFORE FULL COURT: WORLEY, C.J., LUCKHOO, J. and MANNING, J. (Acting).

1949. April 23; June 3.

Appeal—Notice to abate nuisance—Non compliance—Prosecution for failure to obey—Right of appeal against conviction under section 82 (1) *of Public Health Ordinance No.* 15 *of* 1934*—Penalty imposed for "continuing period of default"—No jurisdiction to impose penalty in respect of default continuing subsequent to conviction.*

The appellant was convicted under section 82 (1) of the Public Health Ordinance 1934 (No. 15) of not obeying an order to abate a nuisance. He was ordered to pay twenty-five cents per day for the whole period of the default up to the date of the conviction and. in addition "to be liable to a continuing penalty of twenty-five cents per diem during continuing period of default."

Held: The determination of a magistrate that a person is guilty of the offence in section 82 (1) is clearly a decision in a cause or matter, and therefore, in the absence of express provision to the contrary is subject to appeal under the provisions of section 3 of the Summary Jurisdiction (Appeals) Ordinance (Chapter 16).

The Magistrate's power to inflict a penalty is limited to the default proved up to the day of adjudication upon a complaint brought for an offence under section 82 (1) of the Public Health Ordinance. 1934.

Appeal by the defendant who was convicted by the Magistrate for the Essequibo Judicial District.

T. Lee, for the appellant.

E. Mortimer Duke, Solicitor-General, for the respondent.

Cur. adv. vult.

The Judgment of the Court was as follows: —

The appellant, as owner of certain premises in Bartica, was served with a notice under section 78 of the Public Health Ordinance 1934 (Ordinance No. 15 of 1934) requiring him to abate a nuisance. He did not do so and on the 6th May, 1948 the Magistrate of the Essequibo Judicial District, in exercise of jurisdiction under section 80 of the same Ordinance ordered him to comply with the notice within one month. The appellant failed to obey this order and in consequence was, on the 21st October, 1948, convicted of an offence under section 82 (1) of the aforesaid Ordinance and ordered to pay a penalty of $33.75, i.e. 25 cents per diem during default from the 7th day of June, 1948 to 21st October, 1948, a total of 135 days, or in default to undergo one month's imprison-

ment "and to be liable to a continuing penalty of 25 cents per diem during continuing period of default."

The appellant appeals on the grounds that this sentence was based on a wrong principle and that the Magistrate exceeded his jurisdiction.

The two questions argued on the appeal were

(a) whether a right of appeal lies against a conviction had under section 82 (1) of the Ordinance; and

(b) whether the Magistrate had jurisdiction to impose a penalty in respect of default continuing subsequent to the conviction.

The first question must be answered in the affirmative. Counsel for the respondent contended that no right of appeal lies against any order made or conviction had under the provisions of any of the group of sections numbered 76 to 83 dealing with Nuisances, except as provided in section 83 (1), which gives a limited right of appeal from the decision of a magistrate making an order under section 80 of the Ordinance. We cannot accept this contention. In our view, the determination by a magistrate that a person is guilty of the offence prescribed in section 82 (1) is clearly a decision in a cause or matter, and therefore, in the absence of express provision to the contrary, is subject to appeal under the provisions of section 3 of the Summary Jurisdiction (Appeals) Ordinance (Chapter 16).

The second question must be answered in the negative. The scheme of the Ordinance, as set out in sections 80 to 82, is that if the magistrate is satisfied that a nuisance, in respect of which a notice to abate has been served on the person charged, exists or is likely to recur, he shall make an order requiring such person to comply with the notice or otherwise abate the nuisance. The magistrate may also impose a fine for non-compliance with the notice (section 80(2)). Failure to comply with such an order renders the person against whom it is made guilty of an offence, but such person is not liable to any penalty for his default, unless and until he fails to satisfy the magistrate that he has used all due diligence to carry out the order (section 82 (1)). The question is whether the magistrate's power to inflict a penalty is limited to the default proved up to the day of adjudication upon a complaint brought for an offence under section 82 (1).

Does the word "default" in the provision imposing a penalty "not exceeding three dollars per diem during his default" means proved default? Is not such default consequent upon his failure to satisfy the magistrate that he has used all due diligence to carry out the order?

If there is ambiguity as to meaning of words in a section which is penal in its nature, the construction in favour of the subject, or a benevolent one, should be preferred.

Continuing offences of this nature are frequently prescribed by statute and we were referred in the course of the argument to cases decided under the provisions of certain English Acts.

In *James* v. *Wyvill* 1884 (51 L.T.N.S. 237: 48 J.P. 725) the appellant had been convicted by justices under bye-laws dealing with new buildings which provided a penalty for the offence with which

he was charged and a further penalty "for each day such buildings shall continue or remain contrary to the said provision." He was fined 40s. and a further sum of 20s. for each day the work should continue or remain contrary to the provisions of the bye-laws. The appeal turned upon a point which is irrelevant to our present purpose and was dismissed. No objection was made to the terms of the order, which was confirmed by the Queen's Bench Division.

In Reg. v. Struve and others 1S95 (59 J.P. 584) an order made in similar terms was held to be bad "as imposing penalties for offences not then committed." Pollock B. said "It cannot be supported by the precedent in James v. Wyvill, because the point was not raised there and, for aught we know, may have been waived by consent."

In England the penalty for failing to comply with a nuisance order provided by section 95 of the Public Health Act 1936 (26 Geo. 5 & 1 Edw. 8 Ch. 49) is a fine and "a further fine not exceeding forty shillings for each day on which the offence continues after conviction therefor." But it would seem that even these words do not sanction the imposition of additional daily penalties for future offences (see *Chepstow Electric Light and Power Company v. Chepstow Gas and Coke Consumers' Company* 1905 L.R. 1 K.B. 198: per Ld. Alverstone C.J. at p. 209).

In our view, as section 82 of the Public Health Ordinance stands, the correct principle of construction is that exemplified in the case of Reg. v. Struve and others. If the default continues after adjudication on a complaint, the proper procedure, if the sanitary authority has no power to abate the nuisance or, having such power, does not choose to exercise it, is to bring another complaint in respect of the continuing offence; for, as *Hawkins* J. said in *Reay v. The Mayor and Aldermen* of *Gateshead* 1886 (55 L.J. 92 at p. 103),

> "a man may be convicted day by day as often as he commits the continuing offence and each day, if a summons were taken out, he might be prosecuted and each offence might be the subject of a conviction."

The case of the *Queen v. Waterhouse and others.* Justices of the West Riding of Yorkshire 1872 (L.R. 7 Q.B. 545) is a striking example of this. That was a case under sections 12, 13 and 14 of the Nuisances Removal Act 1885 (18 & 19 Vict. C. 121) which are framed in very similar terms to sections 80 and 82 of the Public Health Ordinance 1934. There had been persistent disregard of an order made by justices to abate a smoke nuisance and eventually nineteen separate summonses were issued simultaneously in respect of as many acts of disobedience, each committed on a different day. The offenders objected that their disobedience was but one default but the Queen's Bench (*Blackburn* & *Hannen* J.J.) held that each daily emission of smoke was a separate disobedience for which a separate summons might lawfully be issued.

The result, therefore, on a consideration of the provisions of section 82(1) of the Public Health Ordinance 1934, is that the order made by the Magistrate in the instant case was bad so far as it purported to impose a continuing penalty for default subsequent to the date of the adjudication. It is conceded by the appel-

lant that this Court has power to amend the order. See also on this point the Chepstow case cited above. We therefore confirm the conviction and the penalty of $33.75 with the alternative of one month's imprisonment with hard labour in default of payment but quash the order for the continuing penalty of 25 cents per diem during any continuing period of default.

The appeal succeeds to this extent and the respondent must pay to the appellant his costs of the appeal.

Appeal allowed.

ZOBEIDA KHATOUN RAYMAN, Petitioner,

v.

MOHAMED ADIL RAYMAN, Respondent.

[1946. No. 253.—DEMERARA]

BEFORE WORLEY, C.J.

1949. May 23, 25; June 28.

Dissolution of marriage—Constructive desertion—Behaviour calculated to make wife leave matrimonial home.

A husband or wife must be presumed to intend the natural consequences of his or her acts and if it is a natural consequence of the husband's behaviour that the wife leaves the matrimonial home then the husband must be presumed to have intended that she do so and is guilty of desertion.

Edwards v. Edwards 1948 1 All E.R. 157 followed.

Petition for dissolution of marriage on the ground of malicious desertion.

E. W. Adams, for the plaintiff.

P. A. Cummings, for the respondent.

Cur. adv. vult.

WORLEY, C.J.: This is a wife's petition for divorce on the ground of malicious desertion and for an order for custody of the children of the marriage and consequential relief. The parties are Mohammedan by religion and were married according to Muslim rites at Vreed-en-Hoop, West Bank Demerara on the 13th December, 1942: the marriage being subsequently duly registered under the provisions of the Immigration Ordinance. There are four children of the marriage, the eldest born in September 1943 and the youngest in September 1946. This petition was filed on May 18th 1946.

The petitioner's case is founded on what is termed "constructive desertion" for she admits that she left the matrimonial home at Vreed-en-Hoop taking the children with her on April 12th 1946, pleading that she was compelled thereto by the Respondent's conduct and intention to put an end to the marriage.

The respondent by his answer denies such conduct and|or intention and alleges that the petitioner left the matrimonial home against his desire and persuasion and voluntarily left his house and protection. He further alleges that he has on several occasions subsequently requested the petitioner to return to his house and protection but she has at all times refused so to do.

Desertion is always a question of fact and. the onus of proof is throughout on the party who alleges that he or she was deserted without just cause (*Dunn v. Dunn* 1949 p. 98). But there are certain well recognized rules which the Court needs to have particularly in mind when approaching the consideration of a petition based on constructive desertion and which are concisely set out in paragraph 128 of Chapter II of Rayden on Divorce 4th Edition as follows: —

> "The party who intends to bring the cohabitation to an end and whose conduct in reality causes its termination, commits the act of desertion; the weight of the fact that the spouse took the step of leaving the matrimonial home depends upon the other facts; there is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation and does so by leaving his wife and that of a husband who, with like intent, obliges his wife to separate from him. So if a husband, having the desire and intention to separate from his wife, orders her to leave him, the separation must be "attributed to him and amounts to desertion; and such desertion will not be terminated unless the deserting spouse makes sincere and reasonable attempts to bring the desertion to an end."

I am satisfied that one of the contributory causes of the differences which have arisen between the spouses in this case is to be found in the semi-patriarchal household in which they have had to live. The respondent's father is a man of wealth and influence at Vreed-en-Hoop. He lives there in a compound in which are situate his factory (managed by the respondent) his own house and a smaller house in which the parties to this petition lived. Several members of the family live in the compound including at least one son of the respondent by a former Mohammedan wife, and it is evident that there is ill-will between some of the family and the petitioner. Trouble started in 1945 when the petitioner was accused by the respondent of having instigated a servant to slash the tyre and tube of his bicycle, and, in consequence, the petitioner left her husband and returned to her father's home in Georgetown. She remained there until December when, as the result of the intervention of Mr. Carlos Gomes, Solicitor, a reconciliation was effected and she returned to the respondent on the 30th December, 1945.

The parties resumed marital relations but reconciliation was not complete. The respondent was fearful that the petitioner might poison him and therefore continued to take his meals at his father's house as he had done while his wife was away.

In February the petitioner became aware that she was pregnant. She alleges that from then on the respondent ceased to sleep with her and sometimes slept at his father's house. She further alleges that in the month of March he ceased to give her money for housekeeping though he continued to supply rice and paid the servant’s wages. The respondent on the other hand

swore that marital relations continued up to the very night before the petitioner left his house and that he continued to give her $15 a week besides supplying milk and rice. One of my difficulties in this case arises from the poor quality of the evidence: most of the questions of fact in issue depend mainly on the evidence of one or other of the parties and I am not disposed to put much reliance on the unsupported evidence of either, nor on the evidence of the two servants who were called. It is true that Dr. Hugh testified that the petitioner was physically and mentally fatigued when he examined her in April 1946 and there is some evidence that she pawned a bracelet early in 1946. But the petitioner's condition might well be attributable to pregnancy or to anxiety over matrimonial discords and the evidence as to the pawning of the bracelet or the reason for so doing is not satisfactory. Even if it were established that the respondent ceased to sleep with the petitioner or neglected to give her housekeeping money, such conduct would not of itself amount to desertion. "It is most important to draw a clear line between desertion, which is a ground for divorce and gross neglect or chronic discord, which is not" (per *Denning* L.J. in *Hopes v. Hopes* C.A. 1949 P. 227 at p. 236). Even if the petitioner had satisfied me that her allegations were true (and she has not) she has still to satisfy me that the respondent had an intention to end the conjugal society and exhibited such a course of conduct that she was compelled to leave the matrimonial home.

I come therefore to the events of 9th April, 1946. On that day the petitioner and her maid servant were seen digging a hole under the house. Respondent and his family placed a sinister interpretation upon this, suspecting the practice of "obeah", and respondent's father, who is a Justice of the Peace, issued or procured the issue of a warrant to search the house. A police constable, Isaacs, excavated loose earth from the hole but found nothing there. The petitioner and her maid servant denied digging the hole and sought to explain it by saying that they had pulled up and thrown away an okra plant. This explanation was not given to anyone at the time and I do not believe it. The constable then searched the house and found in the respondent's chest-of-drawers a "tabeej", which appears to be a sort of talisman or charm containing a text from the Koran. There is no evidence to connect this with "obeah" and for all I know it may be a "lucky charm" of the type commonly worn by superstitious people. The only suspicious object found in the house was a blue candle stuck with pins and with a paper-writing attached to it. The constable suspected that might be connected with obeah and took the petitioner, accompanied by her husband, to the police station. She refused to make any statement and the matter was dropped, no charge being preferred.

Petitioner and respondent gave conflicting accounts of what occurred after their return to the house. The respondent admitted a "coldness" between them as the consequence of this incident but swore that the petitioner begged his pardon for what she had done and that marital relations continued. He denied that he ordered his wife to leave and said that, on the contrary,

he knew nothing of her intention to leave until her brother came to fetch her on the 12th and he then begged her to stay.

The petitioner's story is that on their return the respondent told her to get out and removed, with his pyjamas, to his father's and that he maintained this attitude throughout the next two days so that she left on the 12th with the children for her father's house where she has remained ever since. She was then pregnant and her child was born in September. The respondent has never been to see her or the child, and has not paid the expenses of her confinement. He has paid alimony *pendente lite.*

As I have said I find it difficult to decide which (if either) of the parties was telling the truth, but it seems to me that the petitioner's version is the more probable and more in accordance with the respondent's conduct in this matter. The petitioner may have been indulging in some superstitious and silly practices though whether (if so) her object was to harm or charm her husband is a matter of speculation, but it is evident that her father-in-law seized the opportunity to make her position in the family intolerable by his high-handed and precipitate action. It was quite unnecessary to call in the police for the respondent himself could have made any inquiries or search which seemed necessary. He professes not to believe in obeah and to have still loved his wife at that time. He might therefore have been expected to protect her from the indignity of a police-search and being taken to the police station, instead of which he stood by without protest, apparently in complete subservience to his father.

By this attitude he did in effect make his father's act his own and made himself responsible for the effect of that act on the wife's position in the home. The effect in law of such conduct on the part of a husband is concisely set out in the head note to *Edwards v. Edwards* 1948 (I All E.R. 157) a decision of the Probate Divorce and Admiralty Division in England, in the following terms: —

> "Definite evidence of a clear intention on the part of one spouse to drive the other spouse away is not necessary to prove constructive desertion. A husband or wife must be presumed to intend the natural consequences of his or her acts and, if it is a natural consequence of the behaviour of one spouse that the other leaves the matrimonial home, the offending spouse must be presumed to have intended that the other spouse should do so."

Since the institution of this petition, the respondent had on one occasion approached the petitioner, but his subsequent conduct throws doubt on his sincerity.

The petitioner is, I think, sincere in her desire to return on condition that the respondent finds a home for her at Vreed-en-Hoop outside of the family compound. I think this condition is reasonable for it is clear that there is little likelihood of any real or lasting reconciliation unless the spouses can have their own home free from the influence of the respondent's relatives. The respondent refuses to entertain this proposal as he alleges it would be inconvenient on account of his work. In the circumstances, I think his refusal is unreasonable.

Finally, I have to take into consideration his admission in the witness-box that he does not want his wife back because he does not think they will live happily together. He appears to have

formed a firm intention to put an end to the marriage state and to be unwilling to make any effort at reconciliation.

I therefore grant the petitioner an order dissolving the marriage on the ground of malicious desertion. The respondent must pay to the petitioner her costs of the petition. I will hear counsel on the question of the custody of the children.

Decree nisi of divorce.

Solicitors: *A. Vanier,* for petitioner; *A. G. King,* for respondent.

JOSEPH BAYNES, Plaintiff,

v.

GEORGE THOMAS PRINCE, THE VILLAGE COUNCIL OF VICTORIA, AND THE REGISTRAR OF BRITISH GUIANA, Defendants,

[1948. No. 587.—DEMERARA]

BEFORE WORLEY, C.J.

1949. May 4, 5; June 28.

Parate execution for non-payment of village rates—service of summation—Order XXXVI, r. 2 *Rules of Court* 1900*—summation—Deeds Registry (Sales in execution) Ordinance* 1936*—Effect of section* 3 *where property held in trust.*

The plaintiff was the owner of the S1/2 of a lot of land and the first defendant the N1/2. Due to a mistake of the second defendants parate execution was issued against the whole lot although the first-named plaintiff had paid his rates. The summation was served by affixing it on the gate of the N1/2 but no summation was served with respect to the S1/2. The first defendant purchased the whole lot at execution sale and after obtaining judicial transport advertised transport to his wife. The plaintiff opposed in respect of the S1/2.

Held: There was no service of summation with respect to the S1/2 as required by Order XXXVI, r. 2, Rules of Court 1900 and consequently all the subsequent proceedings including the sale at execution were null and void. The Deeds Registry (Sales in Execution) Ordinance 1936 Section 3 affords no protection to a purchaser under the circumstances set out above.

Action by the plaintiff against the defendant for an order that the sale at execution by the Registrar at the instance of the second-named defendant of South half of lot letter a, Section A, Victoria, E.C., Demerara, was wrongful and unlawful—the levy made thereon being illegal and invalid.

Sir Eustace Woolford, K.C., for the plaintiff.

A. Vanier, Solicitor, for first-named defendant.

C. Shankland, for second-named defendant.

Cur. adv. vult.

WORLEY, C.J.: In this rather remarkable case few of the material facts are in dispute. On 16th October, 1939 the first-

named defendant Prince became the owner by transport (Ex. H) of the whole of lot letter (a), section A, Victoria, East Coast, Demerara, (hereinafter called the lot). On the 9th December. 1940 he transported the South half of the lot (hereinafter described as S1/2) to the plaintiff for the sum of $100 (Ex. O).

Prince alleges that he never received the full amount of the purchase price and the plaintiff, while asserting that he paid in full, alleges that he did not get all that he bargained for. In the present case, however, it is immaterial which (if either) of these allegations is true.

The conveyance of the S1/2 was endorsed on Prince's transport. The plaintiff following the usual practice, presented his transport at the office of the second-named defendants, and was entered in the Village Assessment Book as the owner of S1/2, the defendant Prince being shewn as the owner of the N1/2. Thereafter the two halves of the lot were separately assessed for rates. The plaintiff paid his rates regularly in respect of S1/2 his last payment being for the period January to December, 1946. By a clerical error the receipt issued to him on this occasion was made out in respect of the N1/2 lot. The defendant Prince did not pay the rates assessed on his N1/2 for 1946 and in consequence the second-named defendants proceeded to levy. By yet another mistake of the then Village Overseer (since deceased) the summation was issued in respect of the whole lot. A copy of the Summary Summation and annexed Account of the rates due was duly served on 17th October, 1946 by the Marshal of this Court, who affixed the same to a nail on the front gate of Prince's house on the N1/2 lot. That was the only building on the N1/2 and it was pointed out by the Overseer. There were at that time two buildings on the S1/2 but the Marshal did not post any summation or enter on that half-lot.

Prince received the copy posted on his gate (Ex.F) and admitted having read it and observed that the whole lot was being levied on. He took no steps to point out the mistake or to pay the rates due from him. In due course after the usual advertisement of sale, the lot was put up at execution sale at the Deeds Registry on 15th April, 1947. Prince attended and bought in the lot for $7.50. He admitted that he knew the whole lot was being sold and that one-half of it belonged to Baynes. He alleged that Baynes was present at the sale but this was denied by the plaintiff and I have no hesitation in rejecting Prince's evidence. On 8th August, 1947, Prince obtained his judicial sale transport for the whole lot which he subsequently took to the Village Office to have it recorded.

Some time after this the plaintiff heard of the levy and the sale of his half lot from one Barlow to whom Prince was offering the land. Plaintiff made representations to the local administration and to the second-named defendants. The latter at once realised that their overseer had made a mistake and, as the minutes of their proceedings shew, have done all they could to put the matter right. Prince however refused to listen to reason and rejected all offers of compensation and in September 1948 advertised a proposed transport of the lot to his wife to whom he claims to have sold it for $100.

The plaintiff after due notice to the two first-named defendants thereupon began this action in which he claimed: —

(a) An Order that the sale at Execution by the Registrar held on the 15th day of April, 1947, at the Victoria Law Courts Georgetown at the instance of the second-named Defendants of the S1/2 lot (as more fully described in paragraph 1 of the Statement of Claim) was wrongful and unlawful, the levy made thereon being illegal and invalid.

(b) An Order that the first-named Defendant be compelled to transport to him the said property purchased at the said sale or in default of doing so that the Registrar be authorised to do so.

(c) Payment by the first-named Defendant of any mesne profits accruing as the result of the said sale.

(d) The sum of $300.00 as damages against the second-named Defendants for their wrongful acts in levying on the said property for unpaid rates due by him the Plaintiff.

(e) An injunction against the third-named defendant restraining the passing of transport by the first-named defendant to his wife ROSE PRINCE of the said property until after the final hearing and determination of these proceedings.

(f) Costs.

The third-named defendant has not entered an appearance. An interim injunction was made on 1st October 1948 in the terms of paragraph (e) of the claim. The second-named defendants entered appearance under protest but at the hearing the plaintiff withdrew all claims against them and they were therefore released from the action without costs.

The plaintiff founds mainly on claim (a). As to claim (c) there is no evidence of any mesne profits.

In support of the contention that the sale was wrongful and unlawful counsel for the plaintiff relied upon the case of Apicon v. Woolford, decided in General Civil Jurisdiction by a court of three judges on 28th June 1905 (B.G. Reports: General and Insolvency 1900-6). In that case the Court said—

"In all cases where parate execution is allowed by law it is essential that summation should be served as the law prescribes. In all other cases the liability of the alleged debtor must be established by legal proceedings before execution can issue,……..In cases of parate execution the summation alone gives the alleged debtor notice of the claim made and an opportunity of settling it before his property is taken in execution. In all cases therefore where the summation is not duly served, the subsequent proceedings by way of execution are, in our opinion, null and void, at any rate if (as in the present instance) there is no proof of any waiver by the alleged debtor of the omission or defect." In that case, the Court held on the evidence that it was not proved that the summation had been duly affixed to the principal building on the immovable property which had been taken in execution and that

all the subsequent proceedings in execution including the sale of the property were null and void and the sale must be set aside.

In my view, the passage cited above is as good law today as it was in 1905. I am informed by counsel that the method of service of a summation by affixing it to the principal building was formerly prescribed by a statute which has since been repealed. But the practice and procedure in this matter is preserved by Order XXXVI r.2 of the Rules of Court 1900, and, as appears from the evidence of two Marshals of the Court, is invariably followed. If, however, there is no building on the land, the summation is fixed to a fence post or a tree.

It is clear that in the present case there was no service of the summation on the S1/2 lot. The two halves of the lot had become two separate and distinct parcels of land, incapable of being conveyed by or held under one transport except in the case that the two owners joined therein each to convey his separate half. The two parcels were separately owned and separately assessed for rates and therefore could not be levied upon in one summation,

The defendant Prince, however, has sought to rely upon section 3 of the Deeds Registry (Sales in Execution) Ordinance 1936, which, in terms, re-enacts sub-section (3) of section 26 of the Deeds Registry Ordinance (Chapter 177) originally enacted as Ordinance No. XVII of 1919. This section provides that a judicial sale transport.... shall vest in the transferee the full and absolute title to the immovable property or the rights and interests therein, subject only to certain specified claims and incumbrances, and the solicitor for the defendant Prince contended that the effect of this is to confer on the defendant an indefeasible title to the whole lot of which he cannot be deprived against his will no matter what the circumstances in which he acquired it.

This appears to be another attempt to use the conveyancing statutes of the Colony as a shield and protection for fraud, which this Court as a court of equity will not permit: see Coltress v. Coltress 1937 (1931-1937) L.R.B.G. 523) and Sunichery v. Sooknanan (1943 L.R.B.G. 125). In the latter case the Full Court had to consider the nature of the "full and absolute title" vested by transport under the provisions of section 21 of the Deeds Registry Ordinance, and in so doing said: —

> "(The plaintiff) does not claim any right or interest under the transport either legal or equitable but merely that those in whom is vested the full and absolute title to the property should be required in conscience to carry out the trust upon which they hold such title and so transfer the same to him. We think that this claim is well founded for only if it were expressed in the clearest possible terms would a Court of equity so interpret a statute as to enable a trustee to attract to himself the benefit of the property held by him in trust for another."

By all the canons of construction the interpretation thus placed upon the words "vest in the transferee the full and absolute title to the immovable property" in section 21 applied equally to the same words in section 26 (3) and applies now to section 3 of Ordinance No. 4 of 1936.

I hold therefore that, in respect of the S1/2 of the lot, no summation was served as prescribed by the Rules of Court 1900 and

that all the subsequent proceedings in execution including the sale so far as they purported to affect that half were null and void and must be set aside. There will be a declaration to that effect and the usual order that the first-named defendant do transport the S1/2 of the lot to the plaintiff within thirty days and in default that the third-named defendant does transport the said property to the plaintiff at the plaintiff's expense. On this being done the injunction will be discharged, and the defendant Prince will be at liberty, if so he wishes and there is no other opposition, to transport the N1/2 to his wife.

The first-named defendant must pay the plaintiff's costs of the action which I certify fit for counsel.

Judgment for plaintiff.

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1949

AND IN

THE WEST INDIAN COURT OF APPEAL

[1949].

EDITED BY KENNETH S. STOBY, ESQ.,
Barrister-at-Law, Lincoln's Inn, Additional Judge, British Guiana.

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