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CASES

DETERMINED IN THE

Supreme Court of British Guiana.

THOMAS *v.* BAYNES.

(In the West Indian Court of Appeal, On Appeal from the Supreme Court of the Windward Islands and Leeward Islands (Saint Lucia), (Furness-Smith, Collymore, Worley, C.J.J.) February 1950).

Public officer—Loan for specific purpose—Resignation—Departure from island—Non-payment of loan—False arrest—French law—Reasonable and probable cause—Absence of malice.

In 1947 the appellant was in the service of the Government of the Colony of Saint Lucia as a Staff Surveyor and obtained the sum of $2,100 as an advance for the purchase of a motor car. The loan was to be repayable in five years, by monthly deductions from salary at the rate of £7 10s. 5d. After five months he resigned his appointment and requested Government to take over the car in satisfaction of the unpaid balance. His resignation was accepted but he was informed that the amount due on the car must be paid before his departure from the Colony. On the morning of his departure he left the car at the Public Works Department and went to the Airport in order to emplane for Trinidad. He was arrested at the Airport on a warrant of arrest under Article 651 of the Code of Civil Procedure obtained by the respondent against him as a debtor about to leave the Colony and was not released until security was given for the amount remaining unpaid.

The appellant's action for $10,000 damages against the respondent for false arrest was dismissed as the trial judge found that the debt was due, there was reasonable and probable cause and an absence of malice. The plaintiff appealed.

Held: The existence of the right of the appellant to an official salary from which the Government could deduct the monthly instalments was a substantial security expressly contemplated by the parties. By his act of resignation from the service, the appellant destroyed this security and deprived himself of the benefit of the term. There was reasonable and probable cause and no evidence of malice.

Judgment of the Court:

This is an appeal from a decision of a Judge of the Supreme Court of the Windward Islands and Leeward Islands (St. Lucia) dismissing the appellant's claim against the defendant-respondent for $10,000 damages for false arrest. The respondent is, and was at the material date, the Colonial Treasurer for the Colony, but the action was brought against him in his private capacity, and the learned trial Judge held that the action would only lie if brought under Article 985 of the Civil Code, which provides that every person capable of discerning right from wrong is responsible for damage caused either by his act, imprudence, neglect or

want of skill and is not relievable from obligations thus arising. No appeal has been laid against this ruling. It is well settled in the French law, which is applicable here, that in order to succeed in such an action the plaintiff must establish want of reasonable and probable cause for procuring the arrest and malice on the part of the defendant in so doing.

In 1947 the appellant was in the service of the Government of the Colony as a Staff Surveyor, and on August 11th of that year he applied to the Administrator for an "advance" of £500 for the purchase of a motor car, on the ground that "the nature of his duties warranted the use of a car". Provision for such advances is made in the Financial Rules of the Government, Rule No. 132 (1) (a) providing:—"An advance to an official for the purpose of purchasing an approved means of transport necessary for the performance of official duties shall be repaid within 5 years but will be granted free of interest for the first two years, and thereafter interest will be charged at the rate of 3 per cent per annum."

The appellant's letter of application concluded: "I fully understand that a monthly deduction from my salary would be made towards payment of the loan." Subsequently the appellant varied his application by asking for a loan of $2100 to—purchase a different make of car and added "I would like to repay the sum in sixty months at the rate of $35 per month deduction from my salary."

The Administrator having approved the loan on these terms, the respondent, in his capacity as Colonial Treasurer, advanced to the appellant the sum of $2100 with which a car was purchased. On September 3rd 1947 the appellant signed an acknowledgment of receipt of £437.10.0. advanced to him, and an undertaking to repay "the said sum to the Treasurer from the 30th September 1947 until final payment as follows:—Repayable in 5 years with interest at 3% after two years, rate of payment being £7.5.10. per month in satisfaction of advance to purchase a motor car, until September 1952.

The monthly instalments agreed upon were deducted from the appellant's salary for five months including January 1948. On the 23rd of that month the appellant tendered his resignation from the service to take effect from the end of the month, and requested that the customary month's notice be waived in order to enable him to accept an offer of a post with a firm in Trinidad. This representation was in fact untrue as he had not received any offer of employment. The appellant also asked Government to take over his car to satisfy the balance of the loan remaining unpaid. His resignation was accepted, but he was informed that the Government would not take over the car and that he would be expected to satisfy his debt in full before he left the Colony. A further proposal by the appellant that he be permitted to leave the car in Government's custody on condition of his remitting the amount due from Trinidad was likewise rejected. The appellant did not pay any part of the outstanding balance of the loan and

booked his passage to Trinidad by air for Sunday 1st February and, on the morning of that day, left the car in a garage belonging to the Public Works Department.

That same morning the respondent learnt of the appellant's intended departure and, acting on the instructions of the Administrator, he obtained a Warrant of Arrest under Article 651 of the Code of Civil Procedure to place the appellant in judicial custody. The appellant was arrested upon this warrant at about 2.30 p.m. at the Airport and was kept in custody until 11.30 p.m. when he was released upon giving sureties for the payment of the debt. He paid the amount outstanding in full on the following day Monday 2nd February.

His claim against the respondent was grounded upon the allegations:—

(a) that there was not debt due from him to the Government, recoverable at the time when the respondent sued out the warrant of arrest.

(b) that the warrant of arrest was void or irregular because it was not issued in accordance with the provisions of the Code of Civil Procedure, there being no writ of summons claiming the alleged debt issued with the application for the warrant nor any pending proceeding to which the warrant was incidental.

(c) that there was an absence of reasonable and probable cause.

(d) that there was malice in law on the part of the defendant when he applied for a warrant of arrest.

The learned trial Judge held that not one of these allegations was well founded, and we are of opinion that he was correct in so holding.

The question whether there was a debt due and recoverable on Sunday, February 1st, depends upon the correct view of the obligations of the appellant under the contract of loan in the light of the relevant law. The contract fell within the category of "abligations with a term" which are dealt with in section II of Chapter Seventh of the Civil Code of the colony. The nature of the obligations created by such a contract is set out in the following passage in Mignault— "Le Droit Civil Canadien" 1901 Vol. v. p. 457.

"Lorsque le contrat est à terme, l'existence de l'obligation n'est point suspendu, son exécution seule est retardée, renvoyée à une autre éopque. La créance est acquise *hic at nunc* comme lorsque le contrat est pur et simple: mais le créancier n'en peut exiger le paiement qu'a 1'échéance du terme. C'est donc à tort qu'en dit souvent: qui a terme ne doit rien. Le débiteur a terme doit réellement; seulement, il ne peut pas être constraint de payer tant que le terme n'est pas échu".

In such a contract the debt is in existence from its inception, but it is not ordinarily exigible before the expiration of the term, but Article 1023 of the Code provides that "the debtor cannot

claim the benefit of the term when he has. . . . . by his own act diminished the security given to his creditor by the contract". It appears from Mignault's commentary, cited above, (p. 460) that security here contemplated is not the general security of the debtor's property afforded to all creditors by the common law, but a special security, expressly stipulated or warranted in the contract and appropriated to the payment of the debt.

Counsel for the appellant contended, both at the trial and on the appeal, that the parties intended to include all the terms of the contract in the written undertaking to repay, which contains no stipulation as to security, and that it was not permissible to look at the appellant's letters of application to find any other terms. We agree with the learned trial Judge that the parties never intended the undertaking to repay to be the whole contract between them, and to ignore the basis on which the advance was made, namely, that the appellant was a Government Officer who required a motor car for use in the course of his duties and that the advance should be repayable out of his official salary by monthly deductions. In our view the four documents, namely, the appellant's two letters (Exs. C & D) the undertaking (Ex. A.) and Financial Rule No. 132 (Ex. J.) must be read together to ascertain the terms of the contract and the obligations assumed thereunder by the appellant. But, even without such extrinsic aid, the use of the expression "advance" in the undertaking itself implies that the appellant had received a payment in anticipation of salary and imports the continuance of a salary from which the instalments were to be deducted. We agree therefore that the existence of the right of the appellant to an official salary from which the Government could deduct the monthly instalments was a substantial security expressly contemplated by the parties. By his act of resigning from the service the appellant destroyed this security and deprived himself of the benefit of the term. In accepting his notice of resignation, the Government expressly rejected the appellant's offer to satisfy the debt by surrendering the car and warned him that they would stand upon their right to enforce immediate payment of the whole sum which had become due.

We pass now to consider whether the warrant on which the appellant was arrested was issued in accordance with the provisions of the Code of Civil Procedure. Article 637 of the Code provides as follows:—

"A plaintiff may, in certain cases, simultaneously with the summons or pending suit and before judgment have the person or the property of his debtor, or the object in dispute, placed in judicial custody, as explained in the following chapters, subject to a right of action by the letter to recover damages, upon establishing by proof against the creditor a want of probable cause."

The cases in which this right to issue the writ of capias ad respondendum will come into existence are set out in Articles 638, 640, 641 and 642; and consequential provisions for the affidavit leading to the writ, the time when it may be issued, the

matters to be set out therein and the manner of execution et cetera are contained in other Articles of the same Chapter. The case material to this appeal is prescribed in Article 638 namely:—

> "When the amount claimed exceeds ten pounds, the plaintiff may obtain from the prothonatory a writ of summons and arrest against the defendant, if the latter is about to leave the Colony immediately, or if he secretes or is immediately about to secrete his property with intent to defraud his creditors."

The affidavit must declare that the defendant is personally indebted to the plaintiff in a sum amounting to or exceeding ten pounds and that the deponent has reason to believe, for reasons specially stated, that the defendant is about to leave the Colony immediately, with intent to defraud his creditors in general or the plaintiff in particular and that such departure will deprive the plaintiff of his recourse against the defendant and so on. Article 657 of the same Chapter provides "In all cases in which a writ of capias may issue, a warrant of arrest may be granted by a commissioner". A warrant issued under this Article authorises the arrest of the person therein designated and his detention in custody "during twenty four hours and no longer, unless before the expiration of that time the plaintiff has obtained and caused to be executed against such defendant a Writ of Capias in the ordinary course."

Book First of the Code, of which this Chapter forms part, is headed "Provisional Proceedings which accompany summons in certain cases" and counsel for the appellant, arguing from this and from the General Provision in Article 637, contended that neither a Writ of Capias nor a warrant of arrest can be obtained unless either there is a suit pending at the time of such issue or there is a writ of summons issued simultaneously with the writ of capias or the warrant as the case may be.

The learned trial Judge rejected this contention and held, rightly as we think, that "the designers of the Code intended to supply by the warrant of arrest a temporary and ancillary process prior to the commencement of the action to recover the debt and the suing out of the writ of capias.

The titles to parts of an enactment may be referred to as an indication of the intention of those parts, but neither the title to Book First nor the General Provisions of Article 637 can override the special provisions of subsequent Articles. Article 643 specially provides that the writ of capias may either be joined with the writ of summons, or may be issued afterwards as an incident in the cause. There is no such limitation or special provision imposed on the issue of a warrant of arrest. If a case has arisen in which an intending plaintiff would be entitled to issue a writ of capias, he may at his election apply to a commissioner for the grant of a warrant; and, if the warrant be granted, he thereby obtains the immediate and temporary restraint of his debtor for a period which would normally be long enough to enable him to obtain a writ of capias in the ordinary course. In con-

struing these Articles it must be borne in mind that a writ can only be issued during the hours when the Offices of the Court are open for public business, whereas a commissioner may grant a warrant at any time. In the present instance the warrant was granted on a Sunday by a commissioner upon an affidavit sworn by the respondent in his capacity as Colonial Treasurer and acting on the instructions of the Administrator: the affidavit contained all the averments requisite for the obtaining of a writ of capias.

The remaining two issues are questions of fact, and there was ample evidence to support the learned Judge's findings thereon. The respondent knew that the appellant ordinarily resided out of the Colony, that he had resigned his Office in St. Lucia and was leaving the Colony for good, that he owed the Government of the Colony $1,925 and was leaving no assets here other than the motor car which the Administrator had refused to accept in satisfaction of the debt. On these facts the trial Judge held, that the respondent reasonably believed that it was the appellant's intention to "unload" the car upon the Government without paying his debt and in our opinion his finding was fully justified by the evidence. There was no evidence to support the allegation of malice.

It remains for us to refer briefly to Mr. Gordon's submission that the appellant by paying the amount claimed in full and without reservation had abandoned his right to redress founded on any defect in or abuse of the procedure adopted to effect his arrest (see Beullac—La Responsabilite Civile dans le Droit de la Province de Quebec: 1948, p. 88 section 6). The case cited in support of this is Desautels v. Filiatrault 1889 Montreal: (M.L.R. 6 c.s. 238) in which it was held that a debtor arrested under a writ of capias, who settles with his creditor for the sum claimed in the action without expressly reserving his right to damages for false arrest cannot subsequently sue the creditor for such damages, the receipt accepted by him constituting a final settlement between the parties. The report of the case is not available, and it is unwise to deduce a principle from a mere head note. The point was not pleaded or taken in argument in the Court below as counsel frankly admitted that he was not at the time aware of the authority. Although it seems probable that the appellant made the payment without reservation, there is no direct evidence to that effect. Our findings on the other issues raised make it unnecessary for us to determine this point and we refrain from so doing.

This appeal is dismissed with costs and the judgment of the learned trial Judge is confirmed.

SPRINGER *v.* DOORLY.

(In the West Indian Court of Appeal. On Appeal from the Court of Error, Barbados (FURNESS-SMITH, MALONE, WORLEY, C.J.J.) February 14, 15, March 9, 1950).

Barbados Motor Vehicles and Road Traffic Act 1937—*regulations—requirements—approval by Legislature—directory.*

Section 7 of the Motor Vehicles and Road Traffic Act 1937 of Barbados, as amended by sections 41 and 42 of the Department of Highways and Transport Act, 1945, empowers the Director of Highways and Transport to make regulations relating to Vehicles and road traffic and by sub-section (2) of section 7 of the Act, it is provided that: "All such regulations shall forthwith be reported by the Director to the Governor for his approval and sanction, and shall as soon possible thereafter be submitted for the approval of both Houses of the Legislature and if not approved shall cease to be regulations from the date of their disappro-

val, but the non-approval shall not affect anything done or suffered under the regulations between their coming into force and their rejection by the Legislature.'"

A regulation with regard to the parking of motor cars was made under the above section and reported to the Governor who approved of it, but although the House of Assembly sat on thirteen occasions after the Governor approved of the regulation, it was never submitted to the Houses of the Legislature for their approval or disapproval.

On a charge being brought against the respondent for a contravention of the regulations, the Magistrate dismissed the complaint on the ground that the approval of the regulations by both Houses of the Legislature was a condition precedent to their validity and as this approval had not been obtained, the regulations were invalid. The Assistant Court of Appeal and the Court of Error upheld the Magistrate's decision.

The complainant appealed.

Held: The sub-section was directory and not mandatory and the regulations were valid until the Houses of the Legislature had disapproved.

John Whyatt K.C., Attorney-General, with him W. W. Reece, K.C., Solicitor-General and M. E. Bourne for the appellant.

E. K. Walcott, K.C., J. S. B. Dear with him for the respondent.

FURNESS-SMITH, C.J.

MALONE, C.J.

WORLEY, C.J.

This is an appeal from the decision of the Court of Error holding that certain regulations made under section 7 of the Motor Vehicles and Road Traffic Act, 1937, were, on the date when the respondent is alleged to have committed an offence under them, no longer in force by reason of the fact that the requirements of the section had not been fully complied with. The requirements are contained in sub-section (2) of the section which for convenience I shall refer to hereafter as the Barbados provisions and are in the following terms.

"All such regulations shall forthwith be reported by the Director to the Governor for his approval and sanction, and shall as soon as possible thereafter be submitted for the approval of both Houses of the Legislature and if not approved shall cease to be regulations from the date of their disapproval, but the non-approval shall not affect anything done or suffered under the regulations between their coming into force and their rejection by the Legislature."

The regulations were made by the Director on the 12th February, 1948, and received the approval and sanction of the Governor on the 10th April, 1948. The complaint alleged an offence committed on the 7th June, 1948, but on that date the regulations had not been submitted for approval of the Legislature although it is said that some thirteen sittings of the House of Assembly had taken place since the date of the Governor's approval and sanction.

The question at issue has been discussed in the Parliament of the United Kingdom and by text-book authors but there is no clear authoritative decision upon it. And, although a great variety of textual expression has been employed in the enactments of the United Kingdom which are designed to afford Parliament an early opportunity of approving or repudiating subordinate legislation, none has been found in similar terms to that which we now have to construe. The nearest perhaps is exhibited in the case of *Bailey v. Williamson* (1873) *L.R.* 8 *Q.B.* 118, which for convenience I shall refer to hereafter as the British provisions, and these are in the following terms:—

> "Any rule made in pursuance of the first schedule to this Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament; and if any such rules shall be disapproved of by either House of Parliament within one month after the same shall have been so laid before Parliament such rules, or such parts thereof as shall be disapproved of, shall not be enforced."

In that case the Court was asked to declare the regulations invalid because they had not been laid before Parliament within the specified time. It was argued, as it has been argued before us, that the requirement was mandatory, and disobedience of it rendered the regulations nugatory. The Court held that the requirement was directory only, and not mandatory, and declined to nullify the regulations. It appears to me that, although the British provisions which received judicial interpretation in that case differed in several material respects from the Barbados provisions which we are now required to construe, the differences are even more favourable to a similar conclusion. Since the meaning and intention of the Legislature is to be derived from the text of its enactments, it is important to examine the expressions used in the Barbados provisions, to observe the variations from the text of the British provisions which have already received judicial interpretation, and to consider whether those variations supply a guide as to the mandatory or directory character of the Barbados provisions. The first and most notable variation is that in the Barbados provisions the regulations when made by the Director are required to be approved and sanctioned by the Governor before submission for the approval of the legislature. The subsequent requirement that the regulations are to cease if disapproved by the legislature makes it clear that they are to be regarded as in full force and effect prior to such disapproval. It is not so clear as to when they are deemed to have come into operation. The Interpretation Ordinances of most Colonies provide that regulations commence on the date of publication in the Gazette, but no such provision existed in the Barbados Interpretation Act at the material time. It appears to me that the intention here was that the regulations should come into operation as soon as the Governor gave his sanction to them, and not when the Director made them or when they were published in the Gazette. For the purposes of the present issue the

point to note is that the legislature has provided intermediate machinery for checking the regulations. I am disposed to infer from this that, so far as concerned the operation of the regulations and their suitability, the legislature was content to entrust this to the scrutiny of the Governor and his advisers, and in further providing for its own subsequent approval it intended to give expression to its constitutional position as the sovereign authority in all legislative matters.

Another notable variation in the Barbados as compared with the British provisions is the requirement that the regulations shall be submitted to the legislature for approval. There seems to be no room for doubt that this involves a resolution of approval to make the regulations effective thereafter. It has been submitted on behalf of the respondent that such a resolution must, according to the practice of the Barbados legislature, be moved by a member in charge of Government business in the House, and that this is the final step which Government must take to give permanence to the existence of the regulations as a statutory measure. If that step is not taken within the time prescribed then, it is argued, the regulations become automatically revoked as from that date. This requirement, it is said, constitutes and exhibits the mandatory character of the provision. There is much force in this contention, and it deserves close consideration, although it was not on this ground that the Court of Error decided in favour of the respondent. The British provisions require no act of the executive to give permanence to the regulations other than the act of laying them before the legislature within the prescribed time. The Barbados provisions require the executive to move a resolution of approval. If that was not done, did the legislature intend revocation, or had it some other purpose in requiring it to be done? In determining what that purpose was it is relevant to enquire first whether any public mischief is to be apprehended if, through inadvertence or otherwise, the executive fails to take action in time, and next whether, if revocation were to follow such failure, the date of revocation can be precisely ascertained. In regard to the first question I am impressed by the wideness of the administrative field which is to be covered by the regulations made under this section as enunciated in sub-section (1). Can it be that the legislature intended to destroy the administrative machinery under the Act which itself had set up merely because some member of the House had delayed to move a resolution at the first meeting of the Assembly? It appears to me that if any other less injurious purpose than this is discernible in the provision it should be preferred. In regard to the second question counsel for the respondent was asked on what date in his submission the regulations became revoked. His first answer was, “On the 20th April, 1948”, on which date there was a meeting of the House of Assembly, which was the second meeting subsequent to approval of the regulations by the Governor. On being asked why not on the date of the first meeting he agreed that this would be the more logical date. It is manifest that there is cause for uncertainty as to the date when it will

be possible or practicable to move a resolution during the course of a legislative session. The practical importance of being able to ascertain with certainty and precision the period of operation of legislative enactments is another consideration which leads me to look for some other purpose than revocation as a consequence of inadvertent delay in conforming with the requirements of this provision. I have already indicated what I think that purpose to be. If, as I think, it was to give statutory expression to the sovereignty of the legislature in respect of these regulations that purpose would be readily achieved by the process of question, debate and if necessary censure on the floor of the Assembly, and without recourse to the public mischief which may attend premature and automatic revocation. Such constitutional methods of controlling its own business (including the business of seeing that its members on the Government side do not lapse in the punctual performance of their duties to the House) are common to all civilized legislatures, and such extreme measures as mandamus are quite unnecessary for that purpose. It was this supposed absence of power to compel obedience to the provisions which seems to have moved the Court of Error to the decision which it reached, but I feel sure that neither of the two Houses of legislature in Barbados need have cause to apprehend that such requirements as these now under review could ever be ignored with impunity. The constitutional means of preventing this are in their own hands, and these are ample and sufficient for the purpose. For these reasons I consider that the requirement now under construction is directory and not mandatory, and that the present appeal should be allowed. The case should be remitted to the magistrate to hear and determine according to law. The orders of the Assistant Court of Appeal and of the Court of Error should be set aside. Since the issue on this appeal is of public importance there should be no order as to costs.

JUDGMENT OF

MALONE, C. J. of the Windward Islands and Leeward Islands.

This is an appeal from the decision of the Court of Error holding that certain regulations made under section 7 of the Motor Vehicles and Road Traffic Act, 1937, were, on the date when the respondent is alleged to have committed an offence under them, no longer in force by reason of the fact that the requirements of the section had not been fully complied with. The requirements are contained in sub-section (2) of the section which for convenience I shall refer to hereafter as the Barbados provisions and are in the following terms:

> "All such regulations shall forthwith be reported by the Director to the "Governor for his approval and sanction, and shall as soon as possible "thereafter be submitted for the approval of both Houses of the Legis- "lature and if not approved shall cease to be regulations from the date "of their disapproval, but the non-approval shall not affect anything "done or suffered under the regulations between their coming into "force and their rejection by the Legislature."

On the 19th August, 1948, the appellant, who is a sergeant of Police, charged the respondent before the Police Magistrate District A with the offence of parking a private motor car in Broad Street, Bridgetown, on the 7th June, 1948, for a longer period than was necessary for the purpose of taking up or putting down passengers, contrary to regulation 3 of the Bridgetown (Parking) Regulations, 1948. These regulations had been duly made by the Director of Highways and Transport on the 12th February, 1948, approved and sanctioned by the Governor on the 10th April, 1948, and published in the Official Gazette of the 12th April, 1948. Although the House of Assembly had met at intervals of about one week on thirteen occasions between the 10th April, 1948, the date when the regulations were approved and sanctioned by the Governor, and the 7th July, 1948, the date when the evidence given before the Magistrate showed that the alleged breach of these regulations had occurred, there had been no approval or disapproval of them, by the Houses of the Legislature, as required by the sub-section of the Act quoted above. At the conclusion of the case for the complainant the Magistrate dismissed the charge on the ground that the approval of the regulations by both Houses of the Legislature was a condition precedent to their validity and was an imperative prescription, and as this approval had not been obtained the regulations were invalid. From this decision the appellant appealed first to the Assistant Court of Appeal where his appeal was dismissed, and then to the Chief Justice of Barbados sitting in the Court of Error. The Chief Justice dismissed that appeal, and the appellant has now come to this Court. There is no question that the regulations were *intra vires* the authority to whom the power of making them was delegated, and that they became effective from the date of their approval by the Governor; the only question for consideration is whether or not they had ceased to be effective on the date when the alleged offence was committed.

For the appellant it was contended that the failure to lay the regulations before the Legislature for approval or disapproval was an omission for which the Executive might be called to account by the Legislature, but it was not a matter which would justify a Court in importing judicial sanctions by nullifying the regulations. Involved in the consideration of this contention is the question of statutory interpretation, as to whether the provisions of the statute which require the submission of these regulations to both Houses of the Legislature for approval or disapproval, as soon as possible after they have received the Governor's approval, are directory or imperative. If these provisions are imperative failure to carry them out will result in the regulations being rendered wholly invalid; if they are directory no such consequence results and the provisions are treated as "mere instructions for the guidance and government of those on whom the duty is imposed." In every case in which it becomes necessary to interpret the provisions of a section of an Act of the Legislature similar to the section now under review, the intention of the Legislature, as expressed in the Act and

particularly in the relevant section, must be ascertained. The general principle was stated by Sir Arthur Channell in a judgment of the Privy Council in *Montreal Street Railway Company v. Normandin*, 1917 *A.C.* 170 *at page* 175, this way:

> "The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at
>
> Where the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

As I see it, the object sought by the Legislature in enacting section 7 of the Motor Vehicles and Road Traffic Act of 1937 was to delegate to the Director of Highways and Transport the power to make certain regulations dealing with vehicular traffic and road transport and to safeguard the interests of the public by subjecting these regulations to the approval and sanction of the Governor before they could come into operation. The Legislature nevertheless desired to retain some supervision over this delegated legislation, and has attempted to do so by providing that as soon as possible after the Governor's sanction has been given to the regulations they are to be submitted for the approval of both Houses of the Legislature. Counsel for the respondent while agreeing that the regulations became effective from the date of the Governor's approval contended, with a great deal of force that a positive act of approval was required by the legislature "as soon as possible" after the date of the Governor's approval in order that the regulations might be perpetuated, and if this positive act of approval was not performed the regulations would be deemed to have ceased to exist. If this contention is put to a practical test it at once becomes apparent that not only will there be great uncertainty as to the time when the regulations may cease to exist, but general inconvenience and injustice will result if the regulations were to become inoperative because they had not been submitted to the Legislature for perpetuation. They will cease to exist, counsel argued, (1) if they are not submitted to the Legislature "as soon as possible" after the Governor's sanction has been obtained and (2) if, having been submitted "as soon as possible" a resolution of approval is moved and rejected by the Legislature. It is clear that the members of the public have no control whatever over the person responsible for submitting the regulations for the approval of the Legislature, and it cannot be doubted that great public inconvenience and injustice would result, particularly when regard is had to the great variety of matters which are dealt with in the regulations, if that person neglects his duties and by so

doing rendered the regulations invalid. Moreover, it cannot promote the main object of the Legislature to declare these regulations null and void in such circumstances. Having regard to these considerations I am of opinion that the provisions of section 7 (2) relating to the submission of the regulations for the approval of the Legislature are "directory" and not "imperative".

If, as I hold, these provisions are directory only then the Courts cannot question the validity of the regulations on the ground that these directory provisions have not been complied with. The remedy for this non-observance must be by action of the Executive and not by action of the Judiciary, The exact determination of the cases in which judicial sanctions as opposed to administrative sanctions may be applied is a frequently recurring problem, and the decision in the case of *Bailey v. Williamson* (1873) *L.R.* 8 *Q.B.* 118, is instructive on this point. In that case the Court was called upon to construe the provisions of section 9 of the Parks Regulations Act 1872 (Imperial) which are as follows:—"Any rule made in pursuance of the first schedule to this Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament; and if any such rules shall be disapproved of by either House of Parliament within one month after the same shall have been so laid before Parliament, such rules or such parts thereof as shall be disapproved of shall not be enforced." It was held that the rules were operative *ab initio* and that the disapproval of Parliament was merely a condition subsequent. In like manner it seems to me that the provision relating to the submission of the regulations to the Legislature as soon as possible after they have been approved is merely a condition subsequent and all that was aimed at was the retention by the Legislature of its right to "disapprove". The provisions in subsection (2) are stated in an unusual and somewhat cumbersome manner, but in my opinion the language used shows that the intention of the Legislature was that the regulations having been made in the manner already indicated, should remain in force until some formal step was taken by the Legislature to disapprove them. The prescribed step takes the form of a positive resolution of approval, and if it is defeated, it is in effect a negative resolution of disapproval. There is authority for holding that no legal meaning can, in circumstances like those in the present case, be given to the "vague expression 'as soon as possible'", but whatever may be its meaning it only forms part of the directory provisions referred to and no penal consequences follow from neglect of them, and such neglect cannot have the effect of invalidating the regulations. I agree, that this appeal should be allowed, that the orders made by the Court of Error and the Assistant Court of Appeal should be annulled, and that the case should be remitted to the Magistrate to hear and determine according to law. Having regard to all the circumstances there will be no order as to the costs of the appeal.

(Sgd.) CLEMENT MALONE,
Chief Justice, Windward Islands and Leewards Islands.

I concur in the order proposed but desire to give my reasons out of respect for the learned Chief Justice from whom we are differing. I shall not repeat the facts nor recite *in extenso* the relevant enactment. It is common practice nowadays in many countries of the Commonwealth and Empire for the legislative body to delegate to a designated executive authority the power to make subordinate legislation whilst reserving to itself some degree of control over that sub-legislation so made. There is great variety of detail in the procedures prescribed to secure this control but a general distinction has been drawn between:

(a) those which provide that the subordinate legislation comes into force as soon as it is made by the delegate authority and remains in force unless and until it is disapproved by the legislative body. This class has been described as having validity subject to a negative resolution; or as being "defeasible by condition subsequent."

(b) those which provide that the subordinate legislation shall not be effective unless and until it is approved by the legislative body. This has been described as the "affirmative resolution" procedure; the observance of the procedure is a "condition precedent" to validity.

Variations of detail may be found in each of these types and, in addition, one can discern a number of hybrid procedures, as, for example, the provision that the subordinate legislation shall come into force as soon as made but shall be laid before the legislature within a prescribed period and shall cease to have validity if not approved within a further prescribed period.

A characteristic provision of the negative resolution procedure and of hybrid procedures which give conditional initial validity to the sub-legislation is, as one would expect, an express saving for acts done in good faith during the period of validity of sub-legislation which is subsequently disapproved, or fails to receive positive approval when that is a prescribed requisite to the continuance of the initial validity. The subsequent annulment has in such cases no retro-active effect.

The question that has been frequently discussed by writers on the subject and that has to be answered in the present appeal is, what is the legal effect of subordinate legislation which has been made in due form by the prescribed delegate authority and has thereupon come into effect but which has not been laid before the legislative body for approval or disapproval, as the case may be, within the prescribed time? The question is, of course, only of importance in relation to the "negative resolution" procedure and those types of hybrid procedure which give conditional initial validity to the legislation. Consideration of the problem generally is complicated by the variety and sometimes the indefiniteness of the period prescribed for bringing the sub-legislation to the notice of the legislative body; sometimes this is to be done within a prescribed number of days, or at the next subsequent meeting; but more often it is to be done "forthwith,"

"as soon as may be," "as soon as practicable," or as in the present case, "as soon as possible thereafter." Further, the duty of bringing the sub-legislation to the notice of the legislature is rarely laid upon any definite member or executive officer, the expressions used being often indefinite and passive, such as "shall be laid on the table" or, as in the section we have now to consider, "shall be submitted for approval."

The effect of failure to comply with such statutory provisions varies according to whether the requirements for bringing the sub-legislation to the notice of the Legislature are held to be mandatory (or, as is sometimes said, imperative) or merely directory. The alternatives are expressed in terms which I could not improve upon in a book called, "Law and Orders"—London 1945 written by Mr. C. K. Allen, K.C. At page 109 the learned author says: —

> "If a provision is held to be imperative, failure to comply with it wholly invalidates the action which purports to have been taken under it. It is "of the essence" of the legislative purpose, and if it is disregarded, it cuts away the foundation from the attempted proceeding . . . . . If, on the other hand ,the provision is held to be directory only, failure to comply with it, though it may expose the responsible person to a penalty, does not invalidate the whole proceeding or transaction, and indeed it may not do so even if there is no known penalty which can be applied to the person in fault or no remedy for a person aggrieved. . . . This, clearly, is a fundamental distinction in determining the effect of any statutory provision. Of course, if the statute expressly indicates what the effect of non-compliance is to be, the matter is plain; but in many cases it merely gives its command and says nothing about the consequences of disobedience."

The general opinion is that with the "negative resolution" type of procedure, the requirement to bring the sub-legislation to the notice of the Legislature is merely directory, and this seems to be supported by such authority as there is on this point. See *Bailey v. Williamson* (1873) *L.R.* 8 *Q.B.* 118 which was not cited in the Court below.

So far as this Court is concerned, it must be guided by the rule approved by the Privy Council in *Montreal Street Railway Company v. Normandin* (1917) *A.C.* 170, in which their Lordships said, at page 174 of the report:

> "The question whether provisions in a statute are directory or imperative has frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at . . . . .When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at

> the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them though punishable, not affecting the validity of the acts done."

In that case it was proved that there had been irregularities in the due revision of a jury list, but the Privy Council held that the objects of the statute in prescribing the preparation and revision of the list had not been defeated and that it would cause the greatest public inconvenience if it were held that neglect to observe the provisions of the statute made the verdicts of all juries taken from the list null and void, so that no jury trials could be held until a duly revised list had been prepared.

The object of section 7 of the Motor Vehicles and Road Traffic Act, 1937, is to enable legislation to be made in the form of regulations, dealing with a great variety of matters concerning the construction and use of motor vehicles and the control of traffic. The regulations may prescribe the types and construction of motor vehicles, the types of lights and warning devices to be provided and their use, limitations on the use of streets and highways, the relative precedence of vehicles and foot passengers, the fares to be charged on public service vehicles and so on. It may fairly be said that they affect every person who uses the streets and roads, buses and taxicabs. The Legislature of the Colony, in providing that any regulations made under the section and approved by the Governor should be submitted for their approval, clearly intended to reserve to themselves the right to scrutinize and, if they thought fit, to annul them; but I cannot see that the main object of the section is frustrated by any failure so to do.

It is manifest that general inconvenience would result if it were held that failure to submit the regulations as soon as possible after they have been sanctioned by the Governor makes them null and void. It is not necessary for the purposes of this appeal to decide the stage at which the regulations acquired validity. There are three possibilities; namely, when they were made by the Director, when they were sanctioned by the Governor, or, (on the authority of *Johnson v. Sargant* (1918) 1 *K.B.* 101) when they were made known; I should myself incline to the view that the approval and sanction of the Governor was the effective stage, but whichever view may be correct, the requirements were satisfied, since the regulations in question were made by the Director on February 12th, 1948, approved and sanctioned by the Governor on April 10th and published in the Official Gazette on April 12th of the same year. The date of the alleged offence was either the 7th of June or the 7th of July. The provisions of sub-section 2 of section 7 make it clear beyond doubt that the regulations are to have effect *ab initio* and therefore the man in the street is bound to obey them as soon as made and is entitled to expect that others will do so; but, if it be essential to the continuance of their validity that they be submitted for approval "as soon as possible thereafter," an element of uncertainty is introduced immediately in a region of law where certainty is most desirable in order that "the

wayfaring men, though fools, shall not err therein." The general public has no control over the executive officer whose duty it is to send the regulations to the Legislature after the Governor's sanction has been given, nor over the member of the Legislature whose duty it is to move the resolution of approval, and the probabilities are that the public has no detailed knowledge of the proceedings of the Legislature. Yet, if the respondent's contention be accepted, it is necessary to suppose the Legislature to have said that, although the regulations are to be obeyed when made and sanctioned, nevertheless, if another step is not taken within some future indefinite period of which the public generally will have no knowledge, then they may thereafter be disobeyed with impunity. I think that nothing but the clearest, express words would induce any Court so to construe the section.

There is evidence in the present case from which one might reasonably conclude that the regulations were not in fact submitted as soon as possible, but the construction of the statute must be decided on general principle and not on the facts of the particular case. When a charge is laid under a regulation which has not yet been submitted for approval, who is to say whether the regulation has, by lapse of time, lost its validity? A magistrate's court would be, in my view, a most unsuitable forum for such an enquiry, and, in so saying, I intend no disrespect. What yardstick could the Magistrate use? Counsel for the appellant would have us interpret "as soon as possible" as being equivalent to "at the first opportunity" or "at the first practical opportunity." The Court of Error construed the expression as meaning within as short a time as is reasonably possible, having regard to the circumstances of the particular case. For myself I can see no difference in connotation between this phrase and "as soon as may be" as to which Mr. Allen says:

> "The truth is that no legal meaning can be attached to so vague a phrase, and nobody seems ever to have bothered very much about it."

It is immaterial which view is taken for, in either case, the phrase is directory only, no penalty attaches to neglect of it, and it cannot affect the actual validity of the regulations.

I have not overlooked Mr. Walcott's argument that the necessity for some member in charge of Government business to do a positive act, namely, to move a resolution that the regulations be approved, distinguishes the procedure in the section under consideration from the "negative resolution" type in which the usual requirement is merely that the sub-legislation be laid on the table of the House. It is true that we have here an unusual provision, but, in my opinion, it is only a variation of detail and does not deprive the procedure of the three characteristic ingredients of the "negative resolution" type, namely, that the sub-legislation has validity *ab initio*, that it ceases to have validity on being disapproved and that there is a saving for acts done under it prior to the annulment.

Nor have I overlooked the consideration which found favour with the learned Chief Justice and with the Judges of the Assistant Court of Appeal, namely, that if the command of the Legislature be held to be directory only "the subordinate authority could make regulations and give them permanent validity without their being subjected to the scrutiny of the Legislature by the simple device of disregarding part of sub-section (2) of section 7 of the Act and never submitting them to the Legislature."

It is indeed, as has been said, a little startling to say that a command to lay regulations before the Legislature is "a mere instruction for the guidance and government of those on whom the duty is imposed," but if that is the result which flows from the correct application of the rule of construction laid down by the Privy Council, this Court cannot shrink from saying so. The ineffectiveness of parliamentary control may be an evil, but it is a lesser evil than the general confusion, inconvenience and injustice which acceptance of the alternative view would create. When the weakness is exposed, the remedy is in the hands of the Legislature and it is not for the Courts to impose a sanction which the statute omitted to provide.

(Sgd.) N. A. WORLEY,
Chief Justice of British Guiana.

PERSICK *v.* RAHAMAN

(In Chambers, on appeal from the Rent Assessor, (Ward, J.) (March 27, May 8, 1950).

Rent Restriction—"building land"—interpretation—dwelling house used partly for business purposes—effect of.

By an agreement of lease dated 26th September, 1947 a landlord agreed to let a lot of land for a period of ten years with a right of renewal for five years at a rental of $5.00 per month for the first four months and thereafter at the rate of $20.00 per month. The agreement of lease, subject to certain restrictions, permitted the tenant to erect a two storeyed building on the land to be used partly for a pawnbrokery and partly as a private residence. The land had been first let under an agreement of lease dated 13th December 1943 with a covenant against using any building thereon as business premises without consent and this agreement had been assigned to the tenant.

The Rent Assessor, on an application to him, assessed the maximum rent at $20.00 per month on the ground that the premises were decontrolled and that the standard rent was properly fixed by the agreement of lease.

The tenant appealed.

Held: The kind of building erected on land does not affect the character of building land and the premises were not decontrolled. Further, a dwelling house does not cease to be a dwelling house because a part of it is used as business premises.

Quaere, whether the increased amount had been reserved as a premium in monthly instalments, it would not have been recoverable.

D. P. Debidin for appellant.

J. E. de Freitas for respondent.

Ward, J.

JUDGMENT:

This matter comes before the Court on appeal from a decision of Mr. C. R. Browne, Rent Assessor, who assessed the maximum rent of the premises, on the application of the appellant, at $20.00 per month. The appellant in his grounds of appeal claims that the Rent Assessor was wrong in deciding:

(a) That the premises were decontrolled;

(b) That the standard rent was properly fixed by the agreement of lease at $20.00 per month; and

(c) That the premises were let subject to a progressive rent.

The facts are not in dispute. On 13th December, 1943 the respondent leased Lot No. 6 at Rahaman's Park, Demerara River, for a period of five years with a right of renewal, to Ernestine Angela Toase. On January 24th, 1946 Toase transferred all her rights and benefits under the lease to Ada France, who in turn transferred her rights under the lease to the appellant sometime in 1947. The lease to Toase contained a covenant that the lessee should not be at liberty to use any building erected upon the land as business premises without first obtaining the consent of the lessor, with the additional proviso that the lessor might at any time revoke such a consent by six months' notice in writing.

As the appellant was desirous of opening a pawnbrokery on the premises the parties cancelled the original lease and entered into a new agreement on September 26th, 1947. By this agreement the lessor agreed to let Lot No. 6 Rahaman's Park to the lessee for a period of 10 years with a right of renewal for a further period of five years at a rental of $5.00 per month for the first four months, and thereafter at the rate of $20.00 per month. The agreement contains a clause by which the lessee, subject to certain restrictions as to extensions of the building and the furnishing of plans, is given power to erect a two-storey building to be used partly for a Pawnbrokery and partly as a private residence. The building has been used in the manner provided for in the lease since February 1948.

The Appellant applied on September 27th, 1949 to the Rent Assessor to have the standard rent ascertained and the maximum rent fixed in accordance with the provisions of Sub-section (1) of Section 4 B of the Rent Restriction (Amendment) Ordinance No. 13 of 1941. At the hearing before the Rent Assessor it was submitted on behalf of the appellant that the standard rent of the premises is the rent at which they were first let on December 13th, 1943 viz. $5.00. The relevant sections in the Ordinances of 1941 and 1947 show that the standard rent of building land means the rent at which the land was let on the 3rd day of September, 1939, or when the land was let after that date, the rent at which it was first let. It was submitted on behalf of the respondent that, if the land had continued to be occupied for residential purposes only, the material date for ascertaining the standard rent would have been December 13th, 1943; but as the lease to the appellant is for purposes altogether different from that of the original letting, namely for a combination of purposes, partly as a dwelling house and partly for business purposes, the material date is September 26th, 1947. Mr. De Freitas for the respondent submitted that the correct interpretation of the sub-clause "building land" in Section 2 sub-section (c) of the Rent Restriction Amendment Ordinance 1941 is that building land is let in different categories, and that a letting in one category cannot avail a tenant whose lease falls within a different category. This argument is attractive because the common-sense view would be that a letting for business purposes should normally carry a higher rental than a letting for residential purposes. The wording of the sub-clause will not, however, in my opinion, bear this interpretation. Building land, according to the definition, "means land let to a tenant for the purpose of erection thereon by the tenant of a building, used or to be used as a dwelling or for the public service or for business, trade or professional purposes or for any combination of such purposes, or land on which the tenant has lawfully erected such a building." I interpret this to mean that building land means land let to a tenant for erecting a building thereon, and the following words are intended to show that such a building may include any class of building, private, public, residential, commercial or any combination of these. I think this is clearly indicated when the subclause is compared with Section 3 sub-section (2) of the Rent Re-

striction Ordinance 1941, which it replaces. Under the 1921 Ordinance protection was afforded the tenant in respect only of land on which a dwelling house was erected. When business premises were brought within the ambit of the Rent Restriction Ordinances building land subject to the provisions of the Ordinances was extended to include land with buildings of all kinds erected thereon. In my opinion the kind of building erected does not effect the character of building land, which for the purposes of the Ordinance is land let for the purpose of erecting any kind of building thereon.

But even if this interpretation is not correct it has been submitted by Mr. Debidin for the appellant that the building erected on Lot 6, Rahaman's Park, has changed neither its identity nor its character since its erection as it is still partly used as a residence, and the fact that it is now used partly for business purposes does not take it out of the category of a dwelling house. In support of this submission he cited the case of Vickery v. Martin (1944) K.B. 679. In that case Lord Greene, M.R. quoted with approval a dictum of Scratton L.J. in Hicks v. Snook 93 J.P. 55: "The Court of appeal held that as he, the tenant, was dwelling in the house and had a right to dwell in the house, the house was a dwelling house, and the fact that besides being a dwelling house part of it was used for business premises did not prevent it from being a dwelling house to which the Act applied." This decision has never, so far as I know, been challenged, and in fact was recognised by Swift J. in Williams v. Perry 131 L.T., a case on which the Rent Assessor placed great reliance, at p. 473: "The fact that the tenant was carrying on in his dwelling house a business did not take the premises out of the protection of the Act." It is also relevant to point out that Section 3 sub-section (4) of the Rent Restrictions (Amendment) Ordinance 1947 provides that "where this Ordinance has become applicable to any dwelling house, public or commercial building, or building land, it shall continue to apply thereto whether or not the dwelling house, public or commercial building or building land continues to be one to which this Ordinance applies." The learned Rent Assessor appears to have misapprehended the ratio decidendi in Williams v. Perry. In that case the premises after the original letting was let to the defendant wholly as business premises, which were not subject to control in England, and Smith J. held that it was competent to the parties by agreement to take the premises out of the act by a lease of the premises wholly for business purposes. Clearly the decision in that case cannot apply to the circumstances of the instant case since the lease itself provides that the premises shall be used partly as a dwelling house and partly as business premises.

It was finally submitted by Mr. De Freitas for the respondent that inasmuch as the lessor would have been able to demand a premium or fine as a consideration for his consent to enlarging the terms of the lease the reservation of rent in the lease should be interpreted as fixing the rent at $5.00 per month and exacting the remainder as a premium payable monthly. The lessor could undoubtedly have exacted a premium and I have no doubt that the

ingenuity of conveyancers might discover a method of reserving a premium by way of monthly instalments. But this is precisely what was not done. The language of the lease is clear and the evidence of the respondent is equally clear: "For the first four months it was rented at $5.00 per month, and after that at $20.00 per month."

Mr. De Freitas has urged that it cannot be the intention of the Ordinance to allow a lessee to enter into a solemn and binding agreement, and then to seek to escape his obligations by taking cover under the Ordinance. I think the answer to this contention has been amply given in Solle v. Butcher (1949) 2 All, E.R. 1107, where the decisions in Barton v. Fincham (1921) 2 KB. 291 and Brown v. Draper (1944) K.B. 309 were approved. L. J. Jenkins at p. 1128 says: "The contention that the tenant is estopped from claiming the benefit of the Rent Restriction Act can I think be disposed of on the short ground that, inasmuch as the tenant could have claimed the benefits of the Rent Acts even if he had expressly agreed not to do so, he cannot be precluded from claiming such benefit by words or conduct not amounting to an express promise not to do so, but in fact implying such a promise."

The Rent Assessor was clearly in error when he held that the premises were decontrolled since the period required under a lease to take the premises out of the Ordinance is twenty-five years. He is also, in my opinion, in error in holding that the Standard rent is as set out in the agreement of lease of September 26th, 1947. There is no evidence before me on which I can assess any allowable increases and the application will therefore be returned to the Rent Assessor to consider and fix what amount should be added by way of allowable increases to the standard rent which I find to be $5.00 per month.

COLLINS *v.* KISHNA

(In Chambers, on appeal from the Rent Assessor, (Ward, J.) April 3, June 10, 1950)

Rent Restriction—Two buildings—premises consisting of one building and part of the other—not portion of a building—no apportionment.

In 1942 the lower and upper flats of a building were let separately. The lower flat consisted of a shop and was let together with a bakery which was in another building about fifty feet from the shop.

The tenant of the shop and bakery applied to the Rent Assessor to apportion the rent of the premises. The Rent Assessor held that, inasmuch as the upper flat of the building had never been let since September 3, 1939 with the remainder of the premises it was impossible to ascertain the standard rent of any part of the building now let separately. He then proceeded, however, to fix a standard and maximum rent of the shop and of the bakery.

The tenant appealed.

Held: It was impossible to apportion the rent of the building since the premises let as a unit consisted of two buildings and consequently

one of them could not be a portion of a building which had been first let as separate premises since the date fixed in the Ordinance.

C. Wong for the appellant.

Respondent in person. *Ward, J.:*

The appellant in this case made an application under Section 4 (a) (1B) of the Rent Restriction (Amendment) Ordinance 1948 requesting the Rent Assessor to inspect the premises and to apportion the rent thereof. No evidence was taken, but the Rent Assessor inspected the premises and found that the premises consist of two buildings on one lot of land at 101 Carmichael Street, Georgetown. The two buildings have never been let together as separate premises after March 8th 1941; but in 1942 the bakery and the shop which form the lower flat of the second building were let together, while the upper flat in the second building was let to a different tenant. On June 16th, 1948 the Rent Assessor for Georgetown assessed the Standard Rent and the Maximum rent of the Shop and Bakery under the provisions of Section 4 B (1B) of the Rent Restriction Ordinance 1941 as amended by the Rent Restriction (Amendment) Ordinance 1948 (No. 30) at $26.00 and $31.41 per month respectively. The Rent Assessor held that, inasmuch as the upper flat of the second building has never been let since September 3rd, 1939 with the remainder of the premises, it is impossible to ascertain the Standard rent of the building as a whole, and therefore impossible to apportion the rent of any part of the building now let separately.

The appellant bases his appeal substantially on two grounds viz:—

(a) that the Rent Assessor was wrong in finding that there was no or insufficient evidence for ascertaining the standard rent of the Bakery;

(b) that the Rent Assessor erred in law in holding that no legal apportionment of the standard rent could be fixed without paying regard to the standard rent of the entire premises.

For the determination of this question it is necessary to pay close attention to the words of the sub-section under which the application is brought. This sub-section provides that "where an application under sub-section. (1) of this section is made in respect of any portion of a building first let as separate premises after the 8th day of March, 1941, the Rent Assessor shall, having regard to all the circumstances of the case, including the standard rent of the whole building, ascertain and certify the standard rent of that portion of the building in respect of which the application is made." The important word is the word building. For the subsection to be operative the premises in respect of which the application is made must be a portion of a building. This clearly distinguishes this sub-section from sub-section (1) of Section 4B of the Rent Restriction Ordinance 1941 as amended by the Rent Restriction (Amendment) Ordinance 1947 (No. 13) where the word used is premises. In the present case the premises in respect of which the application is made consist of a separate building, com-

prising a bakery, at a distance of fifty feet or more from the second building and completely separated from it. There is no evidence that this bakery and the separate building containing a shop and flat have ever been rented as a single building. It is therefore impossible to apportion the rent of this building since it is not a portion of a building which has been first let as separate premises since the date fixed in the Ordinance.

So far the Rent Assessor is, in my opinion, correct and his decision is affirmed. Unfortunately the Rent Assessor then proceeded to do something which he was not asked to do and which, inasmuch as the premises in respect of which the application is made is not a portion of a building, he has no power to do under Sub-section (1B) of Section 4 of the Rent Restriction (Amendment) Ordinance 1948. This sub-section gives power to apportion the rent in relation to the whole building only and to fix and certify the standard rent of the premises on that basis alone. That part of the Rent Assessor's decision which purports to fix the Standard Rent and the Maximum rent of the premises exceeds the power of the Rent Assessor under this sub-section of the Ordinance and must be set aside. I make no order as to costs.

RAHAMAN *v.* SLATER

(In the Full Court, (Boland, C.J. (Ag.). Ward, and Hughes, JJ.) June 2, 24, 1950).

Criminal law—Control of Timber (*Returns and Records*) *Order, 1947—Production of books—Request—Authority—Absence of knowledge by owner of sawmill or his agent.*

The appellant was convicted by a Magistrate for failing to produce certain books relating to the working and output of his sawmill after having been required to do so by a person authorised by the Controller of Timber.

The Assistant District Commissioner and Sub-Controller of Customs at Springlands were authorised by the Controller of Timber to request the production of books from persons to whom the order applied. He visited the appellant's sawmill in order to inspect his books, but his manager ran away on the officer's approach. The officer spoke to the appellant, informed him of his manager's conduct and demanded the production of the books. He was not in possession of his authority nor did he inform the appellant that he was a person authorised to act under the order.

Held: To constitute an offence under the order the prosecution must prove inferentially or otherwise that a person who refuses to produce his books knows that the officer demanding production is authorised under the order to require their production.

H. A. Fraser for the appellant.

G. M. Farnum, Legal Draftsman for the respondent.

Judgment of the Court:

The charge on which the appellant was convicted, by the Magistrate of the Courantyne Judicial District, is that having

been required by a person authorised by the Controller of Timber to produce certain books relating to the working and output of his sawmill, he failed so to do, contrary to paragraph 3 of the Control of Timber (Returns and Records) Order, 1947.

The relevant facts, which are not in dispute, are contained in the following extract from the evidence of Lawrence Blackwood Thompson (hereinafter referred to as "the Officer") who was the only witness:—

> "I am the Assistant District Commissioner and Sub-controller of Cus-
> "toms at Springlands . . . . . I went to inspect the books relating to the
> "sawmill and timber business of the defendant. When I got to the defen-
> "dant's sawmill, Vivian Rover, the Manager of the defendant, ran away from
> "the defendant's Office with a pile of books. I called on Vivian Rover to
> "show me the books and he refused. The defendant later arrived at his saw-
> "mill office at Crabwood Creek. I told the defendant what Vivian Rover had
> "done and I requested the defendant to permit me to inspect his books. The
> "defendant said "You say one thing and mean another," "You 'are dishon-
> "est." The defendant refused to show me the books and I left. Vivian Rover
> "was present when I complained to the defendant and told him how Vivian
> "Rover ran away with the books."

In cross-examination, the Officer stated that he did not have with him at the time of his visit to the sawmill the written authority furnished by the Controller of Timber.

Counsel for the appellant informed this Court that he did not propose to urge Certain of the grounds of appeal set forth in the Notice of Grounds of Appeal and accordingly the ground on which it is sought to have the conviction set aside is, in substance, that neither the appellant nor his Manager (Rover) knew, at the time the request for production of the books was made, that the person making such request had been authorised in that behalf by the Controller of Timber and therefore there was no duty cast upon either of them to produce the books.

It is an undisputed fact that neither the appellant nor Rover was informed by the Officer of the existence of the authority furnished by the Controller of Timber. This Court is invited, however, by Counsel for the respondent, to hold that, having regard to the fact that Rover ran away with some of the books on the arrival of the officer, it was not unreasonable to infer that Rover knew of the authority vested in the officer by the Controller of Timber, and that the appellant who refused to allow inspection after being told by the Officer of this his agent Rover's act of running away with the books must be deemed himself to have had knowledge when refusing inspection, that the Officer had the necessary authority from the Controller of Timber. In this connection, it is to be noted:—

(a) that the Officer, in addition to being the Assistant District Commissioner of the District in which this offence is alleged to have taken place, is also Sub-Comptroller of Customs and Deputy Harbour Master and Inspector of Shipping (the Official Gazette

notifying these appointments was exhibited before the learned Magistrate); and

(b) that, before the incident which gave rise to the charge to which this appeal relates, there was a case pending between the Officer and the appellant and the Officer had in fact taken possession of one of the books relating to the sawmill operations of the appellant and in so doing had acted, not by virtue of the authority given him by the Controller of Timber, but in another capacity: these facts were elicited in cross-examination of the Officer in the Court below.

From the facts set out in the preceding paragraph, it would appear that the act of Rover in running away with some of the books is reasonably consistent with his being prompted to do so by his knowledge that the Officer had authority to inspect the books, but there is, in the opinion of this Court, no ground whatever on which it can be said that the only inference to be drawn was that it was within the knowledge of either the appellant or Rover at the material time, that the Officer had been furnished with authority by the Controller of Timber or that the Officer had come to the sawmill in pursuance of such authority. The inference may quite reasonably be drawn that at the time Rover ran away with the books he was of the opinion that the officer had come in the same capacity as on the occasion referred to in the latter part of sub-paragraph (b) of the preceding paragraph and that it was this same opinion held by appellant which prompted him to refuse to allow inspection.

Counsel for the respondent has accepted without question the correctness of the well-founded submission made on behalf of the appellant, that a conviction in this case cannot stand unless the evidence establishes, inferentially or otherwise, that, at the time the appellant refused to produce the books it was within his knowledge that the Officer was authorised, under the relevant Order of 1947, to require their production. This Court finds that there is no evidence of the existence of such knowledge on the part of the appellant (or of Rover) and accordingly this appeal is allowed and the conviction and sentence set aside. The respondent will pay the appellant the taxed costs of the appeal.

WENT *v.* BILLYEALD

(In the Full Court (Boland C.J. (ag.), Ward and Hughes. J.J.) May 31, June 24, 1950).

Criminal law—corruptly accepting bribe—person in employment of any Government department—onus—rebuttable—facts—conclusions unreasonable—duty of Appellate Court—accomplices—no corroboration—duty of Magistrate.

The appellant, an overseer employed at the Public Works Department, Georgetown, was convicted of accepting a bribe contrary to subsection 2 (a) of section 106 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13.

It was not disputed that the appellant received the sum of five dollars from the witness Bollers and, as a result of the application of the provisions of sub-section (3) of section 106 of the Summary Jurisdiction (Offences) Ordinance, the five dollars were deemed to have been corruptly received for the purpose charged. The appellant in order to rebut this presumption swore that the five dollars was a repayment of a loan previously made to Bollers and called witnesses who corroborated his evidence. The Magistrate did not accept the evidence of the appellant and, his witnesses but did not in his reasons for decision state the reasons for his conclusions or that he had directed himself with regard to the necessity for corroboration of Bollers' evidence as he was an accomplice.

Held: (Ward and Hughes J.J.) The appellant's explanation of the receipt of five dollars was *prima facie* evidence of an innocent and lawful purpose and at that point the onus shifted again to the prosecution to prove that the money was received for the corrupt purpose alleged.

The Magistrate in rejecting the appellant's testimony and that of his witnesses had drawn unreasonable conclusions and as the Appellate Court was in exactly the same position as the learned Magistrate to draw inferences as to probabilities there was no reason for accepting his conclusions.

As the Magistrate did not intimate that he had warned himself against the danger of accepting the uncorroborated evidence of an accomplice or that he appreciated the legal implications of sub-section (3) of section 106 of the Summary Jurisdiction (Offences) Ordinance, the appeal must be allowed.

(Boland C. J. (ag) dissenting).

L. M. F. Cabral for the appellant.

G. M. Farnum, Legal Draftsman for the respondent.

Judgment: (Ward and Hughes JJ.)

(Boland C.J. (ag.)).

The appellant was charged under sub-section 2 (a) of Section 106 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13 that "he being an agent of the Crown, that is to say, being employed in the Public Service of the Colony of British Guiana, corruptly accepted from Ewart Bollers the sum of five dollars as an inducement for influencing the obtaining of more and regular work and higher prices for work, the said work and prices being in relation to the affairs of his principal." He was convicted by Mr. M. S. Fitzpatrick, Magistrate of the Georgetown Judicial District, and was ordered to pay a fine of two hundred dollars and sixteen dollars costs or, in default of payment, three months' imprisonment with hard labour. Against this conviction and sentence he has appealed to this Court.

It is not disputed that the sum of five dollars was received by the appellant from the witness, Bollers, on October 21, 1949. Subsection (3) of Section 106 of the Summary Jurisdiction (Offences) Ordinance provides as follows: "Where in any proceedings under this section it is proved that any money, gift or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or public body, the money, gift or consideration shall be deemed to have been paid or given or received corruptly as the inducement or re

ward mentioned in this section unless the contrary is proved." This subsection, which is identical in terms with Section 2 of the Prevention of Corruption Act (6 & 7 Geo. 5 c. 64) has received judicial consideration in a number of cases and particularly in the case of R. v. Carr-Briant 29 Cr. App. R 77. It has been pointed out that this proviso, though a departure from the rule that the onus of proof in all criminal cases lies throughout the case on the prosecutor to prove his case against the accused beyond reasonable doubt, is by no means unique. It is analogous to the rule in cases relating to the receipt of stolen property, in which a person found in receipt of property recently stolen is required to give an explanation showing that he had no knowledge that the articles were stolen. A similar rule exists with regard to the proof of alleged insanity in an accused person. There is a similar statutory provision in the case of a person found with housebreaking implements at night, who is required to show that he had the implements for a lawful purpose. The burden of proof on an accused in such a case is not so onerous as that resting on the prosecution to prove its case beyond reasonable doubt. The standard of proof required has been described in various ways. It has been said that it is no higher than the burden which rests upon a plaintiff or defendant in civil proceedings. In R. v. Ward 11 Cr. App. R 245 where the accused was charged with being in possession of housebreaking implements at night without lawful excuse, the proof of which the statute provides shall lie on the accused, Lord Reading in giving the judgment of the Court observed: "It was for the appellant to satisfy the jury that in the words of section 58 he had a lawful excuse. It was stated by the appellant in his evidence that he was a brick-layer. That being so, and the tools being admittedly bricklayer's tools the accused had established *prima facie* that he had a lawful excuse for being in possession of the tools, and the onus was shifted on to the prosecution to prove to the satisfaction of the jury, if they could, from other circumstances of the case, that the accused was not in possession of the tools for an innocent purpose but for the purpose of housebreaking." After citing this observation with approval Humphreys J. said in R v. Carr-Briant at p. 85 "That authority is, in our opinion, inconsistent with the notion that words throwing the onus of proof of certain matters upon the accused person involve placing the accused person in the same position as the prosecution in a normal case, so as to require of him that he should prove his case beyond any reasonable doubt. Moreover, it seems to us to be in accord with the principle of our law expressed in the well known passage in the speech of Viscount Sankey, L.C., in Woolmington v. Director of Public Prosecutions, 25 Cr. App. R. 72, at p. 95; (1935) A.C. 462 at p. 481: "No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. We see no reason why the rebuttable presumption created by this section and the words 'unless the contrary is proved' should not be construed in the same manner as similar words in other statutes, or similar presumptions at common law, for instance, the presumption of

sanity in the case of an accused person who is setting up the defence of insanity." As soon as an accused person has established *prima facie* that he received the money for a lawful purpose, the presumption is rebutted and the onus is shifted back to the prosecution to prove beyond reasonable doubt that he received the money or gift for a corrupt purpose.

The appellant gave evidence that the money was given to him in repayment of a loan of $8.00 borrowed in two sums by the witness, Bollers. In support of this assertion he called as witnesses, Isaacs and Sargeant and Barrington Charles. Isaacs, who is a contractor, corroborated the appellant as to the loan of $5.00 made by him to Bollers at the Public Works yard. Both Isaacs and Sargeant corroborate the fact alleged by the appellant that on October 14, 1949, at Sargeant's house, Bollers asked the appellant for a loan, that the appellant offered to lend him $3.00, and that as no one present could change a $5.00 note which the appellant had he and Bollers left for the purpose of getting the note changed so that he might hand $3.00 to Bollers. Sargeant further stated that on a subsequent day Bollers admitted receiving the $3.00 from the appellant and said that he had been inclined to refuse the loan because the appellant appeared to be reluctant to lend him the money thereby corroborating the story of the appellant. Here in our opinion was *prima facie* evidence of an innocent and lawful purpose, and at that point the onus shifted again to the prosecution to prove that the appellant had received the money for the corrupt purpose alleged.

But it has been suggested that the learned Magistrate might reasonably reject this evidence because it is unreasonable to believe that the appellant would lend money to Bollers who had shown so much hostility to him. Leaving aside for the moment the fact that these witnesses were not shaken in cross-examination and that the Magistrate has not indicated that he was unfavourably impressed by their demeanour, and proceeding on the basis of probabilities alone, such an act of charity can only be regarded as improbable if one takes a very low view of human nature. People in all walks of life have been known to befriend others who have wronged them or who have proved ungrateful. A judge who has sentenced a prisoner to five years penal servitude would hardly be expected to bear the prisoner malice even though the latter had abused him and offered him violence, and it would certainly not be surprising to find him helping the old lag when his time was up. It is a fundamental principle of the Christian ethic that we should love those who hate us and do good to those who despitefully use us. It appears to us to be treading on extremely slippery ground to attempt to decide a question of fact by discarding the sworn testimony of witnesses and resorting to a theory of psychological reactions when in human experience it is impossible to predict with certainty how any individual will act in a given set of circumstances. In this case the appellant had only done his duty in preventing Bollers and other contractors from mulcting the government in excessive charges. He would have no reason to bear Bollers a grudge, for the alleged assault took place sometime

in March, 1949. But Bollers had every reason to harbour evil feelings against the appellant who had not only prevented him from obtaining a sum of $900 for charges which the District Engineer and the Director of Public Works found were exorbitant, but as a result he had not obtained work from June to October. In addition there was clear and uncontradicted evidence, admitted by Bollers himself, that he had threatened on more than one occasion to do the precise act which the appellant alleged he has now tried to accomplish, namely, to frame him. Whatever Bollers' intention may have been when in March he handed Griffith $5.00 to give the appellant the appellant himself regarded it as an attempt to carry out his threat and so reported to his superior officer. On the basis of probabilities we incline to the view that there is no improbability in the appellant lending Bollers money in the circumstances existing in this case, and as we are in exactly the same position as the learned Magistrate to draw inferences as to probabilities we see no reason to accept what appears to us to be unreasonable conclusions.

As soon as the onus of proof shifted to the prosecutor he was required to prove not only that the accused received the money corruptly but that he received it for the particular purpose alleged in the charge. In this, as in all criminal cases, the charge as laid must be strictly proved, when once the presumption of a corrupt receipt is rebutted by *prima facie* evidence. It is not permissible to make an allegation of bribery generally. Bribery or corruption, like fraud, may assume an infinite variety of forms and an accused person is entitled to know the exact nature or purpose of the bribery or corruption alleged. As a prosecutor cannot lay a charge of bribery generally, so he cannot be heard to say "Although I have not proved the particular purpose which I have alleged, yet the accused is guilty of some kind of bribery or fraud."

It is clear that the prosecutor could only establish this fact by the evidence of Bollers, since he alone did or could give evidence apart from the appellant, as to the purpose for which the $5.00 was given. Bollers, as Mr. Farnum admitted, is a self-confessed accomplice. It has long been accepted as a rule of practice which has virtually become a rule of law that the evidence of an accomplice should be corroborated in a material particular. A tribunal trying a case where the evidence of an accomplice is led should either warn itself or should be warmed against the peculiar danger of convicting on the uncorroborated evidence of an accomplice. This principle has recently been re-affirmed by the Privy Council who approved a statement of the law by Schreiner J. in the South African case of R. v. Neanan (1948) S.A.L.R. 405: "The cautious jury or court will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law requires it so to do. What is required is that the trier of the fact should warn himself, or if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice. For an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused, but is such a witness peculiarly equipped by reason of his inside knowledge of the crime to convince the un-

wary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime was committed by someone. The risk will be reduced in the most satisfactory way if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to explain or contradict that of the accomplice. But it will be reduced even in the absence of these features if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is in such circumstances only permissible where the merits of the former as a witness and the demerits of the latter are beyond question." If we apply the test contained in the last sentence of Schreiner's J. statement of the law it is clear that no court could reasonably convict on the uncorroborated evidence of Bollers. It has been proved conclusively and admitted by Bollers that he had had repeated quarrels with the appellant for refusing to certify his work. It has been proved and admitted by him that he threatened on more than one occasion to "fix" the appellant and to get him out of the Public Works. It was proved beyond doubt that he deliberately lied in the witness stand when he denied that he had ever borrowed money from the witness, Massey. There was evidence, admitted partially by him, that owing to his long period of unemployment he was getting loans and gratuities in all directions. Can it be reasonably said that, as a witness, he has any merits at all? It is a reasonable conclusion that Bollers would not hesitate to deny a loan from the appellant if it suited his purpose when he denies on oath a loan from the witness Massey, which is evidenced by his own signature on a promissory note. What of the appellant? All the evidence, apart from that of the three accomplices, is that he is a man of good character, zealous for the public service, whose zeal has made him obnoxious to the contractors because he will not allow them to defraud the government. It is impossible to say that his demerits as a witness are so great and the merits of Bollers so high as to put the matter beyond question.

But it is not only against the evidence of the appellant that the evidence of Bollers must be tested. On the crucial question of the corrupt purpose for which the money is alleged to have been given there is the evidence of Mr. Lee, the District Engineer, and of Mr. Drayton, the Personnel Officer of the Public Works Department. The learned magistrate appears to have rejected the evidence of Mr. Lee entirely for in his sweeping statement he says "I do not accept the evidence for the defence except that of Massey." Had he any reasonable ground for rejecting this officer's evidence? Clearly none whatever. For Mr. Lee is corroborated by Mr. Drayton, a witness for the prosecution, as to the duties of the appellant as a member of the Public Works staff. Mr. Drayton's evidence is as follows: "He is to supervise all work in Georgetown, give estimates of small jobs, check measurements of contracted work and do other things assigned to him by the engineer." Mr. Lee testifies as follows: "I make allocations for

all extraordinary and major work in the district, more particularly contracts. I give out all work, price a rate, except emergency work in urgent minor repairs. Overseers are permitted to give out that type of work and notify me. There is a schedule but work may be given out at a special rate or price or arranged by verbal agreement, but sometimes in writing. Only in small minor jobs I rely on defendant in the giving out of work such as a leak or a broken window pane. He has no influence on me in giving out work. He supplies data and information to enable me to fix the rate or job price as regards work in progress to which the schedule is not applied. I decide which contractor is to get the work. I decide on the rate of payment. There is a regular scale of rates of payment for most work. The Director of Public Works fixed the scale . . . . Defendant's duties, according to Public Works Regulations, are: (1) to point out the work to the contractors, (2) to supervise the work (3) to check the measurements and (4) to certify that the work has been satisfactorily done before payment is made." With respect to the particular job of work in relation to which this charge is laid Mr. Lee's evidence is equally specific and clear: "Early in October Bollers came to me. He asked for work. I decided to give him work. No one influenced me to do this. I sent defendant to show Bollers what to do as I wanted a tender price from Bollers. He submitted a tender price. I did not accept it. I decided with him at a lower price." Here, as always, when Bollers evidence is tested against that of an independent witness he is proved to be falsifying the evidence. Bollers asserts that he submitted a contract on September 29 which remained unpassed for two weeks. Two weeks from September 29 is October 13. Yet we know this is the only job which Bollers had from the Public Works. Mr. Lee fixes the date of the opening of negotiations in early October and his evidence shows that whenever Bollers' contract was submitted it was not passed for some time as he did not accept the price and negotiated for a lower price which Bollers finally accepted. This story of two contracts is obviously a fabrication.

But it has been suggested that although Lee's evidence may be true, it may yet be assumed that the appellant would have some influence upon him in awarding contracts. The appellant himself asserted that he had no influence on the District Engineer and there is nothing in the evidence to disprove the statement of Lee on this point. If the appellant represented to the contractor that he had such a power he would on the evidence of Lee be guilty of a false pretence, but would certainly not be guilty of the offence of receiving money corruptly to do something which on the evidence he had no power to do. And if the contractors came to such a conclusion independently of any representation by the accused and handed him money it is difficult to see for what offence he could be prosecuted. But this Court, like the Magistrate, is bound by the evidence which shows clearly that the accused by the nature of the duties prescribed for him by departmental regulations had no power to influence the awarding of contracts. And in fact Bollers himself admitted this for in his evidence on this point he said. "I gave defendant $3.00 first payment of $10.00

for allowing me to get the job at Officers' Quarters, Eve Leary."

It is clear from the learned Magistrate's Memorandum of Reasons for Decision, that he failed to apply his mind to these relevant considerations of law. There is no slightest hint that the magistrate either warned himself against the danger of accepting the uncorroborated evidence of an accomplice or that he appreciated the fact that Bollers, Burgess and Joseph were all accomplices There is nothing to show that he appreciated the legal implications of the proviso contained in sub-section (3) of Section 106 of the Summary Jurisdiction (Offences) Ordinance. This Court, in the cases of Boodhan Singh v. Stanley Chin (1944) L.R.B.G. 166 and Lam v. Slater (1944) L.R.B.G. 168, has affirmed the principle that, where there is no indication in the magistrate's notes or reasons for decision that he took into consideration something which ought to have been taken into consideration or that he disregarded something which should have been disregarded the Court will not allow the decision to stand. These decisions are in complete accord with repeated decisions in the Court of Criminal Appeal in England that, where the record either shows that no warning or no sufficient warning was given of the danger of convicting on the uncorroborated testimony of an accomplice, or contains nothing to show that the tribunal was warned or appreciated the danger, the conviction cannot stand. As the learned Magistrate failed to appreciate that, as soon as *prima facie* evidence of an innocent purpose was given, the onus of proof shifted to the prosecution to prove the corrupt purpose, and as he further failed to appreciate or to warn himself of the danger of accepting the uncorroborated evidence of an accomplice, this conviction cannot in our opinion stand.

As this is our view it is unnecessary to consider the other grounds of appeal one of which was that evidence of system was wrongly admitted. This evidence was presumably introduced to meet evidence of honest intent on the part of the defendant but as the evidence of system is given by accomplices who can neither corroborate each other nor the principal accomplice the basic principle (as to acceptance of accomplice evidence) remains the rock on which the prosecution ship founders. We are therefore of opinion that the appeal should be allowed and the conviction and sentence set aside. The appellant will have his costs of appeal.

E. R. L. WARD,
Second Puisne Judge.
H. J. HUGHES,
Third Puisne Judge.

Dated the 24th day of June, 1950.

WENT *v.* BILLYEALD

No. 90 of 1950 Demerara.

In the Full Court of the Supreme Court of British Guiana.

On Appeal from the Magistrate's Court for the Georgetown Judicial District.

Between

JOHN WYCLIFFE WENT

Appellant (Defendant).

and

STANHOPE BILLYEALD, Superintendent of Police,

Respondent (Complainant)

Before BOLAND, C.J. (Ag.), WARD and HUGHES, J.J.

Mr. L. M. F. Cabral for the Appellant.

Mr. G. M. Farnum for the Respondent.

1950: May 31, June 24.

(The majority judgment of the Court Ward and Hughes, J.J., was published in the Official Gazette of 3rd February, 1951).

(Dissenting judgment of Boland, C.J. (Ag.), hereunder).

JUDGMENT

This is an appeal against the conviction of the appellant by a Magistrate of the Georgetown Judicial District on the charge that he, being an agent of the Crown, that is to say a person employed in the Public Service of this Colony did corruptly accept from one Edward Bollers the sum of five dollars as an inducement that he should exercise his influence to obtain for Bollers more and regular work from the Crown and for Bollers to re-receive higher prices for such work. This charge was laid under section 106 2 (a) of chapter 13 as amended by section 4 of Ordinance 21 of 1932. The learned Magistrate fined appellant the sum of $200.00 and costs $16.00 in default three months imprisonment with hard labour.

The evidence led before the Magistrate was to the effect that appellant was at the date of the charged offence on the 21st October, 1949, and for some time prior thereto, an overseer in the Public Works Department of this Colony. As such overseer part of his duties was to supervise work which was being done by Building Contractors who on selection by the District Engineer had entered into contracts with the Department. Before payment to the contractors, appellant would have to check and certify that the work was satisfactorily completed, and that the rates at which payment for same was charged were correct in accordance with the scale prescribed by the regulations, or according to the special contract if the work had been done under a special contract. In the event of a dispute arising between a contractor and the overseer, the latter's decision was subject to be reviewed by the District Engineer, and it was open to a contractor who was dissatisfied with the District Engineer's ruling to appeal to the

Director of Public Works and ultimately, if necessary, to the Governor. Officially, it was on the District Engineer himself on whom the duty fell of arranging and giving out these contracts. Mr. Lee, the District Engineer, who testified for the Defence stated that he himself would select the particular contractor for any work to be done. He had a register of contractors and personally was aware of the capabilities of each contractor. The appellant as overseer, Mr. Lee insisted, could not give out work to a contractor except very minor work and only in an emergency. With his own personal knowledge of the merits of each contractor on the register, Mr. Lee declared he was never influenced by the appellant in selecting a contractor for any type of work. Be that as it may, and despite Mr. Lee's insistence to the contrary it is not altogether unreasonable to believe that in distributing work amongst contractors, Mr. Lee would be largely guided by the recommendations of the overseer who had constant contact with contractors and their work, and even if that was not so, it was not unreasonable for the contractors themselves to conclude that the overseer did exert a powerful influence over the District Engineer in his decision as to who should be given contracts. It was admitted in the evidence given both by the prosecution and the defence that on more than one occasion the appellant had refused to certify Bollers' paysheet, which led to an appeal by Bollers to Mr. Lee, as District Engineer, but chat on many of these occasions Mr. Lee decided that Bollers was right and the appellant was wrong. A certain dispute culminated, it was admitted by Bollers, in abuse and an assault of appellant by Bollers, who was dissatisfied With appellant's refusal to certify his paysheet with which decision Mr. Lee had subsequently agreed. That incident had occurred in March, 1949. In this connection it is to be mentioned that Bollers admitted that he was of quick temper which was at times aggravated by hard drinking. It is possible that Bollers who entertained a genuine belief in the justice of his claim showed an exasperation characteristic of the quick tempered man and resorted to violence. Some time after this outburst he apologised to appellant thus showing an anxiety not to antagonise appellant to his own detriment. Again in May, 1949, appellant refused to certify a big pay sheet of Bollers. On that occasion Bollers had claimed $1,195.10 for his work, basing his charges on a special rate. Appellant rejected the charge at the special rate with the result that the amount of Bollers' paysheet was reduced by the sum of $900.00 by the District Engineer, who agreed with the appellant. At the time of the hearing before the Magistrate of the present charge that dispute had not been finally settled. From June Bollers got no further work until the 18th October, and Bollers would appear to have conceived the idea that it was the appellant who was influencing the District Engineer not to give him work and that he must do what others were reported to be doing that is to bribe the appellant. Evidence was given by a plumber contractor, Phillip Burgess that because at one time he never used to give the appellant money to get him jobs, appellant got annoyed and was penalising him and so he gave the appellant $3.00 to get jobs and that after that he did get jobs and appellant would pass his accounts.

Both in the evidence for the prosecution and for the defence, reference was made to an incident when Bollers sent $5.00 to appellant by his brother-in-law, Clarence Griffith, a Public Work checker. Bollers testified that he sent it at appellant's request "for the birthday present of Mr. Craig the Acting Director of Public Works" but appellant refused to accept it. Appellant, on the other hand, in his testimony referred to that incident as an attempt by Bollers to "frame him" on the pretext that he had received a bribe. He had not asked for any money from Bollers for Mr. Craig's birthday or for any other purpose. Mr. Craig's birthday, it may be stated, was proved to be at an entirely different time of the year. He stated that when he refused to accept the $5.00 from Griffith who gave him no reason why Bollers should be sending it, Griffith attempted to put the money into his (appellant's) pocket. Appellant said he reported the incident to Mr. Lee, who gave corroborative evidence of appellant's making such a report to him.

While it is possible to regard the incident of the sending of the money by Griffith in the manner described as an attempt by Bollers "to frame" appellant, it may equally quite reasonably be viewed as a genuine effort by Bollers either with or without a demand by appellant to bribe the appellant so as to get favours from him. Bollers stated that in sending $5.00 in this manner, he had endeavoured to "decept" the appellant into not insisting on a larger sum. No doubt the reference to Mr. Craig's birthday may well have been a euphemism understood to describe an act of bribery.

While the prosecution would seem to point to the abovementioned incidents as establishing a readiness on the part of Bollers to adopt what he regarded as the general practice amongst contractors of bribing the overseer so as to get regular work and at higher rates, the defence points to the same incidents as showing on the part of Bollers a malicious design to cause a false charge of receiving a bribe to be brought against the appellant. Giving evidence for the defence in support of this, Victor Sargeant testified that in August, 1949, Bollers remarked at the office that the appellant was "humbugging" him from getting his money for work he did in the Fort Yard and he was going to "tend" to him. Also on the occasion that Bollers and appellant had the scuffle Bollers is alleged by the same witness to have said "that blasted man trying to stop my existence and before he stop my existence I am going to stop him." Bollers was never asked in cross-examination whether he did make use of these threats, and so had no opportunity to admit or challenge this bit of evidence, but even assuming that it is accepted that Bollers did make use of those threatening expressions, they would not necessarily imply that he was threatening to ruin appellant by having a false charge brought against him, the words if used could equally have meant that he was going to expose the unlawful practice of the appellant of receiving bribes, and thus he would bring ruin on appellant.

In convicting the appellant on the charge before him which related to an incident when the appellant was alleged to have

received a bribe of $5.00 on the 21st October, the learned Magistrate must have first given consideration to the issue whether or not the earlier incident of the sending of money by Griffith was an attempt "to frame appellant", because if so, what happened on the 21st October, might be another similar exhibition of malice. The learned Magistrate must have considered the two different inferences capable of being drawn from this incident—an attempt to furnish evidence for a false charge of bribery as submitted by the Defence, or an attempt to get the defendant to accept money as a bribe.

In convicting the appellant in respect of the money admitted to be received by him from Bollers on 21st October, the learned Magistrate would seem to have rejected the allegation of an earlier attempt "to frame" appellant, and this Court looking at the evidence of this earlier incident should not say that the Magistrate was wrong in his conclusions on this point.

On the 11th October, a week before the 21st October, according to Bollers' story, Bollers was at the house of a Public Works' employee called Sydney Isaacs and appellant was there. Appellant, Bollers says, told him that he was always trying to help him but the Chinese, Mr. Lee, was always keeping him out. As Bollers was leaving, he and appellant discussed "certain things." Appellant told him that he must give him a "tip" so that appellant could give him work, and he gave the appellant $3.00. This sum was on account of $10.00 for allowing him to get a job at the Officers' Quarters, at Eve Leary. Three days afterwards, the agreement, Bollers testified, which he had submitted for the job at Eve Leary was passed and he commenced the job on the 18th October, although curiously enough a similar agreement submitted on 29th September had remained "unpassed" for two weeks. It would appear from Bollers' evidence that it was arranged that Bollers should meet appellant at the house of a fellow contractor on the night of the 21st October and that there Bollers would pay appellant a further sum, but on the 20th October, Bollers and two other contractors, Phillip Burgess and Philbert Joseph had an interview with the Police and as a result during the day on the 2ist October, five one dollar British Guiana currency notes whose numbers were recorded were given to Bollers. Other notes were similarly handed to Phillip Burgess and Philbert Joseph with instructions from the Police. Bollers and the two men in pursuance of an arrangement with the Police went at about 4.00 p.m. to the Hospital, each at a different spot. Appellant about this time arrived at the Hospital and went into the Observation Ward where painting work was being done. Bollers had some little conversation with appellant outside the ward and then appellant went into the mortuary where some work was in progress and calling Bollers inside the mortuary he took him into an apartment where no one was working. According to Bollers, appellant there asked him "What about the thing?" whereupon Bollers gave him the five dollar notes that had been handed to him by the Police. Those five new one dollar British currency notes were soon after found by the Police in the possession of the appellant. Appellant was

told by the Police that these notes had been handed by them to Bollers to hand to him because of the information that he had been in the habit of receiving bribes. He was duly cautioned but made no statement. Before the Magistrate the case for the defendant was that these notes were in fact received by the defendant from Bollers but they were given by Bollers and received by the defendant in part payment of a loan he had made to Bollers.

Subsection 3, section 106, chapter 13 as amended by section 4 of Ordinance 21 of 1932 enacts—

> "Where in any proceedings under this section it is proved that any "money, gift or other consideration has been paid or given to or received "by a person in the employment of His Majesty or any Government De- "partment or public body, the money, gift or consideration, shall be "deemed to have been paid or given and received corruptly as the in- "ducement, or reward mentioned in this title unless the contrary is "proved."

The prosecution having established by the evidence of Bollers and of Superintendent of Police Billyeald that appellant received this money from Bollers—a fact which the Defendant himself admits, there was established a prima facie case that it was so received by defendant with a corrupt purpose in relation to his duties, and he was to be deemed guilty of the offence unless he could show that his receipt of the money was in the course of carrying out a legitimate transaction or at any rate establish a reasonable doubt as to whether the receipt of the money was tainted with a corrupt purpose or not. If he could give a reasonable explanation which is consistent with the transaction being incorrupt, then the Court although not convinced of its truth, and not having direct proof that it is a lie, must accept the explanation and acquit the defendant of the charge. But to escape conviction, the defendant at the least must give a reasonable explanation.

In this case the defendant's explanation for the receipt of the money was that he had previously made two loans amounting to $8.00 to Bollers. This Bollers categorically denied. This is what appellant said in his evidence before the Magistrate about the circumstances in which each loan was made:

> "At Public Buildings near the carpenters' workshop at 5.30 p.m. to 6 "p.m. one week day I met Bollers. He asked me to lend him $10.00. I "asked him why he asked me for money. He said all the other fellows "had already helped him and I was the only one, and it appeared that I "was still holding malice for him. I knew that other Public Works De- "partment men had lent him money. I felt ashamed and lent him $5.00. "On 14th October, 1949, I met Bollers at Isaacs house. Sargeant, Grif- "fith and others were present drinking. Bollers asked me for a drink in "the presence of Sargeant, Isaacs and Griffith. He said they had lent him "money during the three months he was employed. I told him that I am "going to lend him only $3.00."

Then appellant went on to say that he had no change less than a $5.00 note and that when he and Bollers left, Bollers went into a parlour to get the $5.00 changed saying on his return that he had to buy two packs of cigarettes. He warned Bollers that he then had $8.00 for him and that he would get no further loan from him until he repaid the $8.00. This, he testified, seemed to have angered Bollers, who became very violent remarking how could he pay back when appellant did not give him work. Bollers, he said, exclaimed that if he grudged him the $3.00, he could take the cigarettes and the balance of the change to make up the $3.00. This story seems an unreasonable one, which the Magistrate would be warranted to reject unless the evidence of the witnesses called in corroboration was impressive as witnesses of truth. It is unreasonable to believe that appellant would lend money to Bollers who had shown so much hostility to him which had culminated in violence — who had made an attempt to "frame him" as a person receiving a bribe — who had threatened to ruin him and who at the time was still challenging a certificate issued by him in respect of work involving the payment of a large sum of money. It is still more unreasonable to accept that he lent Bollers the money because he was shamed into doing so as he had been taunted by Bollers that others had lent him and that he would appear to bear a grudge against him. Then Bollers who was so importunate is alleged to have shown so much resentment when told that he would get no further loan until full repayment of the $8.00 he had that he offered to give him the cigarettes he had purchased and the change to make up the $3.00 by way of rescission of the loan.

The Magistrate had the advantage over this Court of seeing and hearing the witnesses who were called to corroborate appellant's story about these loans. He did not believe their evidence and this Court cannot say that having regard to the circumstances in which these loans were alleged to have been made, the Magistrate was wrong. The Magistrate accepted the Bollers' account as to what did happen at Isaacs' home on the night of the 14th October — that is that he gave to appellant $3.00 on appellant's demand for money as they were leaving the house. It may be that to pay the $3.00 Bollers made change by buying with a $5.00 note two packs of cigarettes from a parlour. No question was put to Bollers in cross-examination about this, and it may be noted that accordingly Barrington Charles, who testified for the defence that Bollers on that night came to his parlour and asked him to change a $5.00 note on his purchasing two packs of cigarettes was not seriously challenged in cross-examination by the Police Court Superintendent.

Moreover if, as the defence put forward as its case, Bollers had wickedly availed himself of his obligation to repay a loan so as to get the police to establish proof of appellant's acceptance of money as a bribe, he would hardly have selected for this purpose the 21st October, one week before his first pay day for the work he was doing at Eve Leary. He would more likely have selected a pay day when the appellant would be expecting repayment of the loan.

Having regard to the foregoing, the Magistrate was well justified in disbelieving this story of repayment of a loan by Bollers fortified as the Magistrate was in this view by having observed the manner in which the defendant and his witnesses testified. On the other hand there is nothing incredible in the story of the defence, that a man who believed that he was being made a victim for not like others giving bribes, did alternate from one attitude to another namely giving a bribe genuinely on one occasion and then on another and subsequent occasion paying money ostensibly as a bribe but really with the object that on its acceptance as such the receiver should find that he had been entrapped by the Police and thus put an end to the vicious practice of corruptly taking bribes.

It may be here stated that because Bollers did admit that he had borrowed money from other contractors, it does not follow that he did also borrow from Appellant which he denied.

A point was made at the hearing of the appeal that there was no evidence against the appellant as to the alleged corrupt purpose of the receipt of the $5.00 save that of Bollers himself. It was contended that Bollers was an accomplice. Indisputably he was an accomplice with respect to the alleged payment of $3.00 given by him admittedly as a bribe and this $3.00 was the first instalment of the bribing payment of which the $5.00 was to be second. It was urged that while it is true that there can be a conviction on the uncorroborated evidence of an accomplice yet the Magistrate should, if convicting, first direct himself that it would be unsafe to convict without corroborative evidence—and that nowhere in his reasons for decision did the Magistrate declare that he so directed himself. Certainly, as is well established by authority a conviction on the evidence of an accomplice without corroboration would be set aside in the absence of any such direction.

This ground of appeal is not expressly set out in appellant's grounds of appeal as filed in the Record, but it may be stated that while conceding that in the ordinary criminal charge Bollers' evidence would have had to be treated as that of an accomplice and should not be accepted without corroboration the provisions of the Ordinance section 106 (3) does in effect declare that a prima facie case of corruption is established against a public officer by the mere receipt of money by him in circumstances relating to the particulars mentioned in the complaint. If the other witnesses testifying against the public officer should happen to be accomplices it would seem that there is no necessity for any corroboration of the accomplice's evidence provided the receipt of the money by the public officer is established otherwise. Then the guilt or innocence of the defendant would depend upon his establishing an incorrupt receipt of the money or at any rate such circumstances as would raise a reasonable doubt in his favour. Another point sought to be made was that the learned Magistrate took into consideration evidence of alleged similar acts showing a systematic course of corrupt conduct as given by the evidence of Hulbert Reginald Joseph and Phillip Burgess.

Counsel for the Appellant, when it was pointed out that it was not set out in the record as a ground of appeal that the learned Magistrate had in error of law wrongly admitted this evidence, explained that he was in no wise challenging the admissibility of the evidence given by these witnesses but that he was contending that in giving consideration to this evidence "the learned Magistrate had taken extraneous matters into consideration" as was set out in Ground 3 of the Grounds of Appeal. It is difficult to appreciate that evidence can be legally admissible and yet be deemed extraneous matter and not to be taken into consideration. After all the object of receiving evidence is to give it consideration in the determination of the issue before the court. There can be no doubt whatsoever that the evidence was legally admissible and accordingly the learned Magistrate was entitled to take it into consideration in coming to his decision.

For the reasons given above, the Magistrate had ample grounds for convicting the appellant and accordingly the Appeal should be dismissed and the conviction and sentence should be upheld.

F. M. BOLAND,
Chief Justice (ag.).

In the Matter of a Legal Practitioner, and In the Matter of the Legal Practitioners Ordinance, Chapter 26.

(In the Full Court (Boland C.J. (Ag.) Ward and Hughes, JJ.) June 3, July 1, 1950).

Legal Practitioners Ordinance, Cap. 26*—Misconduct—Report of Committee—Setting down for hearing—Procedure.*

The Legal Practitioners Committee, as constituted under the Legal Practitioners Ordinance, Chapter 26, heard a complaint against a solicitor and found that a prima facie case of misconduct had been established. The Committee also found that the solicitor had lied in his evidence before them.

On the report being set down for hearing before the Full Court, it was submitted by counsel representing the Committee that the onus was on the solicitor to show that there was no misconduct. The Court, after consideration, ruled that the correct procedure was for the Court in actual session at, the hearing to decide whether the Committee's report disclosed a prima facie case of misconduct. If it did then the solicitor should begin, but if it did not, then the solicitor should not be called upon to vindicate himself but instead, counsel for the Committee should submit the Committee's case that the facts found amounted to professional misconduct on tee part of the solicitor before calling upon him.

Where misconduct is not otherwise established before the Committee and the only imputation made against a Legal Practitioner is that

he lied before the Committee, he should be given En opportunity before the Committee of defending himself on that charge before being brought before the Court.

A. C. Brazao, Solicitor General for the Legal Practitioners Committee.

A. T. Peters for the solicitor.

Judgment of the Court.

In this matter of a complaint against a solicitor there has been brought before the Court for its consideration the report of the Legal Practitioners' Committee who reported that in their opinion, after investigation of the complaint a prima facie case of misconduct on the part of the solicitor had been established.

At the commencement of the hearing before us, there arose a discussion on the question as to who should begin — whether the Legal Practitioners' Committee, who were represented by the Solicitor-General, had to begin by satisfying the Court that the facts as found in the Report amounted prima facie to professional misconduct, or whether the solicitor had the burden of disproving professional misconduct as found in the Report. The Court ruled that before calling upon the solicitor, it was upon the Legal Practitioners' Committee to satisfy the Court that, assuming the facts found by them to be correct, the solicitor was in consequence guilty of misconduct.

As the Solicitor-General declared that the above ruling as to the burden establishing misconduct falling upon the Legal Practitioners' Committee was not the practice of the Court, it is well that we should give our views on this question in justification of the Court's ruling in this matter.

Section 28 of Chapter 26 the Legal Practitioners' Ordinance provides for the hearing by the Legal Practitioners' Committee of any complaint against a solicitor for misconduct which is referred to them by the Registrar. After hearing the complaint, the Committee is required to embody its finding in the form of a report to the judges of this Court. If the Committee is of opinion that there is a *prima facie* case, the Committee shall bring the report before the Court for the Court's consideration. Rule 16 of the Rules in the Schedule to the Ordinance, which rule is still in force, makes provision for a judge giving directions to the Registrar to set down the report for the consideration of the Court. We understand that the practice has been for the Chief Justice, after reference to the Puisne Judges, to give the necessary direction for setting down the matter in accordance with Rule 16 and that this direction is regarded by the Legal Practitioners' Committee as sufficient to impose on the solicitor the burden of dispelling the *prima facie* case of misconduct declared by the Report.

We cannot agree with this view. Form 6 annexed to the Rules in the Schedule gives the form of notice to be issued to the solicitor when the matter is set down. It is headed "*Notice of Day of Hearing of Report*" and by it the solicitor is notified that the report of the Legal Practitioners' Committee has been

set down for consideration by the Court at a hearing on the day and time specified therein. The Court must mean the Court as constituted at the hearing on the date as notified. It is this Court, in actual session at the hearing, which on consideration of the Report has to decide whether the Report *prima facie* discloses a case of misconduct. It is true that in many cases a *prima facie* case of misconduct will be self evident from the findings in the report, and the Court would call upon the solicitor at once without first calling upon counsel for the Legal Practitioners' Committee to show that there was misconduct. If on the other hand the finding in the report does not on its face establish misconduct, or if Counsel for the Legal Practitioners' Committee fails to satisfy the Court that the facts found amount to misconduct, then the Solicitor would not be called upon to vindicate himself. In the Court's view the facts declared to be found in the report, though laying a foundation for an action in negligence against the solicitor may not conclusively warrant the finding of misconduct though so declared by the Legal Practitioners' Committee in their report.

It was in keeping with the abovementioned principles that the Court after considering the Report in this matter called upon the Solicitor-General to submit the Legal Practitioners Committee's case that the facts found amounted to professional misconduct on the part of the solicitor before calling upon the solicitor.

Put briefly, the facts as found in the Report are as follows. The solicitor whom the client consulted in February, 1949, about the alleged wrongful act of her landlord in entering upon and breaking down the demised premises which had resulted in the loss of her goods filed on her behalf an action in the Magistrate's Court claiming $48.66 damages for the value of the goods. On the 1st March, she paid the solicitor a fee of $15.00 and $1.68 for disbursements and the writ was duly filed on the 3rd March. In the meantime, a cross plaint by way of counterclaim for rent due was filed by the defendant on 26th March. Both actions were fixed for hearing on the 22nd April. On the 21st April, the solicitor without the consent or knowledge of his client entered into a compromise with Mr. Jai Narine Singh, Counsel for the opposing side, by which he accepted, on his client's behalf, $18.00 in full settlement of the claim and counter-claim. On the morning of the 22nd April—the date fixed for hearing—the solicitor informed his client of the compromise he had effected but the client refusing to agree to the compromise, appeared in Court. The solicitor also appeared.

Relying on the compromise the other party did not appear. The solicitor had written to the Magistrate on the same day, a letter setting out fully the terms of settlement. In his letter he explained the reason for Mr. Jai Narine Singh's not being able to attend Court so as to join with him in the announcement of the settlement arrived at, but he requested the Magistrate despite Mr. Jai Narine Singh's absence to record the two actions as settled. As stated by the Committee in paragraph 4 of their summary of findings of fact, when the cases were called, the solicitor started to tell the Magistrate the terms of settlement and the Magistrate

wrote in the case jacket relating to the claim for damages "solicitor reports following settlement between himself and J. Singh." The client then intervened and stated that she had not settled and the Magistrate crossed out what he had written and put down the claims for proof. Upon proof by plaintiff's evidence, judgment was given in the client's favour for $48.66, and in the cross action for rent the plaintiff in default of appearance, was non-suited with costs. Before the non-suit, the solicitor, in order to implement, as far as he could, the settlement, asked the Magistrate to give judgment for the rent, but the Magistrate said he could not do that

The Committee has declared in the Report that the above facts show misconduct on the part of the solicitor. They set out in paragraph 12 of the Report that there was misconduct on his part in that:

(1) he gave little thought to his client's interest in these matters;

(2) in the circumstances he should not have settled the cases without specific instructions from his client;

(3) he did not act fairly or in a straight-forward manner towards his client and attempted to deceive her both before and after the hearing of the cases;

(We propose later in this judgment to consider the solicitor's conduct after the cases).

(4) it was not honourable practice on his part to take judgment in the two cases after he had arrived at a settlement with the practitioner for the opposite party, and that he should have refused to do so in the absence of such party.

As to Point (1) that he gave little thought to his client's interest in these matters, it is difficult to see how this can be a ground for a finding of misconduct unless perhaps there is a wanton disregard of his client's interest which was deliberately subordinated to that of the solicitor's own interest, or that of some third party. There is no such allegation in the Report. Moreover, this Court on a consideration of the evidence before the Committee fails to see any justification for the finding of misconduct in that "the solicitor gave little thought to his client's interests in this matter." Here was a claim put forward by the client that as a result of the wrongful entry there was a loss of the client's chattels. The loss of the articles and proof of their value would have to be established by the plaintiff. In the absence of corroborative evidence, that may well have been difficult and a compromise such as was effected would not in the circumstances be in complete disregard of the client's interests. True, the solicitor might have advised the client that she had a cause of action in trespass, damages for which could be recoverable without proof of loss of any article. His omission to give this advice may possibly give rise to an action of negligence against the solicitor, but certainly could not be professional misconduct. There was some evidence given by the client before the Committee that she

wanted to file a claim for $75.00 but that is not borne out by her letter of complaint to the Attorney-General, nor in her statement given to the solicitor's clerk, admitted as exhibit "J" in evidence before the Committee. In that statement she gave her total loss to be $48.66, the greater portion of which was the loss of $39.03 in cash, which, it may be remarked, would be difficult of convincing proof. In considering the possible detriment to the client by the compromise, it must not be overlooked that the sum of $18.00 accepted by the solicitor from the other side was to be in full satisfaction not only of her claim for damages, but in full discharge of the claim against her for house rent with respect to which the burden of proving payment would at the trial have been on her. This would have been difficult without the production of the receipts which she said she would not be able to produce because they were lost when the house was broken down by the workmen of the landlord.

As regards (2) of paragraph 12, where misconduct is attributed to the solicitor because, as therein stated, he should not in the circumstances have settled the cases without specific instructions from his client, the special circumstances referred to are not pointed out, but it may be observed that it is settled law that a solicitor by his retainer to act as solicitor for a party in a suit, has a general authority to effect a compromise in that suit in his client's behalf without specific instructions to do so and without the knowledge of his client provided the solicitor acts bona fide and in the honest belief that the settlement is in the client's interest. A solicitor who has received no instructions to effect a compromise may possibly expose himself to an action for negligence if he negligently causes a loss to a client by his breach of duty to safeguard his client's interests, but provided he has acted in good faith he cannot be deemed guilty of professional misconduct. The Report does not state that the solicitor in this compromise had acted with bad faith nor have we seen in the evidence any feature of bad faith on his part. In the circumstances, we cannot agree with the Report that in effecting the settlement without instructions from his client, the solicitor was guilty of misconduct.

We now come to deal with Point 4 of paragraph 12 in which the attitude of the solicitor at the hearing before the Magistrate is also deemed to be misconduct. Here was an irate client who was dissatisfied with the settlement made by her solicitor behind her back. She was told about it by him that morning before going to Court. She nevertheless went to Court with the determination to have her case heard. On the case being called, the solicitor, who had written to the Magistrate informing him of the settlement, began to address the Magistrate so as to notify the Magistrate by way of formal announcement in Court that the matter was settled and the Magistrate actually made the note to this effect on the case jacket. The Magistrate either had not yet had the solicitor's letter handed to him or perhaps had forgotten about it. It seems to us to have been unnecessary for the solicitor to have made reference to this letter in announcing the settlement in Court. It is quite sufficient for counsel or solicitor for a plain-

tiff to announce in Court, a settlement of a case effected outside of court—there is no need for any previous letter. An excuse for the non-appearance of the other party or his solicitor where there is a counter-claim or cross action comprised in the settlement is often mentioned by the solicitor at the same time, which avoids the counter-claim or cross action being struck out for want of appearance. The solicitor in this matter was doing the usual thing when the dissatisfied client intervened, and the Magistrate very correctly refused to accept the announcement of the compromise and crossed out the entry he had made to that effect. What the Magistrate, in our view should have done, was to adjourn the case so as to give an opportunity for the other party and their counsel to be present at the hearing of the matter, and the solicitor should have suggested the adjournment. Instead of that, the Magistrate, because of the client's protest against the settlement proceeded with the matter and the solicitor, flustered no doubt by the determination of the client to go on and the Magistrate's yielding to her request, very wrongly took part in the proceedings by leading evidence for the plaintiff, and accepted the judgment for $48.66 and costs in the absence of the other side.

It cannot be said, however, that he did all this without demur or was in any way misleading the Court, because when the cross action for rent was called he sought to do some measure of justice to the other side by suggesting to the Magistrate that he should give judgment for the rent and not non-suit Mr. Jai Narine Singh's client. The Magistrate, of course could not do this in view of the denial of the client that she owed any rent, and so there was a non-suit of the action for rent with costs of solicitor. These costs, of course, the solicitor should have waived. The solicitor is we feel, not free from blame for what happened. He should have boldly opposed the course taken by the Magistrate which was not in accordance with the settlement he had made. He should have urged an Order of Adjournment from the Magistrate who, we think, was in our view wrong to go on with these matters and thereby contributed in great measure to the unsatisfactory sequel which occurred. But while blaming the solicitor for his weakness before the Magistrate, we see in his attitude in Court no feature of bad faith which could be stigmatised as professional misconduct.

There remains to be dealt with Point 5 of paragraph 12, where misconduct of the solicitor is based upon the Committee's finding that he has lied and attempted to deceive the Committee. We agree that if it is established that the solicitor did lie in his sworn testimony it is such gross misconduct as would warrant the Court inflicting severe punishment on the solicitor by way of disciplinary action. In a case where misconduct is otherwise established, the Court should and would regard such lying for the purpose of exculpating himself as an aggravation of the misconduct. The solicitor would be guilty of wilful and corrupt perjury—a very grave offence if committed by anyone but more particularly reprehensible in one who, as a solicitor, is an Officer of the Court. We feel, however, that where misconduct is not otherwise established, and the solicitor is brought before the Court to

answer only the imputation made against him that he lied before the Committee, the solicitor should be given the opportunity of defending himself of this charge, not first before a public court, but at a hearing before the Committee, where, if given the opportunity, he may be able to call further evidence in disproof of the imputation against him that he has lied.

Having found, as stated above, that on none of the grounds of complaint made by the client, which was the main object of the Committee's investigation, was the solicitor guilty of any misconduct meriting his punishment by this Court, we considered whether we ought to remit the matter to the Committee so that the solicitor should have a formal charge of lying before the Committee made against him, and be given an opportunity to submit his defence in contradiction thereto by additional evidence or other wise. Perhaps the chief reason for the Ordinance setting up a Legal Practitioners' Committee (which is to conduct its investigation in private into a complaint against a solicitor) is to save the alleged defaulting solicitor from the prejudice by which he would be most likely affected by a complaint of misconduct being heard in public even when he may have a perfectly good defence to the complaint. If all that can be said against the solicitor in this case is that he lied before the Committee, then we felt he ought to be given the opportunity in the first instance of exculpating himself of this charge not before a public court but before the Committee. A solicitor whose sole misconduct is that he lied before the Committee may have a good defence to this charge also. In his defence on this charge a solicitor may wish to submit more evidence which he may have thought unnecessary to establish his case in answer to the complaint made by his client.

Counsel for the solicitor at the hearing before us made no application that the matter be remitted to the Committee, but was apparently prepared to submit his case there and then in vindication of the solicitor. Had he made the application for a remission to the Committee we would, for the reasons given above, have sent the matter back to the Committee to hear the defence to the charge of lying. Before us, counsel for the defence tendered no evidence to show that the solicitor had not lied, but contented himself by submitting medical evidence as to the state of health of the solicitor from which the Court was asked to infer that the solicitor, if he uttered untruths before the Committee, was not guilty of wilfully lying in an attempt to deceive the Committee. The members of the Committee themselves would seem to have observed that the solicitor, when testifying before them, was suffering from some impairment of his health because they closed their report in paragraph 13 by saying:

> "The Committee considers that it is its duty to record that the Legal Practitioner gave his evidence in this matter in an incoherent and unsatisfactory manner and that he does not appear to be in full possession of his faculties, and that his counsel in explanation stated that the Legal Practitioner had been ill and was now suffering from mental fatigue."

As to the alleged lies uttered in his evidence by the solicitor, the averments of lying by him may be gathered from the finding in paragraph 10 of the Report. The Committee disbelieved him when he testified that:

(a) he had told the client that she could receive the $18.00 on account and could proceed by writ of execution for the balance of her judgment.

(b) Mr. Singh agreed to the appropriation of the $18.00 on account of the judgment for $48.66 and costs.

It is a fact that after the judgments given by the Magistrate, the solicitor made efforts to see Mr. Jai Narine Singh to inform aim about what had happened. He saw Mr. Singh about one week after and declared, as Mr. Singh testified, that he found himself "in peculiar circumstances and did not know what to do." Apparently, Mr. Jai Narine Singh wavered between insisting upon his client's rights under the compromise and applying for a rehearing. He in fact applied for a stay of execution pending the application for a re-hearing.

In his evidence before the Committee, Mr. Jai Narine Singh admitted that the solicitor did propose that the $18.00 should be appropriated on account of the judgment obtained by his client, but he never consented to it. How the solicitor could have expected Mr. Singh to agree to this suggestion is difficult to see except that his impaired state of health combined with the "peculiar circumstances" in which he found himself may be the excuse for such optimism. This he probably communicated to his client or he believed he did and so testified before the Committee. Mr. Singh's uncertainty as to what course he should take may have contributed in a measure to this self deception of the solicitor. At any rate we hesitate to declare that in uttering what he said to the Committee, the solicitor was wilfully lying in an attempt to deceive the Committee. One cannot imagine a more clumsy and unconvincing attempt to deceive a Committee of practising lawyers. It would have been unreasonable to believe that in the circumstances which had happened, Mr. Singh could have agreed to such a suggestion.

Dr. Bissessar has in his evidence before us stated what was the solicitor's ailment at this period, and that may account for many phases of the solicitor's conduct in relation to the whole matter—his weakness in not insisting that the Magistrate should grant an adjournment—his taking part in the proceedings by leading evidence and accepting the judgment with costs in the absence of the other party after he had effected a compromise—his subsequent suggestions to his client as to the course to be taken following on the judgment—his interview with Mr. Singh and his belief that Mr. Singh was agreeing to let the $18.00 be part settlement of the judgment. Throughout all the occurrences, although acting stupidly, there is not a vestige of evidence that the solicitor was guilty of dishonest conduct, seeking his own personal gain as against the interest of his client. His conduct while unsatisfactory was no doubt attributable to his state of health which also no doubt was responsible for his incoherency

and generally unsatisfactory evidence before the Committee. We find him, however, not guilty of wilfully lying in an attempt to deceive the Committee. In the circumstances we hold that the Report has not established that the solicitor has been guilty of misconduct.

In conclusion, we should like to give a warning to the solicitor that his state of health would be no defence in an action for negligence brought by a client in respect of damages sustained through his incapacity by reason of ill health. When he suffers from impairment of health such as might prevent him from attending to business satisfactorily, he should avoid undertaking solicitor's work.

In this matter each party must bear its own costs.

HOWARD *v.* WILLIAMS

(In the Full Court (Boland, C.J. (ag.) Ward, J.) July 11, 20, 1950).

Appeal—Intoxicating Liquor Licensing Ordinance—District Administration (*Transfer of Duties*) *Ordinance—Revenue Officer—Institution of complaint—Authority—Unlicensed* premises—*Sale—Payment postponed—Offence.*

The appellant a revenue officer charged the respondent with selling rum in unlicensed premises contrary to section 41 sub-section (1) of the Intoxicating Liquor Licensing Ordinance. The complaint was brought by him by virtue of an authority by the Colonial Secretary in accordance with the provision of section 2 of the District Administration (Transfer of Duties) Ordinance (No. 31 of 1937) authorising him to perform any of the functions and duties of a District Commissioner in respect of the Intoxicating Liquor Licensing Ordinance, Chapter 107.

At the hearing before the Magistrate the appellant did not produce the original letter of the Colonial Secretary authorising him to perform the aforesaid functions but produced a copy certified by an Assistant Colonial Secretary.

It was contended by the respondent on appeal that a certified copy of the letter was inadmissible.

Held: Acting in a public office is evidence of due appointment.

Reg. v. Newton (1840) 1 Car. & Kir. 469 and

Reg. v. Roberts (1878) 38 L.T. 690 applied.

Before the Magistrate the appellant proved that the respondent was the barman at a club. In pursuance of a police trap a non-member of the club entered the premises and ordered a quantity of rum. The respondent sold the rum but when the non-member offered to pay the price charged he declined to receive the money until the rum had been consumed. The Magistrate dismissed the complaint on the ground that the sale was not complete.

Held: The receipt and acceptance of the rum constituted a sale even though the seller postponed the time of demanding payment.

A. C. Brazao, Solicitor-General for the appellant.

E. V. Luckhoo for the respondent.

Judgment of the Court.

This is an appeal from an order of dismissal by a Magistrate of the Georgetown Judicial District. The appellant is a revenue

officer, and he brought the complaint which purports to be by virtue of an authority by the Colonial Secretary in accordance with the provisions of Section 2 of the District Administration (Transfer of Duties) Ordinance (No. 31 of 1937) authorising him to perform any of the functions and duties of a District Commissioner in respect of the Intoxicating Liquor Licensing Ordinance, Chapter 107. The prosecution was duly sanctioned by the Fiat of the Attorney-General. It is alleged in the complaint that the respondent on the 25th day of March, 1949, at Wortmanville Club, Bent and Hardina Streets, in the Georgetown Judicial District, sold 3½ fluid ounces of rum to one Emmanuel Rodrigues, contrary to sub-section (1) of Section 41 of the Intoxicating Liquor Licensing Ordinance. The Magistrate held that there had been no sale of rum by the respondent and that the charge was not proved.

At the hearing before the Magistrate the appellant in his evidence said that he was a revenue officer and had been authorised in writing by the Colonial Secretary to perform the functions and duties of a District Commissioner in respect of the Intoxicating Liquor Licensing Ordinance. He further said that his appointment had been gazetted on January 1, 1938. He produced a copy of a letter dated December 31, 1937 authorising him so to act signed by E. J. Waddington, the Colonial Secretary at that date, and certified by L. E. Kranenburg, an Assistant Colonial Secretary. No objection was taken at the hearing before the Magistrate to the admission of this document nor was the appellant's authority to initiate the prosecution challenged. Mr. Luckhoo for the respondent has, however, submitted that the authority of the appellant to bring this complaint under the Intoxicating Liquor Licensing Ordinance was not sufficiently proved since the original letter signed by the Colonial Secretary was not produced nor was a certified copy admissible but if admissible it was not certified in accordance with the provisions of Section 37 of the Evidence Ordinance, Chapter 25. It appears to us that this submission is not well-founded. In Halsbury's Laws of England 2nd Edition Vol. XIII p. 558 at paragraph 628 there is the following statement:— "Acting in a public capacity or relation is evidence of title so to act, even in favour of a party so acting, and even against third persons who have in no way acquiesced therein. Moreover acting in a public office is evidence of due appointment, although the appointment is required to be by deed, and is directly in issue in the proceedings." This statement is fully borne out by the authority of a long line of decisions. In Reg. v. Newton (1840) 1 Car. and Kir. 469 an indictment for perjury in an affidavit stated the affidavit to have been sworn "before one R.G.W. then and there being a commissioner duly authorised and empowered to take affidavits in the county of Gloucester in or concerning any cause depending in Her Majesty's Court of Exchequer at Westminster". It was proved by R.G.W. that he had acted as a commissioner for taking affidavits in the Exchequer for ten years but had never seen his commission; and that ten years before he had applied to his agent to procure for him a commission to take affidavits in the Exchequer and that his agent had told him he had

done so. The Court held that his acting as a commissioner was prima facie proof that he had been duly appointed. This decision was approved in Reg. v. Roberts (1878) 38 L.T. 690 where it was said that the presumption that a person acting in a public or official capacity has been duly appointed is an illustration of the *maxim omnia praesumuntur rite esse acta.*

The substantial point in this case is whether there was in fact a sale of rum in breach of the provisions of the Intoxicating Liquor Licensing Ordinance. The evidence shows that there was a police trap. The witness, Rodrigues, who was accompanied by the witness Adams, went on the instructions of Warrant Officer Sukhnandan to the Wortmanville Club at Bent and Hardina Streets and asked the respondent who is the barman to sell him some rum. The respondent handed him a half bottle of rum, but the witness explained he wanted a quarter bottle and two aerated drinks, and the respondent substituted a quarter bottle for the half bottle Rodrigues asked the price and, when the respondent told him it was 50 cents for the rum and ten cents for the aerated drinks, tendered the respondent a dollar note in payment, but respondent told him to keep the money until he had finished drinking the rum. Rodrigues and Adams poured out a little rum and the aerated drinks and started to drink. Rodrigues then again asked the respondent the price and respondent said fifty cents for the rum and ten cents for the aerated drinks. The witness again tendered the dollar note, but the respondent again refused to take it repeating that he would take it when the rum was consumed and adding that he has to know how we are selling. It was submitted by counsel for the respondent that this was a condition precedent and that until this condition was fulfilled there was no sale but only an executory contract. In support of this submission he cited the case of Titmus v. Littlewood 85 L.J. K.B. 738. In that case an order for six bottles of stout was given at the house of the purchaser to the seller's agent, who at the same time received the money in payment, but the bottles of stout were subsequently selected by the seller on his licensed premises, parcelled and labelled and then delivered to the purchaser at her house. The Court held that the sale was effected where the articles were appropriated to the contract, viz. on the licensed premises, and that the transaction at the house of the purchaser was merely an executory contract. The sale on licensed premises not being in breach of the licence, the complaint was dismissed. In the instant case the facts are different. Here the entire transaction took place on unlicensed premises, and the buyer on receipt of the rum tendered a dollar note in payment. If at this stage the respondent had demanded the return of the rum on the ground that he had made a mistake in delivering it, or if he had invited the witness to taste a sample of the rum before acceptance there would be some force in the submission of learned counsel for the respondent. But on the contrary the respondent invited the buyer to consume the rum completely, postponing the receipt of payment until the bottle was empty. The object of this postponement was frankly admitted by counsel for the respondent to be a subterfuge to escape if possible the

consequences of a sale and delivery of rum in breach of the Ordinance by removing the real evidence of the nature of the article sold. We do not think his ruse succeeded. It has never been doubted that the receipt and acceptance of the goods by the buyer constitutes the sale. If the seller chooses to postpone the time of demanding payment this is a concession by him which cannot affect the nature of the transaction, or the respective rights and liabilities between the parties arising from an actual sale. This transaction differs in no way from a sale of goods on credit under which contract on the receipt and acceptance of the goods by the buyer, he becomes liable to pay the price of the articles at the time and place agreed on. The fact that a seller presses a buyer to take goods on credit in no way affects the nature of the transaction. We are therefore of opinion that the learned magistrate wrongly directed himself on the law applicable to the facts and erred in drawing the inference that there was no sale. The appeal is therefore allowed and the order of dismissal set aside. The case will be remitted to the magistrate with a direction to convict and sentence the respondent as the offence laid in the complaint has been clearly proved. The respondent must pay the taxed costs of the appeal.

LICORISH *v.* ROSS

(In the Full-Court, (Boland, C.J., Ward, J.) July 13, 20, 1950).

Appeal—Jurisdiction of Magistrate—Summary charge of indecent assault—Rape disclosed—Procedure—Summary Jurisdiction (*Procedure*) *Ordinance, Chapter* 14, *section* 34.

The appellant was charged summarily with having indecently assaulted a girl contrary to section 28 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13. The girl's evidence disclosed that the indictable offence of rape had been committed. The Magistrate in his reasons said that he accepted the girl's evidence but he nevertheless convicted the appellant of indecent assault.

Held: The Magistrate exceeded his jurisdiction in convicting the appellant on the summary charge.

Seepersaud el al v. McKenzie

Appellate jurisdiction. 25.11.1901, and *Algoo and anor v. Watson* Appellate jurisdiction 26.9.1905, explained.

C. Lloyd Luckhoo for the appellant.

Solicitor-General for the respondent.

JUDGMENT:

In this appeal there are two points which call for decision by the Court. The first relates to the validity in law of the method adopted by the magistrate for receiving by interpretation the evidence of some of the witnesses who belong to the Akowie tribe of aboriginal Indians and who testified in their own native language. The second is concerned with the jurisdiction of the magistrate to deal with the summary conviction charge laid before him notwithstanding that the facts in evidence relating to

that charge disclosed also the commission of another serious indictable charge beyond the jurisdiction of a magistrate.

As to the first point the appellant was charged before the Travelling Magistrate, Mr. Cossou with the offence of indecent assault on a girl named Kathleen of the Akowie tribe, who herself as well as some of the principal witnesses belonging to the same tribe could speak no English whatsoever. Kathleen being ignorant of the nature and obligation of an oath was allowed in accordance with the provisions of Ch. 25 of the Evidence Ordinance to give evidence without oath or affirmation, and a male interpreter was duly sworn to interpret her unsworn testimony into English. However as her evidence proceeded she refused to say anything about the assault and the Magistrate realised that her refusal was because of the dislike of women of her tribe to communicate this sort of information regarding herself to a man. Accordingly he requisitioned the services of a woman interpreter to whom Kathleen could speak directly, and thereupon Kathleen gave particulars of the nature of the assault committed on her by the defendant. Unfortunately however, this "female interpreter" although capable to speak reasonably good English was apparently herself not qualified to take an oath, and the magistrate permitted her to function without taking an oath, in any form or making a solemn declaration. The "female interpreter", the magistrate has declared in his reasons for decision, was not employed in substitution for the male interpreter but both interpreters were permitted to remain and thus the magistrate had, as he declared in his reasons, the advantage of "being able to check the accuracy of the statements made by the witnesses".

Section 72 (2) of Chap. 25 (The Evidence Ordinance) enacts that "every interpreter must be sworn to interpret". A witness may in certain circumstances as specified in the Ordinance be allowed to give evidence without oath or affirmation, but not so an interpreter. If the magistrate relied upon the interpretation of this woman, described by him as a "female interpreter" then all the evidence which she interpreted would have been inadmissible, and we would be constrained to set aside the conviction. But it is not absolutely clear that the magistrate relied on the interpretation given by this woman; it is possible to infer from his description of what took place that the woman merely transmitted the evidence to the male interpreter who in turn translated it into English for the benefit of the Court and the same process was followed when questions were put to the witness. If that were so the real interpreter was the male interpreter and the so-called female interpreter was not indeed an interpreter but was there only assisting the court to get the witness Kathleen and the other witnesses to speak freely and without restraint. We would hesitate to set aside the conviction on this ground alone without a report from the magistrate giving full particulars of the parts taken respectively by the male interpreter and the female interpreter in the proceedings before him. This course however has become unnecessary in view of the decision we give below in reference to the question of jurisdiction.

As stated the charge against the appellant was that he had indecently assaulted the girl Kathleen. The complaint was laid under section 28 of the Summary Jurisdiction Offences Ordinance. Ch. 13 and therefore on this complaint the Magistrate had power to deal with the case. But Kathleen in her evidence described how appellant invited her to come and eat accouri stew and when she declined he lifted and carried her from the house where she was living into a house where he was staying about ¼ mile away. Then, as she stated, he held her down on the floor and put his penis into her. He lay down on her. She didn't agree to it, but could do nothing about it. She didn't cry but after he was finished, she went home—that is to the place where she was staying. If these facts were true, not only had the appellant indecently assaulted her, but he had perpetrated the more serious offence of rape and on conviction could be punished for this more serious offence. By section 78 of the Criminal Law (Offences) Ordinance, Ch. 17 rape is a felony punishable on conviction with a maximum sentence of penal servitude for life and is therefore an indictable offence triable by the Supreme Court. A magistrate's jurisdiction is one created wholly by statute. As there is no Ordinance empowering him to deal with a case of rape, that offence is outside his jurisdiction.

Section 34 of the Summary Jurisdiction (Procedure) Ordinance, Chap. 14 gives directions as to what should be done if in the course of hearing a complaint it appears to a magistrate that the cause should be tried as an indictable offence. In such a case all further proceedings in the cause as for a summary conviction offence shall be stayed, and depositions shall be taken, and the cause in all other respects be dealt with as if the charge had been originally one for an indictable offence. It is clear that the question whether or not the cause ought to be tried as an indictable offence is entirely a matter for the magistrate, but without doubt his discretion must be exercised not arbitrarily but on judicial grounds. Certainly in respect of an offence which, though by statute triable by a magistrate, is nevertheless punishable on indictment, a magistrate may because of the absence of any exceptional features be justified in not stating the cause for the purpose of taking depositions with a view to an indictment being laid by the Attorney-General. But if he accepts the facts as disclosing the commission of an indictable offence not cognisable within his jurisdiction he cannot continue to deal with the cause under the charge for a summary jurisdiction offence and justify the procedure on the claim that to him it did not appear that the cause ought to be tried as an indictable offence. It would seem that the provision of section 34 of Ch. 14 was designed for the purpose not only to give a defendant the right of trial by jury in regard to an issue of fact involving the commission of an indictable offence but also to subject him to the liability of a punishment beyond that which is within the power of a magistrate to impose.

In this case the magistrate in convicting the appellant for indecent assault sentenced him to 3 months hard labour. In his reasons for decision, the Magistrate says "I am accepting the evidence of Kathleen that intercourse took place, as her actions

were consistent with that of a person who had suffered such an experience. I therefore found the Defendant guilty". Therefore the Magistrate took the view that not only had there been an indecent assault, but there was an actual rape. Accordingly it should have appeared to him that the cause ought to be tried as an indictable offence before the Supreme Court; the moment he was satisfied that there had been sexual intercourse in those circumstances which indicated the absence of consent, he should not have dealt with the cause as for a summary conviction offence, but should have stayed the proceedings and taken depositions and dealt with the cause as if it had been originally laid for the indictable offence of rape.

If the magistrate had said that because of there being no evidence of bodily injury or any medical testimony in support of Kathleen's evidence that there was penetration, there would be some difficulty in getting a conviction for rape and that accordingly in his view the cause ought not to be tried indictably, perhaps it could be said that he had acted within his discretion. But there is no such qualification in the Magistrate's finding that there had been sexual intercourse, and it is not for this court to suggest a good reason for proceedings not being taken as for an indictable charge. That discretion is by the section of the Ordinance given to the Magistrate alone. But it may be remarked that although in rape there must be corroboration of the female's story in a material particular in support of the guilt of the accused, there is no rule that her evidence that there was actual penetration must be corroborated by direct evidence. It would be sufficient if there was corroboration of her story as to the circumstances of the assault on her from which if sexual intercourse did take place as she describes it must have been done by the defendant without her consent. At any rate if a jury were not satisfied that there was actual sexual intercourse, they could always convict for the attempt to rape, which offence is also beyond the jurisdiction of the magistrate.

In support of the law as laid down above reference may be made to the authority of certain decided cases. In these cases though on appeal the Court refused to set aside the conviction by the magistrate, the principles governing his exercise of discretion are clearly enunciated.

In Seepersaud, Makoon and Mahabeer (Appellants) versus Sergeant McKenzie (Respondent), Supreme Court of British Guiana Appellate Jurisdiction 25th November, 1901 there was a charge of indecent assault and in the course of the hearing before the magistrate evidence was given purporting to establish rape. The Magistrate convicted the appellants and in his reasons stated that he "believed all the evidence for the prosecution" and he went on to make reference to a passage in Paley on Convictions which gave Justices the power in a case of assault, where evidence is given, which if true shows the offence to be rape, to decide whether evidence of rape is true nor not. It was held on appeal that the magistrate believed the evidence for the prosecution sufficient to prove an indecent assault but did not believe

a case of rape was made out. Bovell (then Acting C.J.) in the course of his decision on appeal stated that the fair construction of the magistrate's reasons was that the evidence of the prosecution was sufficient to prove an indecent assault, but that he did not believe that a case of rape was made out. The magistrate, he added, was bound to exercise his judgment on the evidence and the court of appeal would not review his discretion just as he would not be compelled to send the case for trial if, in similar circumstances the indictable offence of rape had been laid in the first instance, and he had found that no jury could reasonably convict of rape. But in the instant case by finding that sexual intercourse had taken place following upon the indecent assault, the magistrate did find that there was rape.

Again Algoo & anor v. Watson, Supreme Court of British Guiana Appellate Jurisdiction 26th September, 1905 is to be distinguished from the present case because the magistrate, holding affirmatively that the evidence was not sufficient to find that there was a breaking and entry, convicted for the charge before him which was for larceny of sugar in the premises and the Appeal Court did not set aside the conviction on a submission that he had exceeded his jurisdiction.

Similarly in Wilkinson (Appellant) v. Dutton (Respondent) 1863 32 L.J. N.S. (Mag.'s Cases) 152 the Court of Queen's Bench refused to set aside a conviction by justices of the appellant for the offence for assault on a woman although the woman testified that she had been raped.

"The credibility of the evidence" said Crompton, J. has from the "time of "Lord Tenterden been for the Justices to decide upon, and it is easily conceiv- "able that, though they might doubt the evidence of rape, they might see that "there was amply sufficient evidence to shew that there had been a common "assault."

In the instant case the magistrate did not doubt the evidence as to rape.

Consequently we hold that the magistrate having found that there was rape was wrong in not finding that the cause ought to be tried as an indictable offence before the Supreme Court. He should have stayed all further proceedings for the summary conviction offence of indecent assault and taken depositions and dealt with the cause in all other respects as if the charge had been originally one for an indictable offence. In our view in dealing with the cause as a summary conviction offence upon which he convicted the appellant for indecent assault the magistrate exceeded his jurisdiction.

It may be remarked that counsel for the appellant before closing his submissions asked leave of the Court to withdraw the ground of appeal which purported to challenge the magistrate's jurisdiction to convict of indecent assault although an indictable offence was disclosed. On a question of jurisdiction the Court has always the power to review the magistrate's decision with or without the consent of the parties to an appeal. If there is no jurisdiction, no consent of the parties can give a court jurisdiction.

As was stated earlier in this judgment the provisions of section 34 of the Summary Jurisdiction (Procedure) Ordinance, Ch. 14 was designed not merely to give a defendant the right to trial by jury for indictable offences, but to ensure that a person guilty of an indictable offence is liable to receive more severe punishment than that within the power of a magistrate to impose.

For the reasons given the appeal will be allowed and the conviction and sentence set aside. Each party will bear its own costs.

Solicitor: *H. C. B. Humphrys.*

SANKAR *v.* CONTROLLER OF SUPPLIES AND PRICES and De FREITAS

(In the Supreme Court, civil jurisdiction, Boland, C.J.) September 4, 5, 6, 18, 1950).

Control of Sales (*Motor Vehicles*) *Order* 1948—*Defence Regulations* 1939—*Defence Regulations* (*Supplies and Services*) *Continuance Order* 1946—*Maintaining supplies and services essential to the life of the community—validity of Order.*

The plaintiff deposited $250.00 with the second defendant in order to ensure that when the next shipment of American cars of a specified make arrived in the Colony he would be entitled to select one for himself. Before the shipment arrived, the first-named defendant acting under Regulation 44 of the Defence Regulations 1939, as extended by the Defence Regulations (Supplies and Services) (Continuance) Order 1946, made the Control of Sales (Motor Vehicles) Order 1948, prohibiting without the production of a permit, the purchase or acquisition from a motor dealer of a motor vehicle imported from a country other than the United Kingdom.

As a result of this Order the plaintiff was required to obtain a permit from the Controller of Supplies and Prices so as to legalise the sale to him by the second named defendant of an American car.

The plaintiff applied in terms of the Order for the grant of a permit but as the Controller did not consider that his application disclosed a sufficient degree of essentiality, the permit was refused.

An interlocutory injunction was granted restraining the second defendant from disposing to any other person of the American car which the plaintiff had selected.

This action was brought for a declaration that the Order of the Controller was *ultra vires* and should be deemed null and void, and it was contended at the hearing that the Controller by Regulation 44 could legally make orders controlling the sale of commodities only if such orders were "essential to the life of the community" and it was the duty of the Court to examine the Order to determine whether its provisions were essential to the life of the community and if not to deem it *ultra vires.*

Held: The Court is bound to act on the assumption that there was necessity for the making of the Order.

L. M. F. Cabral for plaintiff.

Solicitor-General for first defendant.

C. *V. Wight* for second defendant.

SANKAR *v.* CONTROLLER OF SUPPLIES AND PRICES
and De FREITAS

Boland, C.J. (*Acting*)*:*

JUDGMENT.

The decision in this action turns upon the question whether a certain order made by the Controller of Supplies and Prices known as the Control of Sales (Motor Vehicles) Order, 1948 is *ultra vires* and therefore illegal; alternatively if legal, whether the Controller's refusal to issue a permit to the plaintiff in respect of his contemplated purchase of a Buick motor car from the second-named defendant, a dealer in motor cars trading under the name and style of the Central Garage, was a lawful exercise of the Controller's powers under that Order.

The facts given in evidence at the hearing disclosed that in the year 1946, long before the making of the order abovementioned, the plaintiff, who is a landed proprietor, had arranged with the Central Garage to purchase from them one of the Buick motor cars which the Garage would be importing from the U.S.A. as part of their stock of cars for sale. At that time, the only restriction affecting the sale of cars was that the price was not to exceed the maximum prescribed price as fixed by the existing regulations controlling the price of certain commodities and articles imported into the Colony. Since this arrangement was made a few Buick cars arriving for the Central Garage were sold to other purchasers.

In order to ensure that he would not be passed over again in favour of any other purchaser, the plaintiff on the 28th January, 1947, deposited the sum of $250.00 with the Central Garage as part of the purchase price of a Buick car. This was to bind a promise in writing which had been made to him by the Garage on 2nd January, 1948, that he would be entitled to have such one of the next set of Buick cars to arrive as he might select for himself.

It should be mentioned that some time during the latter half of the year 1947, in order to conserve hard currency, the Government of the Colony had deemed it necessary to restrict the importation of goods and articles from hard currency areas including the United States of America, and among other articles the importation of motor cars from that area was disallowed. From that time onwards, the necessary licences for such importations were not being granted, and as a consequence there would be arriving in future from the U.S.A. for dealers here, only such cars as had been the subject of importation licences prior to the general discontinuance of licences.

It was understood by the Controller that new cars of British Manufacture which were then available from dealers in the colony were of a light type not exceeding horse power and were not regarded by the general public as providing the same high degree of comfort and durability when driven over the rough roads of the colony as the American cars did, and he therefore anticipated that there would be a rush by intending purchasers to secure these new American cars. He accordingly issued this Order of the 16th January, 1948, with the consent of the Governor so as to ensure that only such persons whose occupations made the

use of such a ear essential should be able to purchase these American cars.

The Order dated the 16th January, 1948, and published in the Official Gazette on the 17th January, was declared to become operative on the latter date. On its face it purports to be made under Regulation 44 of the Defence Regulations 1939, as extended by the Defence Regulations (Supplies and Services) (Continuance) Order, 1946. It makes provision for regulating the sale of Motor Vehicles, declaring in clause 3:

> (1) that no person shall purchase, or otherwise acquire from a dealer any motor vehicle unless such person is in possession of a valid permit authorising such sale or transfer;
>
> (2) No dealer shall sell or transfer the property in or otherwise dispose of any motor vehicle unless the purchaser or transferee surrenders to such dealer at the time of purchase or transfer a valid permit authorising such sale or transfer.
>
> Permits granted are to be in a form set out in the schedule, and a person desiring to obtain a permit has to give with his application certain particulars. He must set out:
>
> (a) his reason for requiring to purchase a motor vehicle;
> (b) whether he is the owner of a motor vehicle;
> (c) full particulars of the vehicle desired;
> (d) full particulars of any motor vehicle or vehicle he may then be owning.
>
> The Order is declared not to apply to motor vehicles imported from the United Kingdom.

As plaintiff at the time of the passing of this Order had nothing more than a contract to purchase a Buick car of a certain type which he had the right to select amongst others of the same type, it was therefore obligatory on him by the provisions of the Order so as to legalise the purchase of a Buick car to get a permit from the Controller which was to be surrendered by him to the vendor, the Central Garage at the time of purchase. Accordingly, he submitted an application to the Controller on the 23rd day of January, 1948, but in addition to the Buick car which he had contracted to purchase, he included in his application a permit for the purchase of a Chevrolet Car. He declared that he was making the application in respect of the Chevrolet on behalf of his wife.

The application on behalf of his wife for the purchase of a Chevrolet was refused, but in due course, at the request of the Controller, plaintiff gave particulars of the grounds of essentiality which he was urging in support of his application for the permit for the Buick car including the need for the replacement of his old Buick car which he was then using. These particulars were duly furnished in a letter to the Controller dated 27th April, 1948. Plaintiff stated in his letter that the old Buick car he was using had already been sold; in his evidence before the Court, plaintiff said that his old Buick was a 1940 model and had been giving him much trouble. His regular country running per week to his Plantation Hope and back to Georgetown was 40 miles amounting to approximately 160 miles per month. He was also doing three trips to his Plantation Maida and back to Georgetown entailing

540 miles per annum over very rough roads, exclusive of emergency trips. Mr. Messervy, the Controller, stated in his evidence that he considered a minimum of 500 miles per month as an essential ground for the requirement of this heavy type of car; this mileage was what such persons as medical practitioners and other persons were compelled to traverse and he accordingly refused the application.

On the question of *mala fides* on the part of the controller, as raised by the plaintiff, it may be mentioned that plaintiff was given the opportunity of submitting his claims for the permit before the Advisory Board by whom the Controller was assisted in the determination of the question of granting permits. Before the Board plaintiff was represented by a solicitor. Despite many renewals of his application, the permit was refused.

In the meantime during the month of August, 1948, the last shipment of Buick cars arrived for the Central Garage. This shipment comprised four cars only: one was sold by the Garage to a Dr. Singh — a medical practitioner, another to a Mr. Perreira, both having the requisite permits from the Controller.

At the time of the filing of the writ in this action only two Buicks remained unsold. The interlocutory injunction which was granted to the plaintiff in these proceedings, restrained the Garage from disposing to any other person than plaintiff the car which the plaintiff duly selected from amongst these two cars. After his selection of one, the other of the two cars was then sold by the Garage to the Demerara Bauxite Company who had obtained a permit from the Controller on his being satisfied of the essentiality of the service of a heavy car for the purposes of the Company's business.

The contention of the plaintiff's counsel is that this Order of the 16th January, 1948, was *ultra vires* the Controller and should be deemed to be null and void. The order, as is stated on its face, was made under Regulation 44 of the Defence Regulations 1939 as subsequently extended by the Defence Regulations (Supplies and Services) (Continuance) Order, 1946.

The Defence Regulations 1939 themselves were made in pursuance of powers conferred by the Emergency Powers (Defence) Act 1939 and the Emergency Powers (Colonial Defence) Order in Council 1939. The Act and the Order in Council authorised the passing of Defence Regulations in the colony when it appears to the Governor to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of the war in which His Majesty may be engaged, *and for maintaining supplies and services essential to the life of the community.*

The Act further enacted that such Regulations may provide for empowering authorities, persons or classes of persons, as may be specified therein, to make orders, rules and bye-laws for any of the purposes for which such Regulations are authorised, and may contain such incidental and supplementary provisions as appear to the Governor to be necessary.

Regulation 44, under which the Controller made the order the legality of which is under review in this action reads:

> "A competent authority so far as appears to that authority to be necessary "in the interests of defence or the efficient prosecution of the war, or for "maintaining supplies and services essential to the life of the community "may by order provide for amongst other matters:
>
> " (a) for regulating or prohibiting the production, distribution, sale, use or consumption of articles of any description and, in particular, for controlling the prices at which such articles may be sold;
>
> "and an order under the regulation may prohibit the doing of anything "regulated by the order except under the authority of a licence granted by "such authority."

The Defence Regulations (Supplies and Services) (Continuance) Order, 1946, provided for the continuance of the provisions of Regulation 44, but deleting as an object "the efficient prosecution of the war" restricted the making of orders by a competent authority in relation to supplies and services to what was deemed by the authority as essential to the life of the community.

Counsel for plaintiff contended that the controller by Regulation 44 could legally make orders controlling the sale of commodities only if such orders were "essential to the life of the community". He pointed out that in England legislation which was enacted to give continuance after the war to some of the special powers exercisable by virtue of the Emergency Powers (Defence) Act 1939 took care not only to exclude as a ground for the exercise of these powers the need for the efficient prosecution of war, but also to substitute for the ground of its being "essential to the life of the community" what he described as the narrower ground of its sufficiency for the well being of the community." These words "essential to the life of the community" being deliberately left unamended in our Defence Regulation 44 as amended by the Defence Regulations (Supplies and Services) (Continuance) Order 1946 had to be construed strictly and must not be interpreted to mean "necessary for the well being of the community." Counsel urged that it was the duty of the Court to examine the Order made by the Controller so as to determine whether or not its provisions were "essential to the life of the community" and if they were not, then the Court would pronounce the Order to be *ultra vires.*

It was stressed that it could not be vitally necessary for the preservation of the life of the community that some persons in the community, no matter their occupation, should have a certain type of motor car rather than another type, in priority over other members of the community. Why should the apportionment of those few American cars amongst special users be deemed vitally necessary for the community when, as admitted in evidence, even the lower horse-powered type of English car can give satisfactory service on the colony's roads for many years, whilst the bigger English cars, as it was agreed, were equal to, if not better than the American cars both for durability and for comfort! The unfettered

right of the subject to purchase whatever type of car he pleases should not be curtailed on a pretext that the life of the community is dependent upon a certain type of car being needed by those who could show essentiality for the use of that type of car and still less can this pretext be advanced in justification for abrogating the mutual contractual rights between an intending vendor and an intending vendor arising out of a valid legal contract for the sale of a car.

I will say at once that I cannot agree with the construction which counsel for the Defence in his contention asks the Court to give to the phrase "essential to the life of the community." Counsel contends that a thing which is essential to the life of a community is something which is so necessary to a community that without it the community would perish. This in my view would be giving the phrase too literal a meaning which would make it synonymous with the words "essential for the purpose of keeping a community alive" which is a limitation of meaning which was never intended by the Emergency Powers (Defence) Act. The phrase can mean nothing more than "essential for the normal life of the community." In England, when cessation of hostilities made an amendment necessary this amendment was also made, it is imagined, so that there should be no misapprehension as to what the phrase did really mean. It could hardly have been intended to delegate to any authority wider powers after the war than during the war. To give a competent authority power to control the maintenance of supplies and services in a manner appearing to it necessary for the *well being of a community* would be giving that authority a wider power of interference with the subject than one which permitted him to exercise such control only when it was essential *for the very existence of the community.*

But, as the Solicitor-General pointed out, once it is agreed that the Defence Regulation 44 was *intra vires* the Act of 1939 and the accompanying Order in Council extending the provisions of the Statute to British Guiana — and this has not been challenged by the plaintiff — the Court cannot question the validity of an order made by the Controller — the competent authority — who has determined in the exercise of the powers given him by the Regulation that such an order is necessary for maintaining supplies and services "essential to the life of the community."

To the Controller of Supplies and Prices, Parliament by the statute and by the certain Orders in Council and Defence Regulations made thereunder, has delegated a power to enact legislation by investing him with full authority to issue such orders as appear to him to be necessary as being "essential for the life of the community." R. v. Comptroller — General of Patents *ex parte* Bayer Products Ltd. (1941) 2 A.E.R. 677 — was a case in England where it was submitted that a certain Regulation 60E of the Defence (General) Regulations 1939 was invalid because, as was contended, its provisions were wholly outside the war purposes to which the power to make Regulations by the Emergency Powers (Defence) Act 1939 was conferred. This Act empowered

His Majesty in Council to make "such orders *as appeared to him necessary or expedient* for securing public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of the war and for maintaining supplies and services essential to the life of the community." Scott L.J. in the course of his judgment at p. 681 states:

> "The effect of the words *'as appear to him to be necessary or expedient' is* "in my opinion to give to His Majesty in Council, as the authority for "passing the delegated legislation, a complete discretion entrusted to him "by Parliament to decide what regulations are necessary for the purposes "named in the sub-section."

And in Progressive Supply Company Limited v. Dalton (1943) 1 Ch. 55, which was a case where the plaintiff sought to impeach the validity of a certain order made by the Board of Trade under the authority conferred by Regulation 55 (1) of the Defence (General) Regulations, Farwell, J. said:

> "If the Crown, acting through its proper servant makes a regulation, it "must be taken to be a regulation which the Crown considers to be neces- "sary for the defence of the realm and the other reasons mentioned. "It is "not for this court to consider whether there is evidence of a necessity for "the making of such order."

This Court is therefore bound to act on the assumption that there was necessity for the making of the order of 16th January, 1948.

It is, however, always open to an aggrieved person to challenge the order on the ground that it was made with *mala fides*, the proof of which would be a heavy burden on the person seeking to impeach the order on this ground. That the controller did give permits to some other persons not having the same essentiality of need of heavy American cars would not be enough. That he may have erred in regard to some other applicant would not justify another error in favour of the plaintiff on pain of being deemed guilty of *mala fides* towards the latter. I may add that, on the evidence submitted, I see no reason to conclude that the Controller had shown any favouritism in granting licences to other applicants. In the case of the grant of a licence to Mr. Psaila the Controller regarded the circumstances as special, and even if one may not be in entire agreement with him, there is no warrant for an inference of favouritism shown to Mr. Psaila — I am satisfied that he acted with perfect good faith throughout.

Though the Court is not empowered to question the need for the Order for the reasons given above, it may be mentioned that in the conditions prevailing at the time, it is manifest to the Court that the Order of 16th January, 1948, was necessary as "essential to the life of the community" giving those words the interpretation I have given above. It must be remembered that at the time no more American cars were to arrive save the few whose importation had already been licensed. The only cars in the market at that time were, as the Controller gave in his evidence, the smaller type of English car — not the equal of the

heavy American car. The Controller anticipated a rush for these American cars, and it was necessary to see that the persons who had real need for heavy cars should have them, and these cars should not get into the hands of others who might wish them just for their more luxurious features, and what also was not a remote possibility that persons having no special use for such cars would buy them at the controlled maximum price to which the dealer was restricted and re-sell them at great profit in the outside market where the price was uncontrolled.

For the above reasons the Court refuses to make the declaration asked for and dismisses the action against the first-named defendant.

As regards the defendant de Freitas, (The Central Garage) his attitude throughout the proceedings was that he was prepared to abide by the Order of the Court, and urged that so long as the Order of the Controller was good and effectual he was debarred from performance of the Contract of Sale. It is not disputed by the plaintiff that if the Order is deemed valid, the defendant de Freitas must be excused from the performance of the contract of sale which would be an offence by both vendor and purchaser. It is understood that the sum of $250: deposited with the defendant, de Freitas, by the plaintiff will be refunded to him on this declaration by the Court that the Controller's order was legal and valid; there is no counter-claim as regards this sum.

But the defendant de Freitas has in the last paragraph of his Statement of Defence given notice of his intention to claim damages for loss to him which may be sustained by his having been precluded from selling the car to any person who might have had the permission or consent of the Controller. No particulars to enable me to assess any such damages were supplied at the trial. It is appreciated that the damages sustained, if any, could only be based upon loss arising because of the lower price at which the car is sold later with perhaps a claim for interest. Such damages would be recoverable by enforcement of the undertaking given by plaintiff to pay any damages possibly accruing to this defendant, which was made a condition of the interlocutory injunction granted to the plaintiff.

In dismissing the action against the second-named defendant and giving judgment in his favour, the Court will give him liberty to apply for any damages he can prove later to have been sustained by him.

The Plaintiff must pay the costs of both defendants.

Solicitors: *Carlos Gomes* for the plaintiff.

V. C. Dias, Crown Solicitor, for the first defendant.

A. G. King for the second defendant.

PSAILA *v.* ROHOMAN

(In the Supreme Court, Civil Jurisdiction, (Ward, J.) September 4, 12, 19/1950.

Trade Marks — Interlocutory injunction — Trade Marks register — registration — Continuous user by non-registered person — agent of such person — Not protected.

In July 1940 the plaintiff applied for the registration of a trade mark "Good Vogue" in relation to razor blades, and on July 22, 1940, the trade mark was registered and a certificate of registration issued to the plaintiff without opposition.

The defendant was the agent of a German firm and was selling in the Colony "Good Vogue" razor blades imported from his principals. For many years prior to 1939, the German firm had exported "Good Vogue" razor blades into this Colony, but the war had interrupted their trade. The plaintiff sought an injunction restraining the defendant from using the word "Good Vogue" on the razor blades sold by him.

Held: There was satisfactory proof of continuous user by the German firm because their non-user was due to special circumstances of the trade over which they had no control but the action was against their agent who was not protected by his principals' user and an injunction would be granted on terms.

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

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

Ward, J:

JUDGMENT:

This is an application for an interlocutory order for an injunction to restrain the defendant, his servants and agents from using the word "Good Vogue" upon any labels or razor blades used by the defendant in the course of his trade in razor blades until after trial of this action. Both the plaintiff and the defendant have filed affidavits, and certain documents and exhibits have been laid over.

From these affidavits, documents and exhibits it appears that prior to 1939 the firm of Steinbruck and Drucks of Solingen, Germany manufactured razor blades bearing a mark "Good Vogue" in relation to razor blades identical with a trade mark registered in this Colony in July 1940 by the plaintiff, except that in the German registration the words "Made in Germany" formed part of the trade mark. It is also asserted by the defendant that a similar mark was registered at Berne, Switzerland in 1939 by Steinbruck and Drucks in accordance with the provisions of an international agreement for the protection of Industrial Property, known as the Madrid Arrangement 1911. But the trade mark was never registered in this Colony by the German manufacturers nor by any agency representing them. Great Britain was not a party to the Madrid Agreement so that the registration in 1939 confers no rights on Steinbruck and Drucks in this Colony. Prior to 1939 razor blades manufactured and exported by Steinbruck and Drucks and bearing; their "Good Vogue" trade mark were sold in fairly large quantities in this Colony through their agents R.

Singh & Co. of Berbice, and after 1938 through the defendant as their agent. After the outbreak of war in 1939 between Great Britain and Germany importations of razor blades from Germany ceased, and sales of "Good Vogue" razor blades as supplied by Steinbruck and Drucks consisted of blades from stocks imported into the Colony prior to September 1939. It is alleged in the defendant's affidavit that razor blades from stocks imported prior to September 1939 were being sold in this Colony as late as 1943, but this assertion is based on hearsay evidence. In July 1940 the plaintiff applied for the registration of a trade mark "Good Vogue" in relation to razor blades, and on July 22, 1940 the trade mark was registered and a certificate of registration issued to the plaintiff without opposition. This trade mark has now remained on the Register of Trade Marks for ten years, and by Section 39 of the Trade Marks Ordinance Chapter 59 there is an absolute presumption as to the validity of the original registration after seven years unless the registration was obtained by fraud or fell within the terms of disqualification in Section 10 of the Ordinance. This registration, unless the validity is challenged on the ground of fraud or of disqualification under Section 10, confers upon the proprietor of the trade mark a limited monopoly to use the trade mark, with this qualification that, if a person can prove that there has been substantial continuous user of the trade mark by him or his predecessor in business from a date anterior to the user or registration by the proprietor, the latter is not entitled to interfere with or restrain the user of the trade mark by such person.

It is admitted that the firm of Steinbruck and Drucks can establish user of the trade mark in this colony prior to the registration of the plaintiff's trade mark. But it has been submitted that there is no proof that the user has been continuous up to and beyond the date of registration of the plaintiff's mark; and secondly that in any case the defendant has no interest, whether as proprietor, assignee or licensed user in the "Good Vogue" trade mark of Steinbruck and Drucks.

With respect to the first submission the special circumstances of the case must be taken into consideration. The cessation of user of the trade mark by Steinbruck and Drucks in this Colony was not voluntary, nor is it asserted by the plaintiff that there was ever an abandonment of the user. In fact, as soon as trade relations were re-established between Germany and Great Britain and her colonies, the importation into this Colony of "Good Vogue" razor blades manufactured by Steinbruck and Drucks was started again through the defendant as agent. Further the plaintiff himself imported 500,000 blades from this firm bearing the name "Good Vogue" trade mark between April and June 1950. The case of Mouson & Co. v. Boehm (1884) 26 C.D. 398 was decided before the Trade Marks Act 1905, and the opinion of Maugham J., as he then was, in Smith, Bartlett & Co. v. British Pure Oil, Grease and Carbide Co. 51 R.P.C. 157 suggests that to establish continuous user something more must be proved than is necessary to negative abandonment. It is clear that non-user of the mark by Steinbruck and Drucks during the years of war and trade dislocation would

not amount to abandonment; and the case of Re David Thom & Co. Ltd's Application (1946) 63 R.P.C. 161 E. & E. Dig. 1947 Supp. Vol. XLIII. 21 par. 511 b. is authority for the proposition that where the non-user is due to special circumstances of the trade over which the alleged user of the trade mark had no control such non-user will not prevent the Court from holding that there is satisfactory proof of continuous user. In the latter case the applicants were prevented from using their mark because it was impossible to obtain import licences; and I am satisfied that for the purposes of the instant application Steinbruck and Drucks would be able, if they were parties to the action, to establish continuous user and the plaintiff would not be entitled to obtain an injunction against this firm to restrain them from selling in this Colony razor blades with the trade mark "Good Vogue".

But the action and summons are not against Steinbruck and Drucks but against the defendant who is their agent. Can the defendant assert any right to the use of this trade mark, either as proprietor, assignee or licensee? If he had been appointed as agent for the protection of their trade mark by Steinbruck and Drucks he might have asserted any right or set up any defence of which they might avail themselves. But it appears from the evidence that he is merely a commission agent for the sale of their product receiving by way of remuneration commission on all orders despatched by his principal to this Colony. As such he clearly has no claim to his principal's mark. But it has been suggested by Counsel for the defendant that he is entitled to the use of the trade mark as a person dealing with or offering for sale razor blades bearing the "Good Vogue" trade mark. It has been decided that a person who is an importer of manufactured goods may acquire for himself a proprietary right in goods bearing the manufacturer's trade mark by "getting a reputation for his care in selection or his precautions as to transit or storage, or because his local character is such that the article acquires a value by his testimony to its genuineness". But the defendant does not assert in his affidavit nor do the documents or exhibits show that the razor blades manufactured and marked by Steinbruck and Drucks were in any way associated with the defendant either by selection or get up or any other connection. Nobody in purchasing "Good Vogue" razor blades associated them with the defendant or with the Atlantic Sales Co. I follow in this matter the decision of Kay J. (later L.J. Kay) in Richards v. Butcher 7 R.P.C. 288 where he held that an exclusive agent has neither proprietary or any other right in the trade mark of his principal nor has he any right of action for passing off by misrepresentation. This decision was approved in its entirety in Dental Manufacturing Co. Ltd. v. De Troy & Co. (1912) 29 R.P.C. 617. If in fact the plaintiff has an exclusive right to the use of the "Good Vogue" Trade Mark conferred on him by the registration of his trade mark for seven years it would be no defence for the defendant to say that he is the agent of a manufacturer who had exported the razor blades to this Colony.

The plaintiff is, however, asking for the exercise of its powers

by a Court of Equity, and an injunction even of an interlocutory nature will not be granted unless the plaintiff's right to the exclusive use of the trade mark and to invoke the powers of the Court to protect it from infringement is clear. It is therefore necessary to consider the plaintiff's right to the user of the trade mark. Fraud has been alleged in paragraph 12 of the defendant's affidavit, but, quite rightly as I think, learned counsel for the defendant has not attempted to argue this allegation. The plaintiff in applying for registration of the trade mark may have been ignorant of the registration of the trade mark of Steinbruck and Drucks in Germany. There is no evidence about this one way or the other. But he may well have felt that for a period of uncertain length razor blades bearing the "Good Vogue" mark could not be imported into this colony, and to ensure that a supply of blades similarly marked should be available for the purposes of his trade he applied for a trade mark which could retain the goodwill already secured in the local market by "Good Vogue" razor blades. There is nothing inherently fraudulent in such an action since it was possible that the war might have lasted even longer than it in fact did or that the firm of. Steinbruck and Drucks at the end of hostilities might no longer be in existence. I am of opinion that the same considerations are a sufficient answer to any suggestion that the registration of the trade mark was calculated to deceive, though this is not specifically alleged by the defendant. If the war had not intervened or continued the use of the trade mark or the application to register could have been effectively challenged by Steinbruck and Drucks on the ground that it was calculated to deceive since it was in every material respect identical with their trade mark. But as the war had stopped the supply of "Good Vogue" razor blades and there was no certain prospect that a supply from the same manufacturers would be again available the plaintiff did not in my opinion register a trade mark which could be removed from the register because it fell within the disqualification set out in Section 10 of the Ordinance.

Mr. Stafford for the defendant has made a final submission that the plaintiff's object in registering the trade mark and in bringing this action for infringement was and is to prevent anyone in this colony from competing with them for business with the firm of Steinbruck and Drucks; and that on the authority of Re New Atlas Rubber Co. Ltd's Trade Mark (1918) 35 R.P.C. 269 the plaintiff is not entitled to do this As I have indicated above there is nothing in the affidavits or evidence to show that this was the plaintiff's object in registering the trade mark; and the plaintiff asserts that he has used the trade mark in connection with goods manufactured to his order by firms in England, the United States of America and Argentina. If an injunction is granted the plaintiff in the terms asked for it would effectively prevent the defendant from importing directly form Steinbruck and Drucks "Good Vogue" razor blades. But the plaintiff's an-

swer appears to me to be simple. Though this may be the effect of the action the intention is to protect his registered trade mark, which for the purposes of the present application appears to mo to have been validly registered.

I am careful to point out that any findings of fact are made upon the evidence at present before the Court, and are not final and conclusive findings with respect to the action, which must be decided by all the evidence adduced at the trial whether before me or another Judge.

Applying the law as I understand it to the facts before me the plaintiff as the registered proprietor in this colony of the "Good Vogue" trade mark in relation to razor blades has just grounds of complaint against the infringement of that mark by the defendant who has no proprietary or other right in the trade mark of Steinbruck and Drucks; the defendant is not entitled to the protection afforded by the proviso to Section 39 of the Trade Marks Ordinance since he has not established any user of the mark anterior to the plaintiff's registration nor has he any right to registration as proprietor of the "Good Vogue" trade mark. The plaintiff is in my opinion entitled to restrain defendant's user of the mark. But, as counsel for the defendant has assured the Court that Steinbruck and Drucks intend to apply for registration of the "Good Vogue" trade mark as proprietors either as a second registration with the plaintiff's trade mark or alternatively for the removal of the plaintiff's trade mark from the Register of Trade Marks, the order of the Court will be that an interim injunction restraining the defendant, his servants and agents from using the words "Good Vogue" upon any labels or razor blades used by the defendant in the course of his trade in razor blades be granted until after the trial of the action on condition that

(i) the action be not brought on for trial until Messrs. Steinbruck and Drucks have taken the necessary action to protect their alleged user of the "Good Vogue" Trade Mark from a date anterior to the user and registration of the "Good Vogue" Trade Mark by the plaintiff or until three months have elapsed from the date of this order, whichever event happens sooner; and

(ii) the plaintiff gives an undertaking to refrain from taking any action either by writing, cables or through agents in Germany to persuade Steinbruck and Drucks to transfer the agency for that firm in this Colony from the defendant to the plaintiff.

Costs of the application to be costs in the action. Liberty to apply.

Solicitors: *H. W. de Freitas* for plaintiff.

I. G. Zitman for defendant.

BOVELL *v.* JASODA, WAITH and MISIR

(In the Full Court (Boland C.J. (Ag.) Ward, J.) August 31, September 16, 23, 1950.

Appeal—Intoxicating Liquor Licensing Ordinance, Chapter 107*—Summary Jurisdiction* (*Appeals*) *Ordinance, Chapter* 16*—non-compliance.*

The respondents and another made separate applications to the Licensing Board for the county of Essequebo for the grant of a spirit shop licence under the Intoxicating Liquor Licensing Ordinance, Chapter 107. The appellant opposed each of the four applications which for convenience were considered together.

At the conclusion of the hearing the Board being of opinion that each applicant had equally good grounds for the grant of a licence and as it was possible to grant only one licence ordered the District Commissioner, in accordance with the provisions of section 18 of the Ordinance, to put up the right to the grant of a licence for sale at public auction.

The appellant lodged an appeal against the Board's decision and deposited the sum of twenty-five dollars as security for costs.

Preliminary objection to the hearing of the appeal was taken on the ground that as there were four applications a deposit for each should have been made in respect of each application appealed against.

Held: That there were in fact four decisions and that if the appellant desired to exercise his right of appeal in respect of three of the four decisions of the Board, he was required to give three separate notices of appeal and to pay the fees required by section 5 of Chapter 16 in respect of each appeal.

Alexander—v—Das and Glasgow (1938) L.R.B.G. 206 distinguished.

J. O. F. Haynes for the appellant.

L. Low for first-named respondent.

Theo Lee for second-named respondent.

Sir Eustace Woolford, K.C. for third-named respondent.

Judgment of the Court:

JUDGMENT.

On the 16th September at the conclusion of the hearing we dismissed this appeal with costs and duly recorded our decision, but we mentioned then that we considered that the point of law which was involved made it justifiable that we should set down more fully in writing the reasons for our judgment. Accordingly that which follows furnishes the full reasons for the judgment of the Court.

This is an appeal from a decision of the Licensing Board for the County of Essequibo, constituted under Section 5 of the Intoxicating Liquor Licensing Ordinance, Chapter 107 dated November 3, 1949 in the matter of the applications of one Jane Williams and of Jasoda, William Waith and Sreedat Misir the Respondents herein. At the conclusion of its hearings of the four applications the Board found as follows: "The Board is of opinion that the premises of the four applicants are situate in the same locality and considers that a certificate may be granted to any one of the four applicants".

It appears from the evidence that there are three spirit shops licensed in accordance with the Intoxicating Liquor Licensing Ordinance in the Island of Leguan. By Order-in-Council No. 641 published in the Official Gazette of April 30, 1949 the permitted number was increased to four, and it was in respect of the grant of this additional licence that the four applications were made. Having reached the conclusion that each of the four applicants had an equally good claim to the grant of this additional licence, the Board, in accordance with the provisions of Section 18 of the Intoxicating Liquor Licensing Ordinance Chapter 107 ordered the District Commissioner to put up the right to the grant for sale at public auction. The Appellant after due notice had appeared at the hearing before the Board and opposed each of the three applications made by the Respondents.

A preliminary objection to the appeal was taken by the learned counsel who appeared for the three Respondents, Jasoda, William Waith and Sreedat Misir, on the ground that the appellant had not complied with the provisions of Section 5 of the Summary Jurisdiction (Appeals) Ordinance Chapter 16, which by Section 25 subsection (2) of the Intoxicating Liquor Licensing Ordinance is made applicable as regards procedure, fees and the powers of the Full Court to appeals from decisions of a licensing Board. Sir E. Woolford, K.C., who appeared as Counsel for Misir, invited the Court to hold that the case of Alexander v. Das and Glasgow (1938) L.R.B.G. 206 was wrongly decided. The Court is of opinion that for the purpose of deciding this preliminary objection it is unnecessary to review the decision of the Pull Court in Alexander v. Das and Glasgow or to canvas the question proposed by learned Counsel.

It is more relevant to consider the procedure in the matter of applications for the grant of a licence under the Intoxicating Liquor Licensing Ordinance. Section 13 of this Ordinance provides that "anyone who wishes to apply to a board for the grant of a certificate for the issue or renewal of a hotel, tavern or spirit shop licence shall serve on the district commissary an application in duplicate signed by himself or his agent on his behalf in Form I in the Schedule". Section 14 of the Ordinance provides that when notice has been duly given by anyone of his intention to apply for a certificate anyone may oppose the application on any of the grounds enumerated in Section 12 of the Ordinance. Then by Section 17, it is provided that on the day appointed the board shall openly hear, consider and deal with all applications presented; and if the objections to the grant or renewal of a licence are established to the satisfaction of the board, the board may reject the application; otherwise the application may be granted if the board is satisfied that the application is duly made and can be granted. Section 25 (1) of the Ordinance gives a right of appeal both to the applicant and to anyone who has duly opposed the application "against the decision of a board refusing or granting a certificate". The provisions of Section 18 of the Ordinance come into operation only after the board considers

that a certificate may be granted there being no valid objection to its being granted to any one of two or more applicants.

It is clear that each application is a separate and distinct cause or matter for the consideration of the Board, and in the matter now before the Court the appellant duly filed three notices of opposition to the three applications which he desired to oppose. The grounds of opposition were set out in accordance with the provisions of the Ordinance and differed in the matter of the application of William Waith from those stated in the matter of the applications of Jasoda and Sreedat Misir. The Board is required to hear and consider each application separately, and, having heard the witnesses, to decide whether the objections have been established and whether the application has been duly made and can be granted. The decision in respect of each application is a separate decision, and it is against such a decision either refusing or granting a certificate that a right of appeal is given by Section 25 of the Intoxicating Liquor Licensing Ordinance. The fact that for the convenience of the Board or of Counsel appearing for the applicants and the opponents the applications are considered together does not exempt the Board from its duty of considering each application and giving a decision with respect to each application. There were in fact four decisions in respect of the four applications before the Board, and, if the appellant desired to exercise his right of appeal in respect of three of these decisions, it appears to us that he was required to give three separate notices of appeal and to pay the fees required by Section 5 of Chapter 16 in respect of each appeal. This he has not done and this Court has therefore no jurisdiction to hear this appeal since the Ordinance provides that unless this has been done within the prescribed period of time the notice of appeal shall be of no effect.

The appeal is therefore dismissed and the appellant is ordered to pay the taxed costs of the three Respondents. The sum of twenty-five dollars deposited by Appellant shall be divided equally between each of the three Respondents in part payment of his costs; leave to withdraw such share of the deposit for the purpose aforesaid is hereby given to each Respondent.

FRED M. BOLAND,
Chief Justice (ag.).
E. R. L. WARD.
Second Puisne Judge.

Dated this 23rd day of September, 1950.

LALLIE *v.* LOWE, ISHMAEL *v.* HOBBS

Between:—

LALLIE,

Appellant (Defendant),

— and —

ISAAC LOWE, P.C. 5173,

Respondent (Complainant)

AND

MOHAMED ISHMAEL also called MOHAMED JACOOB,

Appellant (Defendant),

— and —

OSCAR HOBBS, L|cpl. 4582,

Respondent (Complainant)

(Before Full Court (Boland, C.J. (Acting) Ward and Hughes J.J.) 1950 June 2 and 24.

Motor Vehicles and Road Traffic Ordinance—uninsured vehicle—driver acting contrary to express instructions—owner not using vehicle.

The appellant Ishmael's motor car was licensed for private use only and the appellant Lallie was employed to drive it. The car was insured against third party risks but only in respect of its use for social, domestic and pleasure purposes and for the policy holder's business. The policy expressly excluded use of the car for hire and reward.

While driving the car on the owner's business the driver took up passengers and received fares although he had been instructed not to do so.

The Magistrate convicted the driver, the appellant Lallie, for using an unlicensed motor vehicle and for driving a motor car when there was not in force in relation to the user of the said vehicle a policy of insurance in respect of third party risks. The owner, the appellant Ishmael, was convicted for using the said motor car when there was not a policy of insurance in relation to the user of such car in respect of third party risks. Both owner and driver appealed.

Held: the appellant Lallie, who was driving the car was clearly in breach of the provisions of the Ordinance, but as the driver was acting on his own account and without authority, the appellant Ishmael was not guilty of the offence charged.

John T. Ellis Ltd—v—Walter T. Hinds (1947) 1. K.B. 475 and Dutch —v—Burns (1943) 2. All E.R. 441 applied.

S. D. S. Hardyal for appellants.

G. M. Farnum, Legal Draftsman for respondents.

Judgment of the Court:

The appellant, Lallie, was charged before the Magistrate of the Courantyne Judicial District firstly with using an unlicensed motor vehicle contrary to section 22 (1) of the Motor Vehicles and Road Traffic Ordinance and secondly with driving a motor car when there was not in force in relation to the user of the said vehicle a policy of insurance in respect of third party risks. The second appellant, Ishmael, was charged for using the said motor car when there was not a policy of insurance in relation to the

user of such car in respect of third party risks. The Magistrate convicted both appellants on all the charges and they have both appealed to this Court Lallie against the sentence and Ishmael against conviction and sentence in respect of the alleged breaches of the Motor Vehicles Insurance (Third Party Risks) Ordinance No. 22 of 1937.

There is no dispute as to the facts in issue. The appellant, Lallie, who was employed on the 2nd September, 1949, to drive the appellant, Ishmael's motor car P. 5478 — a car licensed for private use only — took up passengers and received fares while on a journey from New Amsterdam to Skeldon. According to Lallie's evidence he was not regularly employed by Ishmael and his instructions were to proceed to Skeldon and to return to New Amsterdam with Ishmael's wife and mother. He was, he says, warned by Ishmael not to take up any passengers on the way. There was in force at the time a policy of Insurance with respect to the car by which the insurers undertook to indemnify the owner, Ishmael, against third party risks but only in respect of its use for social, domestic, and pleasure purposes and for the Policy holder's business. The policy expressly excludes use of the car for hire and reward.

On this evidence the learned Magistrate held that both the accused had committed an offence against sub-section (1) of Section 3 of the Motor Vehicles Insurance (Third Party Risks) Ordinance. The first point to be decided is whether in fact there was an insurance policy in force in relation to the user of the motor car P 5478 on the relevant date. The terms of the policy appear to us clearly to exclude the use of the car for hire or reward; and, as at the time of the incident which forms the subject of the charge it was being so used, the policy would not cover this use and at that moment there would be no policy in force with regard to the user of the car. As the appellant Lallie was driving the car he was clearly in breach of the provisions of the Ordinance; and, in view of the serious consequences which might have resulted from that breach if a third party had been injured, we do not consider it advisable to reduce the fine imposed by the Magistrate even though his conviction also involves the loss of his driver's licence for a year.

In the case of Ishmael, however, there is a further point to be considered. Ishmael was charged with using the motor car in breach of the Ordinance. As has been pointed out the word "use" is capable of many meanings. A passenger in a motor car may be said to be using it while he is given a lift; and in another sense an owner may be said to be using the car when he directs his servant to drive it whether he is present or not. Under certain provisions of the law relating to motor vehicles on public highways an owner may be held to be using the vehicle even though he does not know of the actual user, as for example where a servant in the course of his employment takes out a car with defective brakes without the owner's knowledge that the brakes are defective. It was the reasoning in such a case as this which apparently misled the learned Magistrate

into construing "use" in the widest possible terms in relation to any breach of the laws relating to motor vehicles. But it is clear that in the instant case the owner would not have been liable to a third party if, while the driver was using the vehicle in an unauthorised manner, such third party had received injuries. This point was clearly expressed by the Court in the case of John T. Ellis Ltd. v. Walter T. Hinds. (1947) 1, K.B. 475. Lord Goddard L.C.J., in delivering the leading judgment said at p. 485: "A company which employs men to drive their vehicles must take out a policy which will cover the user of the vehicles by their servants, but only while they are being driven on the company's business, because if the company's servants are driving on their own account, or are using their master's vehicles without authority, the master has neither caused nor permitted the use of the vehicles." Then referring to the case of Sutch v. Burns (1943) 2 All. E.R. 441 the Lord Chief Justice said: "If we understand the judgment aright, it would mean that the owner of a car was bound to have a policy which would cover the liability of his chauffeur who had taken out his master's car on what is commonly known as a joy ride and caused personal injury to a third party while so doing. If a driver the results of whose negligence would be covered by his master's policy when driving for him, drives under circumstances which absolve the master from liability, he commits an offence against the section, but the master does not." In this case the section itself makes it clear that "use" is not to be interpreted in any comprehensive sense since the master is also made liable if he causes or permits the vehicle to be used. Here the user by Lallie was against the express orders of the owner who had in force a policy in accordance with the provisions of the Ordinance to cover the use of the car which he had directed and permitted. He was not therefore guilty in our opinion of the offence charged and the appeal must be allowed and the conviction and sentence set aside. As the two appeals have been taken by consent together the order as to costs will be that the appellant Lallie, whose appeal is dismissed and conviction and sentence affirmed, pay one half of the costs of the appeal to the other appellant.

BOOKER BROS. *v.* GANGA PERSAUD

BOOKER BROS. MCCONNELL & Co., LTD. *v.* GANGA PERSAUD

(In the Supreme Court, Civil Jurisdiction (WARD, J.) October 5, 12, 1950).

Hire purchase — Owner — Sale — Purchaser hiring to previous owner.

The de fendant was owner of a motor car which required extensive repairs. Upon completion of the work by the plaintiffs, they purchased the defendant's motor car for its agreed value before repairs in order to secure the debt due to them for the repairs and then let the car to the defendant with an option of purchase by entering into a hire purchase agreement under which six months' rent together with deposit would have amounted to purchase price.

The defendant omitted to pay the monthly hire but kept the car for ten months and then terminated the agreement by delivering the car to the plaintiffs.

Held: The agreement was clearly a hire purchase agreement and the plaintiffs were entitled to recover the instalments due under the contract, but only for six months.

JUDGMENT:

This action is for the recovery of $1,340 for breach of a contract of hire purchase made between the Plaintiff Company and the Defendant on 29th October, 1948. By the terms of the contract the Plaintiff Company agreed to hire the Defendant a Plymouth motor car on certain terms and conditions set out in the agreement with an option to the Defendant to purchase the motor car either at the end of the period fixed in the agreement as the period of hire or at any intermediate point of time within the prescribed period. The hirer had the right under the agreement of terminating the contract at any time by delivery of the car to the Plaintiff Company, the only condition being that if he terminated the contract before three months had elapsed he should pay to the Plaintiff Company a sum equivalent to three months' rent.

Counsel for the Defendant has argued that this is not a hire purchase agreement at all and that in contracts of this sort one is entitled to look at the reality of the contract and not at its form. This latter proposition is right and is clearly stated in the opinions given in the House of Lords in Helby vs. V. Matthews 1895 A.C. 471. He contends that the real nature of the contract was to give security to the Plaintiff Company for the cost of the repairs done by them on the motor car which had originally belonged to the Defendant. I have no doubt that the Plaintiff Company desired nothing more than the payment of the existing debt for the repairs to the car or security for it and this was admitted by Mr. Napper. But it is equally clear that after full consideration, the Plaintiff Company decided that the only manner in which they could secure their debt without inconveniencing the Defendant was by purchasing the Defendant's interest in the car and hiring it back to him with an option to purchase. The car was valued by Mr. Stoute as at the date of delivery for repairs and this was accepted by the Defendant and by the Plaintiff Company; and the Plaintiff Com-

pany paid the Defendant $300 by cheque and so became the owner of the car. The agreement now sued on was entered into between the Plaintiff Company and the Defendant who paid the Plaintiff Company $600 as a first payment. The terms of the agreement clearly fall within the well-recognised boundaries of a hire purchase agreement and I call attention specially to the clause giving the Defendant a right to terminate the hire at any time. I am satisfied that the Defendant knew the nature of the contract by his subsequent actions and letters and by his election to terminate the agreement by delivering the car to the owner.

The question of the cost of the repairs does not really arise as it is clear from the agreement and the correspondence that the Defendant accepted the sum of $1,104 as a reasonable charge for the work done until May 1949. But I would add, to avoid any misconception in case the matter is taken further, that in my opinion the Defendant's contention that he was charged for work not done and charged excessively for work done is wholly unfounded. The evidence for the Defendant on this point really supports the Plaintiff's bill of charges.

The sole question which remains therefore is the amount the Plaintiff Company is entitled to recover. The claim is for ten months' rent at $134 per month, the monthly sum agreed upon for the hire of the car. I do not think the Plaintiff is entitled to this amount. A hire purchase agreement, as Goddard J. (as he then was) pointed out in Karflex Ltd. v. Poole (1933) 2 Q.B. page 264 is not an ordinary simple bailment for hire. It is a special kind of contract partly creating a bailment and partly giving an option of sale and there are special terms and special representations in such an agreement. One of the terms of the agreement is that the hire shall be for a specified period, in this case six months. As far as I know it has never been suggested that if an owner allows some indulgence to the hirer by letting him defer payment of an instalment when it is due he is entitled to extend the period of hiring and claim rent for any additional period. In some hire purchase agreements the hirer is penalised for failure to pay an instalment at the stipulated time by being charged interest on it. But in such an agreement an ordinary bailment for hire is clearly not in the contemplation of the parties. In my view the agreement must be interpreted strictly. The bailment is for a fixed and certain period at the end of which, if certain conditions are fulfilled, the hirer has the option of sale. If at any intermediate period of time the hirer elects to pay the total amount chargeable for the full period of hiring he exercises by so doing his option to purchase and the car would become his. If on the other hand he fails at any intermediate period of time to carry out the terms of the agreement the owner may seize the car and sue for any rent remaining unpaid or any sum agreed on between the parties for depreciation. But if the owner gives some forbearance to the hirer by postponing the payment of an instalment or instalments this does not jeopardise his rights nor on the other hand does it extend his right to recovering rent beyond the limits of the contract. In my view the essential terms

of this contract are for a hiring for a period of six months at the end of which period the full sum contemplated by the parties as owing under the contract would be discharged. I express no opinion as to whether the plaintiff company might claim successfully for use and occupation for any period exceeding the six months specified in the contract if they had demanded the delivery of the article from the defendant. But on the facts of this case and applying the law as I understand it I find that the defendant is indebted to the plaintiff company for six months' rent under the terms of the hire purchase agreement of October 29, 1948 and I give judgment accordingly to the plaintiff company for the sum of $804 and the taxed costs of the action.

Solicitors: J. E. de Freitas for the plaintiff. N. O. Poonai for the defendant.

In the matter of the Income Tax Ordinance, Chapter 28.

JAIKARAN & SONS, LIMITED v. COMMISSIONERS OF INCOME TAX.

(In Chambers, (HUGHES, J.), October 17, 24, 1950)

Income tax rules 1929—*Appeal from Commissioner—Requirements—Particulars—Preliminary objection at hearing.*

In an appeal to a Judge in Chambers from the assessment of the Commissioner of Income Tax a preliminary objection to the hearing of the appeal was taken on the ground that the summons filed by the appellants did not set out a full statement of the grounds of appeal by specifically stating the several facts and contentions of law upon which the appellant urged that the assessment of the Commissioner was erroneous as required by rule 2 of the Income Tax Appeal Rules, 1929.

The appellant argued that the preliminary objection ought not to be considered as such objection was in the nature of an application and should be made by motion on summons to comply with rule 18 of the Rules.

Held: A preliminary objection to the hearing of an income tax appeal is not required to be made by motion or summons.

The appellant's summons did not comply with rule 2 of the Rules and should be struck out.

L. M. F. Cabral for appellants.

Solicitor-General for respondents.

HUGHES, J.

In this matter application is made on behalf of the Respondents that the summons herein, filed by the Appellants on the 22nd December, 1949, be struck out on the ground that it does not "set out a full statement of the grounds of appeal by specifically stating the several facts and contentions of law upon which the appellant alleges that the assessment of the Commissioner is erroneous," as required by rule 2 of the Income Tax Appeal Rules, 1929, (hereinafter referred to as "the Rules.").

2 (1) Before considering the merits of the application referred to in the preceding paragraph, it is necessary to deal with the objection taken, on behalf of the Appellants, to that application. Such objection is to the effect that the application is in fact an "application in Chambers" within the meaning of that expression in rule 18 of the Rules, and therefore must be, but has not been, made in accordance with the Rules of Court as required by rule 18 of the Rules. The point for decision in this connexion is simply this: Can the application of the Respondents be regarded as a preliminary objection and one which may properly be made when the appeal comes on for hearing or is it the case that such application must be made by motion or summons?

(2) In the first paragraph of the judgment of Worley, C.J. in the case of British Guiana Restaurants Ltd. and the Commissioners of Income Tax (No. 293 of 1949), quoted by the learned Solicitor-General in the instant case, there occurs the following sentence "I upheld a preliminary objection by the Respondents based on the appellants' failure to comply with the provisions of section 44 and dismissed the appeal with costs." The objection in that case is, as regards both the ground on which it was made and the manner in which it was taken, in no material respect different from the objection now under consideration. With great respect, I agree that the procedure for making the objection, adopted in the case referred to herein, is correct and accordingly the submission of learned Counsel for the appellants on this point is not upheld. To hold that this objection should be made otherwise than in the manner adopted in this case would, in my view, be to import, without ground for so doing, a more formal and cumbrous procedure which would be out of keeping with the tenor of the provisions governing appeals in these matters: such provisions appear to be designed to bring about the determination of an appeal in as summary a manner as possible and with a minimum of formality.

3 (1) The next matter for consideration is whether the summons complies with the requirements of that part of rule 2 of the Rules which is quoted in paragraph 1 hereof.

(2) It is clearly the intention that the particulars called for by rule 2 and by rule 5 (which relates to the Commissioner's statement of material facts and reasons) shall provide full and complete information not only regarding the points in issue but also all relevant details in connexion therewith. It is, in my opinion, not putting it too high to say that compliance with these two rules should, in most cases, render unnecessary the taking of oral evidence on the hearing of an appeal.

(3) There is, in my view, no doubt whatever that the summons does not comply with Rule 2 of the Rules for, as regards the facts, it does no more than give the two sums in dispute and state that these are respectively incurred for legal expenses and for medical expenses for Mr. Jaikaran. As regards the contentions of law there are merely the bald statements first, that the two sums are not taxable and secondly, that the Commissioners

did not comply with the requirements of sections 40 and 41 of the Income Tax Ordinance. It cannot be said that the Summons contains a full statement either of the facts or of the contentions of law—it is in fact difficult to imagine a more incomplete statement.

4. Had the summons been less defective, I would have considered allowing amendment; as it is, I find myself with no alternative to striking it out and it is ordered accordingly.

5. Costs to respondents fixed at two hundred and forty dollars—section 45 (9) of the Income Tax Ordinance, Chapter 38.

Solicitors:

F. I. Dias for the Appellants.

V. C. Dias, Crown Solicitor, for the Respondent.

(In Chambers, on appeal from the Rent Assessor, (WARD, J.) September 11, 30, 1950).

Rent Restriction — dwelling house — agreement to let — essential factor — business premises.

The respondent applied to the Rent Assessor to ascertain and certify the standard rent and fix the maximum rent of his dwelling house. The uncontradicted documentary evidence established that the respondent before renting the premises requested the appellant to make certain specific alterations and additions suitable for his "business". The Rent Assessor found that the appellant had let the premises as a dwelling house and certified the standard rent as the first rental of the dwelling house. The landlord appealed.

Held: 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 and therefore if premises are let for business purposes, the tenant cannot claim they have been converted into a dwelling house, because he lives in them and the premises were let as business premises.

Wolfe v. Hogan (1949) 2 KB 194 applied.

Mr. I. G. Zitman for Appellant.

Mr. Theo. Lee for Respondent.

WARD, J. JUDGMENT:

This is an appeal from a decision of the Rent Assessor of the Judicial District of Georgetown who on the Respondent's application fixed the standard rent of premises at Lot 81 Robb and Camp Streets, Georgetown at $40 per month and the maximum rent at $80.87 per month. It is admitted by Counsel for the Respondent that in calculating the permitted increase under section 6 (1) (b) of the Rent Restriction Ordinance, the learned Rent Assessor made a mistake and that the permitted increase should be $17.70 instead of $11.20 as it appears on the Certificate of the Rent Assessor.

The application is not however limited to the question of the permitted increases, though these are specifically traversed. The Appellant contends that the learned Rent Assessor erred in holding as a matter of law that the premises at 81 Robb and Camp Streets, Georgetown were let to the Respondent as a dwelling house. The Rent Assessor in his findings on this point says: "In 1939 the entire building which was a two-storeyed building with the usual unenclosed space below was let by A. Sankar as a dwelling house from the Heirs of De Freitas Limited at $50 per month. In 1945 without any alteration the entire building including the unenclosed space below was rented to E. C. Inniss at $80 per month. E. C. Inniss lived on the premises and carried on a boarding house. In the circumstances above stated I find that the standard rent is $50 per month". This I understand to be a finding that the premises are a dwelling house and were rented as such to the Respondent by the Appellant's agent.

The facts as shown in the evidence and in the record sent up to this Court do not in my opinion support this finding. The terms of the agreement between the Appellant and Respondent are, according to the evidence of Andrew James, the Appellant's agent, contained in a letter dated 20th April, 1948—Ex. "A". This has not been contradicted by the Respondent. The document is signed by the Respondent, and the Appellant has on the strength of the agreement expended a considerable sum of money in effecting alterations and additions to the premises to suit the Respondent's convenience and the purpose for which he agreed to rent the premises. That purpose is clearly set out in the second sentence of the latter: "The set up however is not suitable for my business and I am willing to pay you a rental of $125 per month provided you make the following alterations and additions", which are then specifically set out in nine paragraphs. The tenant in his evidence does not attempt in any way to deviate from the terms of the agreement. He said: "There were three bedrooms in the middle flat; this was increased to five. Two bedrooms were added to the top flat making seven. All the items in Ex. "A" were done except that only two rooms were added to the top flat". Nowhere in his evidence does he assert that the premises were rented as a dwelling house or that he has occupied it as such to the knowledge of the Respondent.

The Rent Assessor relied in coming to his decision on the cases of Colls v. Parnham 1922 1 K.B. 325 and Vickery v. Martin 1944 2 A.E.R. 167. With due respect to the learned Rent Assessor I think he failed to appreciate the real grounds of the decision in these cases. In both of these cases the original letting of the premises was as a separate dwelling, that is a dwelling house. In Vickery v. Martin the assignee of the lease had actually covenanted to use the premises as a private dwelling house only, but he had in fact used if as a boarding house to the knowledge of the landlord who had not objected. In Colls v. Parnham there was no covenant but the letting was of a dwelling house at which the tenant subsequently received paying guests. But the facts in the instant case are entirely different. Here the terms of the letting

are for the purposes of business. A somewhat similar agreement for letting was recently considered by the Court of Appeal in England in Wolfe v. Hogan 1949 2 K.B. 194. In this case Evershed L.J. adopted the statement of the law applicable to such cases from Megany on the Rent Acts Fourth Edition at page 19: "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. Thus if premises are let for business purposes the tenant cannot claim that they have been converted into a dwelling house merely because somebody lives on the premises". Denning L.J. expresses the same view at pages 204 and 205: "In determining whether a house or part of a house is let as a dwelling within the meaning of the Rent Restriction Acts it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting it is not necessary to look further. It is not a question of implied terms it is a question of the purpose for which the premises were let".

In this case not only is the agreement unequivocal but all the circumstances show that the building was completely changed from a dwelling house into a building to be used, as section 2 of the Rent Restriction Ordinance prescribes, mainly for purposes of trade, business or professional purposes. The major portion of the ground floor was detached from what was originally a dwelling house and converted into a building which now accommodates an Aerated Water Factory. Staircases were removed; the first and second flats were remodelled so as to add increased accommodation for boarders in order to facilitate the business which the Respondent intended to carry on the premises. It would be difficult to imagine a landlord carrying out these extensive alterations unless he understood that the premises were leased by the new tenant for business purposes. It is clear both from the words of the agreement and from the alterations and additions that the purpose of the letting was for business purposes.

Business premises are controlled under the Rent Restriction Ordinance and it is necessary in fixing the standard rent to ascertain the rent at which the premises were let as a commercial building either on the 3rd September, 1939 or on the date at which they were first let after that date. It is clear that these premises were not let on September 3, 1939 nor at any date prior to that as a commercial building. The Rent Assessor has found as a fact that the letting to E. C. Inniss was as a dwelling house and there is nothing in the evidence to contradict that finding. In August 1945 Mr. Inniss rented the premises from the Respondent at a rental of $80 per month. No remodelling or alterations had been done and it would appear that Inniss used the premises as a residence and took in boarders at the same time. Giving due regard to the definition of commercial building in section 2 of the Rent Restriction Ordinance as a building or part of a building which is used mainly for business, trade or professional purposes I cannot find in the evidence anything to show that either the agreement made by Mr. Inniss or his use of the premises was mainly for the pur-

poses of business. It therefore appears that the earliest date at which the premises were let as a commercial building was at the date on which they were let to the Respondent in accordance with the terms of the agreement. That being the case the standard rent would be the rent he agreed to pay on that date, namely $125 per month.

The appeal is therefore allowed and the certificate of the Rent Assessor is amended by assessing the standard rent al $125 and by deleting the assessments for permitted increases made thereon. There will be no order as to costs.

E. R. L. WARD,
Second Puisne Judge.

Dated this 25th day of September, 1950.

LEE *v.* LEE and ABASS

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago, (Collymore, Malone, Worley, C.J.J.).

Divorce—adultery—submission of no prima facie case—duty to elect—new trial.

The appellant petitioned the Court for a decree dissolving his marriage with the respondent on the ground of her adultery with the co-respondent.

At the conclusion of the petitioner's case counsel for the respondent submitted that the petition should be dismissed as the quality of the evidence was not such as to satisfy the degree of proof required to establish a charge of adultery. Counsel for the petitioner asked that respondent's counsel be put to his election whereupon the latter replied "I elect to rest on my submissions if I am required to do so."

The trial Judge did not hear co-respondent's counsel nor was opportunity afforded to petitioner's counsel of addressing the Court on the merits of the case as a whole. He reserved judgment on the submission and the next morning the petition was dismissed.

The petitioner appealed.

Held: When counsel desire to make a submission of no case the Judge, sitting without a jury, should put counsel to his election and refuse to rule unless counsel elects to call no evidence. The proceedings in the court below were so unsatisfactory that there must be a new trial.

Judgment

The appellant in this matter petitioned the Court below for a decree dissolving his marriage with the respondent on the ground of her adultery with the co-respondent and asked for the custody of two children issue of the marriage, for the costs of the suit (as regards the respondent to be paid out of her separate estate) and that the co-respondent be condemned in damages. His petition was dismissed with costs of suit to be paid by him to the respondent and co-respondent and he now asks this Court to reverse that judgment and to grant him a decree nisi with costs,

alternatively, to order a new trial. The petition alleged that the respondent and co-respondent had frequently committed adultery and charged two particular occasions namely, on 17th May, 1947, and the 6th September, 1948. Condonation of the adultery alleged to have occurred on the former occasion was admitted and the petitioner and respondent subsequently lived and co-habited together; but the petitioner relied on revival of the condoned offence by subsequent misconduct on the latter occasion.

The trial took an unfortunate course and ended abruptly at the close of the petitioner's case on a submission by counsel for the respondent. It is important to consider the nature of this submission, the circumstances in which it was made and the manner in which the learned trial judge dealt with it.

The case for the petitioner was concluded on the afternoon of 19th October, 1949, after a hearing which had lasted several days, and counsel for the respondent then submitted, as the judge noted, "no case to answer". In view of the order which we propose to make we shall avoid any comment upon the evidence, and it will suffice to say that this submission could not have been made on any ground of insufficiency of the evidence in law, but was, as Mr. Clarke counsel for the respondent admitted in argument, based solely on the ground that the quality of the evidence was not such as to satisfy the degree of proof required to establish a charge of adultery. When Mr. Clarke began to elaborate his submission, counsel for the petitioner asked that he be put to his election, to which Mr. Clarke replied "I elect to rest on my submissions—if I am required to do so". It was stated at the Bar by junior counsel for the appellant on the appeal, and not contradicted, that the judge then said "Quite right: I should have thrown the case out long ago".

The argument on the submission was then resumed, in the course of which counsel for the petitioner contended that the submission was merely that there was no *prima facie* case to answer and both counsel referred to some of the facts in issue. The learned judge then said (as we are informed by counsel) "I agree with you Mr. Clarke, even at the risk of future developments. I don't believe the story. But I will adjourn to tomorrow for judgment on the submissions". The following morning the judge read his judgment (which forms the written judgment in the record) and dismissed the petition. Thus a final decision was reached after a conditional election on behalf of the respondent, no election or indeed submission of any kind on behalf of the co-respondent and without any opportunity being afforded to counsel for the petitioner of addressing the Court on the merits of the case as a whole. Senior counsel for the co-respondent was in Court on the afternoon of October 19 and the morning of the 20th but did not intervene until after judgment had been delivered, when he rose to make some explanation of the position of his client. He was informed by the judge that as the wife had been dismissed from the suit the co-respondent had likewise been dismissed, whereupon he asked for and was given his costs.

In Alexander v. Rayson (1936) L.R. 1 K.B. 169, the Court of Appeal made observations on the inconvenience of the practice of asking a judge, when sitting without a jury, to rule at the conclusion of the evidence of the party on whom the onus of proof lies, that there is no case to answer. At p. 178 of the report the Court said:—

> "Where an action is being heard by a jury it is. of course, quite usual and often very convenient at the end of the case of the plaintiff, or of the party having the onus of proof, as the defendant had here, for the opposing party to ask for the ruling of the judge whether there is any case to go to the jury, who are the only judges of fact. It also seems to be not unusual in the King's Bench Division to ask for a similar ruling in actions tried by a judge alone. We think, however, that this is highly inconvenient. For the judge in such cases is also the judge of fact, and we cannot think it right that the judge of fact should be asked to express any opinion upon the evidence until the evidence is completed. Certainly no one would ever dream of asking a jury at the end of a plaintiff's case to say what verdict they would be prepared to give if the defendant called no evidence, and we fail to see why a judge should be asked such a question in cases where he and not a jury is the judge that has to determine the facts. In such cases we venture to think that the responsibility for not calling rebutting evidence should be upon the other party's counsel and upon no one else.

In Yuill v. Yuill (1945) 1 All E.R. 183 Lord Greene M.R. at page 185 assumes that this is a proper practice to follow in the Divorce Division and explains its effect:—

> "It does not mean that counsel by submitting no case ipso facto loses his right to call evidence if his submission fails. He only loses that right if he definitely elects to call no evidence. He may make this election expressly or (as in Laurie v. Raglan Building Co. Ltd. (1942) 1 K.B. 152) impliedly. The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election and no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission".

The inconvenience and confusion which may result from asking a judge sitting alone to rule oh the evidence before it has all been heard, especially in a divorce petition involving a respondent and a co-respondent, are well exemplified in the present case. Had counsel for the respondent contented himself with saying that he would call no evidence, the Court would then have called

upon counsel for the co-respondent who might or might not have elected to call evidence. The order of the final speeches would then have been determined and the court would have been apprised of all the evidence and arguments.

The accepted rules of practice were not, however, followed with the result, as already indicated, that the petitioner's counsel was deprived of his right of address on the whole case and counsel for the co-respondent, sheltering behind the conditional election made on behalf of the respondent, had no need himself to elect whether to call evidence or make any submission to the Court. His quiescence is not surprising as the co-respondent's case stood or fell with that of the respondent, and it is clear from the record and from what was stated at the Bar that the learned trial judge, had, earlier in the proceedings, rightly or wrongly, indicated his opinion on the merits of the petitioner's case.

It is clear also, that the judge, in his zeal for elucidating the truth and arriving at a conclusion, took a very prominent part in the conduct of the trial. At various stages he interposed lengthy and searching cross-examination of the witnesses; he also required that a particular witness should be called at a particular stage of the hearing and demanded the production of a statement taken by the Police from one of the witnesses.

> In Yuill v. Yuill (supra) Lord Greene said at p. 189:— "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge to what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue".

With all respect to the learned trial judge, we think that these observations are particularly relevant to the present case.

For these reasons we cannot but feel that the proceedings in the Court below were so unsatisfactory that justice was not done between the parties and we must reluctantly order a new trial.

The judge has given no reasons for his decision other than his conviction that the petitioner's evidence as to having seen the respondent and co-respondent in a compromising position on September 6, 1948, was deliberately false. There were admittedly some discrepancies, but we do not know how much of the petitioner's evidence and that of his witnesses was believed or dis-

believed, particularly that part which might have established a revival of the condoned adultery. We are, therefore, in no position to accede to the request of counsel for the appellant-petitioner to find that any of the charges of adultery was established against either the respondent or the co-respondent and to grant a decree accordingly; nor, on the other hand, are we able to accept the view that all the issues were rightly concluded in favour of the respondent and co-respondent.

The appeal is allowed: the judgment of the Court below is set aside and the petition remitted for trial before another judge. The respondents on the appeal must pay the appellant his costs of the appeal, the proportion thereof payable by the wife-respondent being chargeable on her separate estate. There will be no order as to the costs of the abortive trial.

In the matter of the Infancy Ordinance, Chapter 141 and In the matter of RAMDAI, an infant, MATADEEN *v.* RAGOO

In Chambers, (Hughes, J.), October 16, November 25, 1950

Infancy Ordinance, Cap. 141 — *Illegitimate child — custody and control — rights of parent.*

Five months after the birth of the infant, her mother took affiliation proceedings against the plaintiff alleging that he was the father. The plaintiff denied paternity but the Magistrate adjudged him to be the putative father and he was ordered to pay a weekly sum to the mother for the maintenance and education of the infant. From the time of her birth the infant lived with her mother at the home of the defendant, the material grandfather of the infant, and was there for five years, after which they removed to another house. A year after the removal the mother died and the infant returned to the defendant's home. The plaintiff applied to a Judge in chambers for the custody and control of the infant. It was admitted that he had never been to see the infant and that she was an absolute stranger to him, and that the defendant was in a better financial position than the plaintiff.

Held: Although the welfare of the infant is the first and paramount consideration it is not the only consideration, and since the plaintiff's life was blameless and he was capable of maintaining his child he was entitled to the custody and control.

W. J. Gilchrist for plaintiff.

C. E. R. Debidin for defendant.

HUGHES, J.

JUDGMENT:

This is an application, under the Infancy Ordinance, Chapter 141, in which the plaintiff seeks an order that he be appointed guardian and be given custody and control and maintenance of his illegitimate daughter (hereinafter referred to as the infant) aged six and one-half years.

The infant was born in March, 1944, and five months later the mother took affiliation proceedings at which the plaintiff, though denying paternity, was adjudged to be the father and ordered to pay sixty-eight cents a week: that amount was, in March, 1950, increased to one dollar and twenty cents.

From the time of her birth until April, 1949, the infant lived with her mother at the home of the defendant, who is the maternal grandfather of the infant. The mother then went to live at Eccles, East Bank, Demerara River, taking the infant with her, and there they stayed until the death of the mother in May, 1950; from that time up to the date of the hearing of this matter (and presumably up to the present time) the infant has stayed at the home of the defendant.

It is alleged by the defendant, and not denied by the plaintiff, that the plaintiff has at no time been to see the infant and that the infant is consequently "an absolute stranger" to the plaintiff.

In June this year, the plaintiff accompanied by a Police Constable, went to the defendant and asked him to deliver the infant; the defendant refused to do so. Less than two months after that request the defendant took proceedings, before a Magistrate, in which he sought an Order giving him custody of the infant: those proceedings were adjourned on the Magistrate being informed that action relating to the custody of the infant was about to be instituted in the Supreme Court.

In March, 1945, one year after the birth of the infant, the plaintiff got. married and now lives, apparently quite happily, with his wife and their three children, the oldest of whom is four and one-half years old.

As regards the ability of the plaintiff and of the defendant to make the necessary provision for the maintenance of the infant, the position is as follows: the former is a labourer in regular employment with the Public Works Department and earns one dollar and twenty-eight cents a day; the latter is a farmer and owns a rice cultivation as well as cattle and poultry.

There is no allegation of moral unfitness against either party. It was suggested, however, that this application by the plaintiff is prompted by his desire to rid himself of the burden occasioned by the Order of the Court to pay one dollar and twenty cents a week for the maintenance of the infant. While it may be the case that this consideration is not wholly absent from the mind of the plaintiff, there is no evidence on which to find or infer that the plaintiff is not bona fide ready and willing to undertake the maintenance of the infant. In this connection, it is to be remembered that the plaintiff is now happily married and has three children living with him, it is therefore not unreasonable to conclude that he has now come to value and have affection for his offspring. The plaintiff is in fact at present in circumstances materially different from those in which, some six years ago (as a bachelor, nineteen years of age) he denied paternity of the infant. To assume that the plaintiff's application is not founded on a genuine desire to care for his child as a father should would be, in my

view, capriciously to impute to him improper motives in the making of this application. In considering this aspect of the matter, that is to say, the *bona fides* of the parties, it should perhaps be mentioned that the suggestion was made that the defendant, in seeking to retain the custody of the infant, was to no little extent concerned with possessing himself of the maintenance paid by the plaintiff. That suggestion is without merit for the defendant has offered to agree to the payment of such maintenance into a Savings Account there to accumulate and, at the appropriate time, to be used for the education of the infant; that offer appears to be in keeping with the circumstances of the defendant.

It is settled law that in matters of this nature, the welfare of the infant is the first and paramount consideration. Indeed this is, in England, a statutory requirement for section 1 of the Guardianship of Infants Act 1925, provides:

> "Where in any proceeding before any court . . . . . the custody or up bringing of an infant . . . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration . . . . . ".

It is to be remembered, however, that the welfare of the infant, though the first and paramount consideration, is not the only consideration—*In* re Thain (an infant): L.R. (1926) ch. page 676.

The first matter to be taken into consideration is the ability of the plaintiff and of the defendant to maintain the infant. It is the case that the defendant is in better circumstances than the plaintiff but the position of the latter, in my opinion, is not such that the addition of the infant to his household would place an undue strain on his resources and so give rise to hardship or privation. There must be in this Colony very many parents who are called upon to support larger families on a similar, or perhaps smaller, income.

The next matter for consideration is the effect which removal from the home of the defendant and from familiar surroundings may have on the mind or health of the infant. Can it be said that, having regard to the length of time that the infant has resided in the home of the defendant, the probability is that removal therefrom will adversely affect her mind or health? In considering this aspect of the matter it is well to remember that during the first period of such residence, that is up to April, 1949, the mother of the infant was also in the home and it is altogether reasonable to assume that the affections of the infant, particularly at her tender age, were centered, not on the defendant, but on her mother. The other period of residence, which commenced as recently as May this year, is of insufficient length materially to affect a decision in this connection. The age of the infant makes it most improbable that she will be so affected either permanently or, as far as I am aware, to any appreciable extent. The words of Eve, J. (in *in re* Thain, referred to above) are in point:

> "It was said that the little girl would be greatly distressed at parting from Mr. and Mrs. Jones. I can quite understand

> it may be so, but, at her age, one knows from experience how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case."

The child referred to in this quotation was "nearly seven years old". In the light of the above, I cannot find that removal from the home of the defendant would adversely effect the mind or health of the infant. The infant will find companionship in the home of the plaintiff for, as appears from what has already been stated, the plaintiff's eldest child is two years younger than the infant.

Finally, it must be said that the wife of the plaintiff has stated, on oath, that she is ready and willing to take the infant into her home and to regard her as one of her own.

I find that there is no sufficient ground for denying the plaintiff the custody and control of his daughter. In the words of FitzGibbon, L.J. in *in re* O'Hara:

> "Where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities, ... the Court is, in my opinion, judicially bound to act on what is equally a law of nature and of society, and to hold (in the words of Lord Esber) that the best place for a child is with its parent'".

The application is allowed. Delivery of the infant, by the defendant to the plaintiff, shall be on or before 30th November, 1950.

The plaintiff shall permit the defendant to have access to the infant, at the home of the plaintiff, at least once a week for a period of not less than two hours on either Sunday between the hours of 10 a.m. and 6 p.m. or on Wednesday between the hours of 3 p.m. and 6 p.m.

The Magistrate's Orders of 23rd August, 1944, and 6th March, 1950, regarding payment of maintenance by the plaintiff, are discharged.

By consent, no order as to costs, the defendant foregoing any claim against the plaintiff for maintenance of the infant since the death of the infant's mother.

Liberty to apply.

25th November, 1950.

COX *v.* RIDLEY, COX *v.* GORDON

COX v. RIDLEY

COX v. GORDON

(In Chambers, on appeal from the Rent Assessor's Court,
(Stafford J. (acting) 1950: April 25, November 30)

Rent Restriction—Standard rent—Reduction by Rent Assessor—Rental based on capital cost of premises — Standard rent restored.

The respondents, tenants, of the appellant, applied to the Rent Assessor to have the maximum rent of their respective flats ascertained. The appellant thereupon made a similar application. At the hearing before the Assessor the evidence established the first rental or standard rent in respect of each flat. Under cross-examination the cost of construction of the flats was elicited. The Assessor referred his notes to the advisory committee who recommended no increase or decrease of the rentals. The assessor inspected the premises and having regard to the condition of the. premises and taking into account the capital cost of construction exercised his powers under section 4B (1A) of the Rent Restriction Ordinance 1941 as enacted by section 4 of Ordinance 30 of 1948 and reduced the rental to a sum lower than the first rentals or standard rents. The landlord appealed.

Held: The Assessor had not considered all the relevant factors including the rentals of similar premises in the locality and the first rentals should be treated as the standard rents

J. Edward de Freitas for the appellant.

J. Carter for the respondents.

Stafford, J. (acting):

JUDGMENT.

These are two landlord's appeals taken together by consent. Both are against the assessment of rents of premises at lot 3, Water Street, Kingston.

There are two buildings on the lot aforesaid, and each building is divided into two separate flats, one above and one below. In April and May, 1949, Messrs. Gordon and Ridley and Miss Seelig, three of the tenants, applied to the Assessor to have the maximum rent of their respective flats ascertained and certified. After these applications came up for hearing on the 11th June, the Assessor inspected those three premises on the 22nd June and on the 9th July the landlord, Mr. Cox, filed a counter-application with respect to all four flats.

At the hearing before the Assessor, the landlord's attorney and only witness, gave evidence directed to establishing the first rental of each flat after it had been constructed, and such rentals would ordinarily be the standard rent by reason of the definition of "standard rent" in section 2 of Ordinance 13 of 1947, unless the Assessor, acting under section 4B (1A) — section 4 of Ordinance 30 of 1948, reduced the same with respect to the two ground floor flats, which were constructed after 8th March, 1941.

No evidence was led by the tenant and nothing appears in the examination-in-chief or cross-examination of the attorney to show

that any of the first rentals were fictitious, fraudulent or oppressive, or even excessive. All questions seem to have been directed to ascertaining what was the capital cost of construction, and more particularly the cost of construction of the ground floor flats. It further emerged that in the cases of the premises occupied by Messrs. Douglas and Ridley and Miss Seelig, the first lettings were to tenants by the names of Cooke, Gillette and Farnum respectively.

The Assessor referred his notes to the Advisory Committee who considered that the estimates of costs given by the attorney were reasonable and the rents charged fair, having regard to that expenditure. The Committee recommended no increase or reduction of the four rentals.

The Assessor accepted the recommendations with regard to the two upper flats not because he agreed with the Committee's findings, but because on the evidence they were constructed before 8th March, 1941, and first let around 1945. The landlord could therefore let for what he could get and the rents at the first lettings became the standard rents, and the Assessor had no power to reduce these. Using his own observations, however, the Assessor considered that the first rentals were excessive having regard to the locality and disallowed any increases under section 6 (i) (c) as amended by section 6 of Ordinance 30 of 1948. In exercising his powers of disallowance, I am unable to say that the Assessor did not exercise his discretion judicially and I therefore cannot interfere with that exercise.

In spite of the Committee's recommendation, the Assessor considered that his own observations required and justified his exercising his powers under section 4B (1A). In doing so, however, he seems to have allowed his inability to interfere with the standard rents of the upper flats to affect his views with regard to the two ground floor flats. His method too of assessing a fair rental by first finding the capital cost of the premises and then taking some percentage of this as fair rental value is to say the least of it objectionable and dangerous; for firstly, it does not take into consideration the rentals of similar premises in the locality and other factors which may go to show that the rentals though apparently high are on a par with those of similar premises and therefore reasonable; and secondly, it would seem to make the object of the Ordinance merely the limiting of a landlord's returns, which would tend to discourage the erection of new buildings, and this is the very opposite of public policy at the present time.

It is to be noted that the authors of the well known text book Modern Methods of Valuation by Lawrence and May at page 254, refer to this "Contractor's Method" as one used in the case of special types of property "not let at a rent and not easily comparable with similar premises e.g. public institutions, libraries, etc." They say it is usually applied by "taking a percentage on the estimated value of the land plus a percentage on the cost or structural value of the buildings in order to arrive at a gross

value or net assessed value as the case may be." In the instant case, even assuming the Contractor's Method to be applicable, the Assessor has taken only the actual cost of construction of the flats into account and has indicated no percentage of the value of the land occupied, or of the value of the upper flats as roofs to the lower. Both these latter factors must be taken into account. Again, the authors of the same work on Valuation draw attention to the fact that figures of actual cost may be used with respect to newly erected buildings, but may be misleading where the buildings have been erected for some considerable time. In the instant case, one has comparatively new lower flats, under old upper flats; some means would therefore have to be devised for reducing both to a common standard, and that in relation to the lot of land upon which all stand. The above remarks illustrate some of the difficulties facing the Assessor when he is forced to assume the role of valuer, as he must do where departing from the first agreed rental in order to assign to the premises, by virtue of his powers under section 4B (1A) some rent that he considers reasonable. They also show that the assessments of the two lower flats cannot stand. I accordingly set them aside, and taking into my consideration the evidence, the findings of the Assessor from his own observations and the recommendations of the Advisory Committee, I ascertain and certify the standard rents as the rentals at the first lettings, $35.00 for the lower flat now occupied by G. Gordon and $30.00 for the lower flat now occupied by K. Ridley. Having regard to the Assessor's findings as to the state of repair of the premises when he visited them, the matters are remitted to the learned Rent Assessor for him to ascertain and certify such increases, if any, as he may now consider and find to be proper to arrive at the maximum rents.

PAYNE v. SADLOO

(In Chambers, on appeal from the Rent Assessor,

(Stafford, J.) April 23, December 2, 1950)

Rent restriction — First letting — standard rent — Rent Assessor's power to reduce — to be exercised judicially.

On a tenant's application to the Rent Assessor to ascertain and certify the standard rent the Rent Assessor found that the rent on the first letting of the premises was $7.00 per month but having regard to the cost of construction of the premises and all the circumstances of the case he reduced the rent to $4.50 per month as permitted by Section 4B (1A) of the Rent Restriction Ordinance 1941 as enacted by Section 4 of Ordinance 30 of 1948. The landlord appealed.

Held: The power conferred on the Rent Assessor by Section 4B (1A) is to be judicially exercised in cases where the circumstances are so out of the ordinary as to warrant his interference.

J. Carter for the appellant.

Akbar Khan for the respondent.

Stafford, J. (*Acting*)*:*

JUDGMENT:

This is a landlord's appeal from the assessment of the Rent Assessor with respect to premises situate at lot 10 Bagotstown, East Bank, Demerara River, rented to the respondent at $7.00 per month.

Before the learned Rent Assessor, the Respondent's case was that he had once occupied the whole of the lower flat of the building at $5.00 per month; that he had removed as a result of notice to quit; that the premises had been repaired; and that he had been put into possession of only half of what he had formerly occupied at a new rental of $7.00 per month. The Rent Assessor, however, found as a fact on the evidence in the case that there had been a complete reconstruction and that the two halves of the lower flat were new premises erected in 1949. This finding is not disputed. Ordinarily the standard rent of the new premises, therefore would be the rent on their first letting, $7.00 per month, as provided in the definition of 'standard rent' in section 2 of Ordinance 23 of 1941, but by an amendment by section 2 of Ordinance 30 of 1948 the definition is made subject to the provisions of section 4 B (1A) as introduced by section 4 of Ordinance 30 of 1948.

Now the amendment by the said section 4 B (1A) prescribes that the standard rent when ascertained by the first letting of new premises may, where those premises are erected after or were in course of erection on the 8th March, 1941, be ascertained and certified by the Rent Assessor, he having regard to all the circumstances of the case, at a lesser amount that the rent at the first letting.

In my opinion, the power conferred upon the Rent Assessor by this last mentioned section is to be judicially exercised in cases where the circumstances are so out of the ordinary as to warrant his interference. The power is not to be exercised arbitrarily. There must be at least something in these circumstances that makes the amount of the first rent unfair (Furman & Co. Ltd. v. Rafferty et al, B.G. 31st December, 1949) or unreasonable or excessive, and therefore unjust and not merely high. Further, 'having regard to all the circumstances of the case' means not only a fair interest on the landlord's asset when reduced to a capital money value, but it includes every other circumstance. For instance, it must include the desirability of the premises for the purpose for which they are let, which purpose may perhaps have nothing to do with their value as an investment, but may have its own peculiar value to the tenant or to the landlord, or to both. It may in an extreme case even include the desirability of the premises for a purpose other than the one for which they were let; a landlord may fairly agree to let premises peculiarly suitable for a particular purpose and so carrying a high rental to a tenant who, knowing their peculiar suitability, still desires them for another purpose ordinarily affording less rent, and who is willing to pay the high rental because the premises suit his purpose. In such

circumstances it could hardly be said that the rental was unfair or unreasonable merely because it was higher in comparison to that of other premises occupied for purposes similar to the tenant's, or because it yielded after deduction of all outgoings a higher rate of interest than normal on the assessed capital value of the building and the lot upon which it stood. And, of course, mention of outgoings reminds one that depreciation, and insurance, are factors that have also possibly been considered by both landlord and tenant, and should also be taken into his consideration by the Rent Assessor.

For the above reasons then, the first question that the Rent Assessor should ask himself in the case of a standard rent ascertained by a first letting of a building erected after March 1941, is "Is this rent excessive or unfair, or unreasonable, having regard to all the circumstances of the case?" Only if the answer be in the affirmative, should the Rent Assessor proceed, again having regard to all the circumstances of the case to ascertain and certify what he considers should be the proper standard rent. And here I would remark that the contractor's method of ascertaining the cost of construction of a building and ascribing a certain percentage of that for out-goings and fair return and adding to that a percentage by way of fair return of the capital cost of the land on which the building stands, is a method used by valuers only where the building is one of a class not usually rented and having nothing similar to which it can be compared, *e.g.* libraries, public buildings, *vide* Modern Methods of Valuation by Lawrence and May, p. 254. In my opinion, the Assessor, the moment he proceeds to exercise his powers under 4 B 1 (A) is assuming the functions of a valuer and he should use the Contractor's method as charily as a valuer would.

In the instant case, the Rent Assessor has not stated that he considered the first rent unfair or unreasonable or unjust. He has said that he has considered as one of the circumstances the cost of building the premises and that the rent $4.50 as fixed by him will allow a gross return of 16 per cent, of the capital investment which he had found to be $650.00. But 16 per cent. of $650.00 is $104.00 per annum or $8.66 per month. I do not know if, in calculating this return, the Assessor assumed that Nelson would apply in the near future and that he, the Rent Assessor, would fix Nelson's rent at $4.11; but that is rather putting the cart before the horse. Two further factors besides the actual cost of reconstruction are to be taken into his consideration if the Rent Assessor is eventually forced to arrive at the standard rent by calculating fair interest on capital value. Firstly, the new premises are roofed or ceiled by the old upper flat. Some amount must be ascribed for the value of such roofing or ceiling. Secondly, the premises, like all the other premises, share the occupation of a lot of land. The value of that land must be ascertained and a proper proportion of that value ascribed to the new premises. Both these amounts must be added to the cost of reconstruction to arrive at a capital value of the premises for rental purposes. No evidence relating to the above factors appears on the record.

For the above reasons, the assessment is remitted to the Rent Assessor for a fresh investigation and, but only if necessary, ascertainment of the Standard Rent of the premises under the powers conferred by section 4 B (1A).

A copy of the notes of evidence of the witness Nelson, called before me, will be forwarded to the learned Rent Assessor.

PEREZ, FERRAZ and VANDEYAR v. EYTLE

(In Chambers, on appeal from the Rent Assessor's Court.

(Stafford, J, (Acting), April 21, 25, 28, May 1, 5, December 2, 1950).

Rent Restriction — Standard rent — Section 4BB (1) *of the Rent Restriction Ordinance, 1941, as enacted by Section 5 of Ord. 30 of 1948 — No power to increase standard rent.*

Under Section 6 sub-section (1) of the Rent Restriction Ordinance 1941 as enacted by Ordinance 13 of 1947 the standard rent of premises could be increased to a maximum rent by certain permitted percentages as the Rent Assessor allowed. With the introduction of Section 4BB (1) of the Ordinance by section 5 of Ordinance 30 of 1943 it was claimed by the respondent landlord that the Rent Assessor as a corollary to his power under section 4B (1A) to reduce the standard rent could, if he thought fit and with the advice of the Advisory Committee, fix a maximum rent higher than the maximum rent permitted by section 6. The Rent Assessor agreed with the contention and increased the maximum rent.

Held: The section does not authorise the Rent Assessor to increase the standard rent other than by the permitted increases allowed under section 6, and if the permitted increases cause the maximum rent to exceed the rent being paid by the tenant, the sanction of the advisory committee must be first approved.

P. A. Cummings for appellant.

J. Edward de Freitas for respondent.

Stafford, J. (*Acting*).

JUDGMENT:

The appellants appeal against the decision of the Rent Assessor whereby the latter cancelled Certificate No. 216 of 1945 fixing the standard rent of the Appellants' premises at $12.00 per month and the maximum rent at $16.17 per month, and certified and assessed the maximum rent of the appellants' premises at $22.00. In doing so, the Rent Assessor purported to be acting under and by virtue of section 4 BB (1) of the Rent Restriction Ordinance 1941, as amended and introduced by Section 5 of Ordinance 30 of 1948.

Perusal of the Principal Ordinance of 1941 and of the subsequent amending Ordinances shows that with respect to dwelling houses and land, the standard rent primarily relates to the rental on 3rd September, 1939, and by section 6 of the said Ordinance, the landlord might increase that rent by:

(a) a certain percentage of any amount spent by him on improvements or structural alterations;

(b) the amount corresponding to any increase in taxation since the 3rd September, 1939; and

(c) a percentage not exceeding ten on the standard rent.

It is to be noted that these increases were entirely at the option of the landlord and the tenant could only assail the increase under (a) by an application to the Court.

This state of affairs was continued under the Defence (Landlord and Tenant Rent Control) Regulations 1944, which first created the office of Rent Assessor.

When business premises first became controlled under the Defence (Georgetown Rent Control) (Amendment) Regulations of 28th August, 1941, the rent Assessor was given power to increase the percentage of standard rent from 10 to 25, although the S.R. was itself ascertainable as in the case of dwellings, and he was also given power to disallow any portion of the 10 percent, increase of standard rent put on by the landlord. After the Defence Regulations ceased to be operative, the Rent Restriction (Amendment) Ordinance 13 of 1947 re-created an office of Rent Assessor with, *inter alia,* the powers hereinbefore referred to, and the Ordinance continued the control of public or commercial buildings, as well as dwellings.

But Ordinance 13 of 1947 introduced a startling innovation. Whereas the permitted increases or additions to the standard rent had hitherto been put on by the landlord subject to the control of the Assessor, by section 7 (b) of the Ordinance the word "an amount" in section 6 (1), paragraphs (a), (b) and (c) of the Principal Ordinance, referring to the above, permitted increases were deleted and in their place were substituted "an amount, assessed by the Rent Assessor and set out in his certificate issued under section 4B or 4C of this Ordinance". The effect of this substitution was that thereafter no landlord could himself apply the permitted increases or any part thereof to the standard rent, but had, as a condition precedent, to obtain the assessment and approval of the Rent Assessor.

By section 5 of Ordinance 30 of 1948, a new section 4BB was introduced. This provided in paragraph (1) that "Where on the hearing of an application of a landlord under subsection (1) of section 4 B, it appears to the Rent Assessor that having regard to all the circumstances of the case the maximum rent should be fixed at an amount exceeding the rent then being paid by a tenant in respect of the premises, or, if the premises are not then being rented, the rent at which it (sic) was last let, or in any other case where he thinks it necessary so to do" he should submit the notes of evidence taken by him to the Advisory Committee. Sub-sections (2) and (B) provide that the Committee should make recommendations to him, to which recommendations, the Assessor should pay due regard.

It is contended for the respondent that the new section by

necessary implication confers on the Rent Assessor the power, in cases of hardship upon the landlord to assess and certify as maximum rent an amount in excess of the total sum comprised by the standard rent plus the increases permitted under section 6; and that this power is the corollary to the Rent Assessor's power under 4B (1A) — introduced by section 4 of Ordinance 30 of 1948 — to assess and certify as the standard rent in the case of buildings rented after 8th March, 1941, an amount less than the rent at their first letting.

Were this the intention of the Legislature, one would have expected that intention to be expressed in language as direct as that used in Section 4B (1A). It could only be inferred obliquely, if at all, from the actual words of 4BB (1). But in interpreting 4BB (1), is one really forced to arrive at its objects by inference? Is there no direct interpretation? In my opinion there is. It provides for further control upon the permitted increases. Whereas in the first stage the permitted increases upon the standard rent might be imposed by the landlord, and in the second stage by the landlord only with the sanction of the Rent Assessor, now in this third stage section 4BB (1) requires the Rent Assessor to obtain the recommendations of the Advisory Committee before he may sanction any increase, and that increase may only be one permitted by section 6 of the Principal Ordinance as amended by the later ordinances. Section 4BB (1) then, far from amplifying the Assessor's powers, is really a restriction upon them.

For the above reasons the appeal is allowed and the assessment rescinded. The certificate thereunder dated the 28th day of February, 1950, is cancelled and the standard rent of $12.00 per month is restored. The matter is remitted to the Rent Assessor for him to assess and certify the present maximum rent having regard to any increases under and by virtue of section 6; and in the event of it appearing to him that such maximum will exceed the last certified maximum of $16.17, the Assessor should, before assessing and certifying, obtain the recommendations of the Advisory Committee as to the increases.

Dated the 13th day of October, 1950.

D'AGUIAR BROTHERS, LIMITED v. HIS MAJESTY'S ATTORNEY GENERAL.

(In the Supreme Court, Civil Jurisdiction.

(Worley, C.J.) December 4, 9, 1950).

Customs Duties Ordinance — articles ordinarily merchantable — advertising device — taxing statutes — interpretation.

The plaintiffs imported into the Colony from the United States of America six electrically operated coolers. On all four sides of each cooler and in two places on the top of each there appeared in large letters the words "Pepsi Cola" in a characteristic scroll, the whole being

stamped in low relief on the metal cover and painted in red on a white background. The plaintiffs claimed that the proper rate of duty payable on the coolers was that prescribed under the general tariff in Item 3 of the second schedule to the Customs Duties (Amendment No.2) Ordinance (No. 25 of 1944) namely 16 2/3 per centum. Item 3 read "Articles, ordinarily merchantable other than paper and paper bags, bearing an advertising device, not enumerated in the First Schedule and not exempt in the Fourth Schedule." The defendant contended that the proper rate of duty was 331/3 per centum as prescribed under the general tariff in Item 18 of the same schedule which read "All other goods not in this, nor in the First and Third Schedules particularly mentioned, nor in the Fourth Schedule particularly exempted". It was agreed that the coolers were not articles enumerated in the First or Third Schedules nor exempted in the Fourth Schedule.

Held: The coolers were articles bearing an advertising device and as the words used in Item 3 had to be construed literally the coolers were ordinarily merchantable and duty was payable under Item 3.

H. C. Humphrys, K.C., for plaintiffs.

C. A. Burton, Crown Counsel, for defendant.

Worley, C.J.:

JUDGMENT:

In June 1947, the plaintiff company imported into the Colony from the United States of America six electrically operated coolers of the value of $1,403.55 and claimed that the proper rate of duty payable thereon was that prescribed under the general tariff in Item 3 of the Second Schedule to the Customs Duties (Amendment No. 2) Ordinance (No. 25 of 1944), namely, 16 2|3 per centum i.e. $231.53 and $41.68 Bill of Entry Tax. The Comptroller of Customs rejected the entry prepared and claimed duty at the rate of 33 1|3 per centum as prescribed under the general tariff in Item 18 of the same Schedule, at which rate the duty payable would be $467.85 and $42.11 Bill of Entry Tax.

The plaintiffs, pursuant to section 22 of the Customs Ordinance, deposited the sum of $509.96 and obtained delivery of the coolers. They now ask for:

(a) a declaration that the proper duty payable by them in respect of the coolers is at the rate of 16 2|3 per centum plus $41.68 Bill of Entry Tax; and

(b) a refund of the sum of $236.39, being the difference between the amount of duty and Bill of Entry Tax demanded by the Comptroller and deposited by them and the amount of duty payable on the said coolers at the aforesaid rate.

At the relevant date the "description of goods" in Item 3 of the Second Schedule read:

"Articles, ordinarily merchantable other than paper and paper bag's, bear-
"ing an advertising device, not enumerated in the First Schedule and not
"exempt in the Fourth Schedule."

Item 18 read:

"All other goods not in this, nor in the First and Third Sched-

"ules particularly mentioned, nor in the Fourth Schedule particularly exempted."

It is agreed that these coolers are not articles enumerated in the First or Third Schedule nor exempted in the Fourth Schedule which exempts, *inter alia*, advertising articles of no commercial or marketable value including show cards, calendars and the like, for free distribution.

The plaintiffs contend that these coolers are "ordinarily merchantable", that is to say, that they are saleable and have a commercial or marketable value but that, by reason of their bearing an advertising device, the range of possible customers is limited and the marketable value reduced and for that reason a lower rate of duty is prescribed. The defence does not admit that the coolers in question bear an advertising device and further contends that, assuming that they do bear such a device, they are merchantable despite such device and are therefore inadmissible to duty under Item 3.

Evidence was led as to the appearance and purpose of these coolers and one was produced in Court. At the close of the hearing I indicated that I had no doubt from my inspection of the article that it bears an advertising device. On all four sides of the cooler and in two places on the top there appear in large letters the words "Pepsi Cola" in a characteristic scroll, the whole being stamped in low relief on the metal cover and painted in red on a white background. The registered trade mark for this particular product consists of the words "Pepsi Cola" written in this characteristic manner and I have no doubt that these devices, which are designed to attract attention and which could only be obliterated with great difficulty, if at all, are put there for the purpose of advertising this particular beverage and not merely, as the defence suggested, for the purpose of identification. I observe also that in another case between the same parties, No. 130 of 1946, Luckhoo, J. held that the same mark appearing on capsules used in the bottling process was an advertising device. The only question therefore remaining for consideration is the construction of Item 3 of the Second Schedule.

The evidence adduced showed that these coolers are used by retailers in parlours and other places for storing and cooling bottled drinks, and that the plaintiffs had sold a similar cooler, one of a previous consignment, to a local hotel at slightly below cost price; they had sold one of the present consignment to another hotel, also below cost price, and had loaned another to a petrol service station which sells the particular non-alcoholic drinks manufactured by the plaintiffs. The remaining coolers are used by the plaintiffs in their own retail trade. It was also proved that another company in the same line of business had imported six similar coolers bearing a device advertising a competing beverage and had sold them all to retail traders at cost price. When there has been an out-and-out sale, no condition has been attached that the retailer should stock only the vendor's proprietary drinks. I

find on the evidence that there is a ready sale for these coolers to retailers of bottled drinks; but they are imported and distributed primarily for the purpose of advertising the particular drink whose device is advertised on them and that the importers do not aim at making any profit on their sale but are satisfied if they recover the whole or the greater part of the cost in consideration of the benefit indirectly accruing to them by the advertisement of their goods.

The plaintiffs contend that these facts are sufficient to bring them within the plain meaning of the words used in Item 3, but the defence asks me to construe this item as being limited to articles, which though ordinarily merchantable, that is having a commercial or marketable value and saleable in the ordinary course of business, are not, in fact, saleable because of the advertising device which they bear. It certainly cannot be said that this limitation is expressed by the words used and it seems to me that the Attorney-General is asking me to ignore the accepted principles of construction of taxing statutes when he seeks to supply a deficiency in the actual language of the legislation by what he asserts to be a reasonable intendment. As Cairns L.C. said in Pryce v. Monmouthshire Canal and Railway Companies 1878 — 9 (4 A.C. 197 at p. 202).

> "In as much as there was not any a priori liability on a subject to pay any "particular tax . . . . . the tax payer had the right to stand upon a literal "construction of the words used, whatever might be the consequence."

In my view, the literal construction of the words used in item 3 supports the plaintiffs' interpretation and, even were I to feel a doubt upon the matter, it would, according to the well recognised principle of interpretation, be incumbent upon me to lean against the construction which would impose a heavier burden on the subject. The intention of the Legislature to impose a tax must be clear and, in a case of reasonable doubt, the construction most beneficial to the subject is to be adopted.

I therefore declare that the proper duty payable in respect of the six coolers, is at the rate 16 2|3 per centum plus $41.68 Bill of Entry Tax, and that the plaintiffs are entitled to a refund of the sum of $236.39 as claimed.

Plaintiffs must also have their costs of this action. Fit for counsel.

Solicitors: *H. C. B. Humphrys,* for the plaintiffs.

V. C. Dias for the defendant.

In the matter of an application to determine the maximum rent of a building.
Ex parte L. H. Wharton and B. H. Wharton

(In Chambers on appeal from the Rent Assessor,

(Stafford, J. (Acting)) May 1, December 2, 1950.)

Rent restriction — Application to Rent Assessor to certify standard and maximum rents — new premises — No part of premises ever let — No jurisdiction to entertain application.

The appellants the owners of a new building in Georgetown applied to the Rent Assessor to ascertain and certify the standard and maximum rent of their building although it had never been let. The Rent Assessor entertained the application and certified the rent. The owners appealed.

Held: Until premises are let for some purpose bringing them within one or other of the controlled classes they are not the subject of control, and the Assessor is without jurisdiction to entertain any application for assessment.

J. Edward de Freitas for the appellants.

Stafford, J. (*Acting*):

JUDGMENT:

The appellants, the owners of a new building situate at lot 1, Croal Street, Stabroek, Georgetown, made three applications on the 17th September, 1949, to the Rent Assessor to ascertain and certify the standard and maximum rents relating to the building. Application No. 412 was with respect to what were described as nine offices on the upper flat, No. 413 nine offices on the middle flat and No. 414 sixteen offices on the bottom flat; but in actual fact at the date of the application no part of the said building had yet been let, or been made the subject of a concluded agreement to let. The applications were made *ex abundanti cautela* so as to avoid the risk of the landlords having to refund any excess rent in the event of the maximum rents being reduced at some subsequent date to a figure less than the first agreed rentals by the Rent Assessor acting under subsection 1A of section 4B of the Rent Restriction Ordinance 1941 as amended by section 4 of Ordinance 30 of 1948.

The applications were heard on the 15th November, 1949.

Since August 1949, there had been negotiations between the appellants and Government over the proposed letting to Government of the top flat. An agreement had been drawn but. I understand, not executed at the date of hearing of the applications. The rent had been agreed upon at $180.00 for the whole top flat. With regard to the middle flat, one of the nine offices had been in fact let as an office at $30.00 per month before the date of hearing and similarly, several of the bottom or ground floor offices bad been let at $20.00 per month.

Although the above facts were put in evidence by one of the appellants, no application was made by them to make Government or the other tenants — those on the middle and ground floors — parties to the applications, nor did the Assessor make them so and the applications were proceeded with ex parte. The Assessor submitted his notes of evidence to the Advisory Committee, purporting to act in doing so under section 4 BB (Section 5 of Ordinance 30 of 1948). The Advisory Committee estimated the rent of the ground floor at $150.00 per month, the second at $127.00 per month, and the top floor at $110.00 and recommended that these sums should be apportioned between the offices on the respective floors. Put into practice, on an even division, this recommendation would have resulted in rentals of $12.22 for each of the nine offices on the top floor, $14.11 for each of the nine on the middle floor, and $9.34 for each of the sixteen offices on the ground floor. The Assessor, for reasons stated by him, decided not to accept the Committee's recommendation, and proceeded to ascertain and certify rentals which, though higher than those recommended by the Committee, were less than those proposed and put into partial effect by the appellant.

The first question arising is: Had the Assessor jurisdiction to entertain the applications? In other words, were the premises controlled by the Ordinance at the date of the application?

Section 3 of the Ordinance as re-enacted by section 3 of Ordinance 13 of 1947, prescribes three classes of premises which are to be controlled under the Ordinance and premises not falling, within the prescribed classes, or being within those classes but coming also within certain exceptions enumerated in the same section are not controlled. By section 3 (1) (b), "all public or commercial buildings whether let furnished or unfurnished" are controlled, and a "public or commercial building" is defined in section 2 (Section 2 of Ordinance 13 of 1947) as "a building or part of a building separately let, or a room separately let which is used mainly for the public service or for business trade or professional purposes, and includes land occupied therewith under the tenancy. . . . ." The two other controlled classes are also defined. On reading these definitions, one perceives that the question of whether premises fall within one class or another does not depend upon the type or style of the premises, or the purpose for which they were designed, but upon the agreed purposes for which they are actually let.

Again, the definition of "standard rent" as contained in section two, having regard to each of the dates by which it may be ascertained, relates to an actual letting present or past; and this is so even where the Assessor exercises the powers conferred upon him by section 4B (1A) — (section 4 of Ordinance 30 of 1948). Section 4BB (1) — (section 5 of Ordinance 30 of 1948) — empowers the Rent Assessor to submit his notes of evidence to the Advisory Committee where it appears to him that having regard to all the circumstances of the case the maximum rent should be fixed at an amount exceeding the rent then being paid by a tenant in respect

of the premises, or, "if the premises are not then being rented, the rent at which it (sic) was last let, or in any other case where he thinks it necessary to do so."

It has been submitted that either the words "if the premises are not then being rented", or the words "in any other case where he thinks it necessary so to do", were sufficient to empower the Rent Assessor, in cases where the landlord applied for assessment, to proceed to the assessment of premises which had not even been let. But the former words cannot be divorced from their context "the rent at which it was last let"; and the latter although wide enough to embrace tenants' applications and all cases of difficulty, must nevertheless still relate to controlled premises.

In the absence of some words in the Ordinance showing that the Assessor may exercise his jurisdiction in relation to premises "intended" to be used for a purpose bringing the premises within one of the controlled classes, I am forced by the terms of the aforementioned definitions and sections to the conclusion that, firstly, until premises are let for some purpose bringing them within one or other of the controlled classes, they are not the subject of control, and the Assessor is without jurisdiction to entertain any application for assessment; secondly, until such letting there is no rent upon which the Ordinance may operate to fix the standard rent or a maximum rent, and therefore there is no material upon which the Assessor can exercise his powers under section 4B (1) or under section 4B (1A), or under section 4BB (1).

In my opinion the fact that parts of the premises were actually let for the first time at dates subsequent to the filing of the applications and prior to the dates of the Assessor's certificates does not cure the initial lack of jurisdiction; quite apart from the fact that the tenants of those premises ought to have been invited to the hearing of applications which might materially affect them

I would add that my interpretation of the term "premises" in section 4B (1) is that it is synonymous with tenement. In consequence of that and also of the fact that a tenant of one tenement ordinarily is not concerned with the rental of any tenement other than his own, each tenement (in a case such as this, each office) should be the subject of a separate application and of a separate certificate. Of course, this in no way restricts the Assessor from taking all the applications at one consolidated hearing if all parties consent.

I have further asked myself whether the words "who shall have power" in subsection (5) (b) of section 4E of the Ordinance (section 5 of Ordinance 13 of 1947) should be read as meaning that a Judge in Chambers sitting on a Rent Assessment Appeal "shall only have power" to make the three orders set forth under (a), (b) and (c), and I have come to the conclusion that those powers are enumerated by way of clarification, and not by way of restriction.

For the above reasons the decisions of the learned Rent Assessor on these applications are set aside and the certificates cancelled.

Jugroo v. Rahaman Ali, executor under the last will and testament of Abdool Kadir, deceased, probate whereof was granted by the Supreme Court of British Guiana on the 13th February, 1948.

(In the Full Court, (Boland and Hughes J.J.) 1950: November 29, 30, December 29.

Appeal — Workmen's Compensation — defendant not alive when application filed — procedure — limitation of time within which action maintainable against executor or administrator—questions of fact — no right of appeal in Workmen's Compensation cases on questions of fact.

The appellant who claimed to be the sole dependent of his deceased son filed an application in February 1949 for compensation against one Abdool Kadir, alleged to be his son's employer. Abdool Kadir died in December 1947 and probate of his will was granted to the respondent in February 1948. The appellant obtained an order from the Magistrate substituting the respondent as defendant in place of Abdool Kadir. The Magistrate after hearing evidence found that the deceased was not a workman within the meaning of the Workmen's Compensation Ordinance, that the appellant was not a dependant of the deceased and that there was no satisfactory evidence as to how the accident resulting in death occurred. The plaintiff appealed.

Held: In order to maintain an action against an executor or administrator the action must be brought within six months after letters of administration have been granted vide section 21 of the Civil Law of British Guiana Ordinance, Cap. 7, and consequently the proceedings were out of time.

Whether a person is a workman or not is a question of law but an Appellate Court will not interfere with the Magistrate's decision unless there is no evidence to support his finding of fact.

Whether the appellant's version of the incident is true or not is a question of fact and there is no right of appeal on questions of fact in workmen's compensation cases.

J. O. F. Haynes for the appellant.

A. M. Edun for the respondent.

Judgment of the Court:

Claiming to be the sole dependent of Kemraj, a deceased workman, appellant filed an application before the Magistrate of the West Demerara Judicial District for compensation under the Workmen's Compensation Ordinance, 1934, in respect of the death of his son Kemraj from personal injury by accident arising out of and in the course of his employment. This application was filed in February, 1949 and the Respondent named therein was one Abdool Kadir owner of a rice mill alleged to be Kemraj's employer. The accident was stated to have occurred on the 8th December, 1946 but Abdool Kadir, though alive at that date, had died long before the filing of the application; he died in December 1947 and probate of his will had been granted by the Supreme Court since 13th February, 1948 to Rahaman Ali his executor. With the object of putting himself in order an application was made by appellant to the magistrate for an order to substitute as respondent in the pro-

ceedings Rahaman Ali, the executor of Abdool Kadir, and this application was duly granted.

The matter in due course came on for trial before the learned magistrate who after hearing the evidence dismissed the claim for compensation stating in his Memorandum of Reasons for decision that

(1) he had done so because of the conflicting nature of the evidence and that he was not satisfied

(a) that the deceased Kemraj at the material and relevant time was a workman in the employ of Abdool Kadir, and a workman within the meaning of the Ordinance;

(b) that though the deceased Kemraj lived with his father the applicant, the latter was his dependant;

(2) there was no satisfactory evidence as to how the accident resulting in death occurred;

(3) it was not competent for applicant to have Rahaman Ali substituted as Defendant — Respondent.

In the grounds of appeal filed in the record it is declared as one ground that the magistrate erred in law in holding as he did that the applicant could not legally have Abdool Kadir's executor substituted for Abdool Kadir in the proceedings. We propose to deal with this point first. At the outset we must state that as Abdool Kadir was already dead in 1949 he certainly should not have been named as Respondent in the application. This was not the case of the death of a person who was a party to a suit at the time of his death and in whose place as such party his Legal Personal Representative had to be substituted in order to have the claim satisfied out of the deceased party's estate where liability would in law devolve on that estate. Substitution of another for a party because of the latter's death postulates that the person who died was a party in the suit at the time of his death if the applicant for compensation was at the time of the filing of his application unaware of the death of the employer, he should on getting information of the death either have discontinued the application against him and submitted a fresh application against the Legal Personal Representative, or, since there could have been no service on a dead man, have obtained leave to amend the application so as to change the name of the Respondent from Abdool Kadir to his Legal Personal Representative. Such an order for amendment could not be described as an order for substitution which is an entirely different thing.

Appellant did not in his notice of Grounds of Appeal give particulars of the mistake in law committed by the Magistrate in relation to this point as he is required to do for the information of the respondent and the Court by Section 10 of the Summary Jurisdiction (Appeals) Ordinance Ch. 16 nor did the Magistrate in his Reasons for Decision give any reason for holding that "it was not competent to have substituted Rahaman Ali as Defendant Respondent". But Counsel for the Respondent in support of the

Magistrate's ruling on the point cited section 21 of the Civil Law of British Guiana Ordinance, Ch. 7 which enables an action "to be maintained against the executors or administrators of anyone deceased for any wrong committed by him in his lifetime to another in respect of his property" *if the injury was committed within six months before his death and if the action is brought within six months after letters of administration have been* granted. It would appear that the learned Magistrate relied on this section for his ruling, which was in effect that these proceedings were not maintainable against the executor of Abdool Kadir because they were brought more than six months after the grant of probate. "Letters of Administration" in the section would of course include a grant of probate of the will. Appellant's counsel has contended that section 21 of Ch. 7 has no application to a claim made under the Workmen's Compensation Ordinance which in section 12 (1) (d) makes special provision for the time limitation of claims made in respect of the death of a workman. The section reads —

> "Proceedings for the recovery under this Ordinance of compensation for an injury shall not be maintainable unless
>
> > "(a), (b), (c),
> > "(d) in the case of death the claim for compensation has been made "within 6 months after the date of the accident."

The contention is that as regards the time within which a proceeding for compensation is maintainable the only condition to be fulfilled is that which the section provides — namely a claim for compensation within 6 months of the death.

It is obvious however that the limitation period mentioned in section 12 applies to proceedings brought for the recovery of compensation between the workman and his employer himself. If the employer dies before proceedings are instituted then it seems clear to us that proceedings against his executor or administrator would be subject to the limitation of time mentioned in section 21 of ch. 7. In this connection it is to be observed that "action" is defined in section 2 of the Supreme Court of Judicature Ordinance Ch. 10 as meaning a civil proceeding commencing by filing a claim or in any other manner prescribed by rules of court and includes a suit.

We therefore hold that the proceedings were not maintainable against the respondent-executor being out of time.

We next turn to the other ground of appeal in which the Magistrate's decision is challenged as erroneous in law because, as is stated, the Magistrate found that the deceased Kemraj was not a workman within the meaning of the Workmen's Compensation Ordinance. It is well settled on the authority of many decided cases that though the decision whether a person is a workman or not under the Ordinance is a point of law and not of fact and as such is subject to appeal, an appellate Court will not interfere with the decision of the arbitrator on this point unless there is no evidence at all from which such an inference can be drawn—

Jones -v- Penwyll Denis Silica Brick Co. (1913) 6 B.W.C.C. at p. 497 cited with approval in the judgment of this Court delivered on the 15th day of January, 1945 in Babagee -v- James Cummings. It may be pointed out however that the Magistrate did not find affirmatively that Kemraj was not a workman, but what he said in his reasons is that he was not satisfied because of the conflicting nature of the evidence that he was such a workman. The burden of establishing the claim being on the applicant, the Magistrate accordingly was bound to dismiss the application. We see no reason to hold that he was wrong.

Whether or not the evidence was sufficient to support a finding that the deceased died as a result of an accident, and whether the version of the incident given on behalf of the applicant was true or not and so would warrant a finding that Kemraj did receive an injury by accident arising out of and in the course of employment by Abdool Kadir would clearly be a question of fact. There is no right of appeal on questions of fact in workmen's compensation cases. Accordingly on all the grounds specified above we are of the opinion that this appeal must fail. We therefore dismiss the appeal and award costs to respondent.

FRED M. BOLAND,
First Puisne Judge.
H. J. HUGHES,
Third Puisne Judge.

29th December, 1950.

SKINNER *v.* CUKE

In the West Indian Court of Appeal. Appeal No. 1 of 1949.

CLIFFORD SKINNER (Appellant)

v.

ARDEN ST. CLAIR CUKE (Respondent).

(*In the West Indian Court of Appeal, on appeal from the Court of Common Pleas, Barbados,* (*Furness-Smith, Malone, Worley, C.J.J.*) *February* 13, 14, *March* 9, 1950)

Negligence—motor car—insurance—disclosure to jury—new trial.

The appellant was defendant in an action brought by the respondent to recover damages for personal injuries sustained by him when driving his motor car.

During the trial it was inadvertently disclosed to the jury that the appellant's motor was insured. Third party insurance is not compulsory in Barbados.

Although this disclosure was not made a ground of appeal, as the fact appeared on the record and the Court did not feel assured that there was a fair trial between the parties and that the jury were not influenced both in their finding on the question of negligence and in their assessment of damages by an unfair appeal to their prejudices, a new trial was ordered.

Gowar v. Hales C.A. (1928) 1 K.B. 191

Grinham v. Davies (1929) 2 K.B. 249 applied.

W. W. REECE, K.C., J. E. T. BRANKER with him for the appellant.
D. H. L. WARD for the respondent.
Judgment of the Court.

The appellant in this case was defendant in an action brought by the respondent in the Court of Common Pleas of this Colony to recover damages for personal injuries sustained by him when driving his motor car as the result of a collision with the respondent's motor car. The action was tried in February 1949 before a special jury, who gave a verdict for the plaintiff-respondent for £.4. 3. 4. special damages and £1,500 general damages and judgment was entered against the appellant for this amount and costs. The appellant moves this Court to reverse the verdict and to enter judgment in his favour with costs here and in the Court below, on the grounds that the verdict was against the weight of evidence, that the jury were misdirected by the trial judge and that, if the respondent were entitled to a verdict, the amount of damages given was excessive.

On the view we take of this matter it is not necessary to refer other than briefly to these grounds. It is settled law that an Appellate Court will not disturb a verdict, as being against the weight of evidence, unless it is one which a jury, viewing the evidence reasonably, could not properly find. Where the evidence for both sides has been fairly put to the jury, it is no ground for upsetting the verdict that the judges of the Appellate Court take a different view of the facts: *Toronto Railway Company v. King and another* (1903) *Appeal Cases* (*P.C.*) 260.

In the present instance the collision occurred in daylight on 7th November 1947, on Colleton Hill, a public highway, at a time when the respondent was driving down the hill and the appellant was driving his car up the hill. At the moment of impact the respondent's car was on the near side of the road and parallel to the near-side verge, while the appellant's car was on the wrong or off side and slightly askew across the road. The respondent's case was that the appellant had been negligent in failing to keep to his proper side, in failing to apply his brakes and stop his car before it collided with the respondent's and in failing to keep a proper look-out. The appellant, while denying negligence, pleaded contributory negligence on the part of the respondent, the substantial negligence alleged being that, as the cars were approaching each other, the respondent drew out to his off side in order to overtake a cart at a curve in the road, and thereby created a situation of such imminent peril that the appellant had no sufficient opportunity of avoiding the collision, but sought to do so by swerving across to his off side.

As is usual in this class of case there was a sharp conflict of evidence on the positions of the vehicles and the actions taken by the drivers during the last few moments immediately preceding the collision. The jury had before them the evidence of four eyewitnesses, namely, the respondent and his wife, the appellant and the mule-cart driver. The other most material evidence was

given by a Police Corporal who deposed to having measured a brake-mark 31 feet long running transversely across the road to the off rear wheel of the respondent's car. Counsel for the appellant strongly urged that the only inference to be drawn from this evidence (which the jury could not reasonably reject) was that the respondent was driving on his wrong side until the moment immediately prior to the collision thereby creating a position of peril and that any verdict inconsistent with that inference could only be perverse. While we fully appreciate the cogency of this evidence, it is inexpedient for us, in view of the order which we propose to make, to express any opinion on this criticism of the verdict. The respondent, as the result of an injury to his knee caused by the collision, suffered pain and is still suffering from a partial disability which, according to the medical evidence, is likely to be permanent, but, for the reason above stated, we express no opinion on the amount of damages awarded.

The appellant attacked the trial judge's summing-up on the ground that he did not put clearly before them the two limbs of the defence, that he did not properly direct them on the law relating to contributory negligence, and misdirected them by saying that the question was who had the last opportunity of avoiding the accident, and did not tell them the question was whose negligence substantially caused the wrong. This Court is at a disadvantage in considering this ground of appeal in that we have before us no complete transcript of the summing up but only a note made by the appellant's Counsel or Solicitor which is admittedly incomplete. In these circumstances the difficulty, often emphasized by Appellate Courts, of evaluating the effect of a summing up by isolating particular passages or sentences is manifestly greatly augmented. We can only say that, so far as we can judge from the material before us, the allegations of misdirection have not been substantiated.

There is however a matter apparent on the record which affects the fairness of the trial but which was not made a ground of appeal. The respondent put in evidence a statement, made by the appellant to a police officer shortly after the collision, which contained the sentence "My car is insured with the Barbados Fire Insurance Company." In addressing the jury at the close of the case, appellant's Counsel informed them that the damage to the respondent's car had been settled by an insurance company and that they were only concerned with a claim for personal injury. The appellant's statement to the police did not expressly refer to Third Party Risks Insurance but Mr. Ward very fairly admitted that the jury may have come to the conclusion that the appellant was insured against such risks. Nothing was said during the trial as to whether or not the respondent was similarly insured.

It is a settled rule of practice in cases of this kind that the jury should not be informed by or on behalf of the plaintiff that the defendant is insured: *Gowar v. Hales C. A.* (1928) 1 *K.B.* 191. The purpose, extent and effect of the rule are clearly set out in

the judgment of Salter J. in *Grinham v. Davies* (1929) 2 *K.B.* 249, at page 250:—

> "The rule is, of course, not universal, but it is well established in cases of this kind, and is obviously fair, inasmuch as one knows that in such cases the jury are, naturally enough, much more prone to find for the plaintiff if they know what the amount of their award will be paid by an insurance company and not by a private person. It is often difficult for counsel for the plaintiff to avoid letting the jury know this fact; and if he does so the circumstances will no doubt be considered by the judge in deciding what course he should adopt. But there is no doubt whatever of the existence of the rule, and it is an important one. If the rule is violated, it is no doubt a matter of discretion for the judge what course he will take. The result of the violation of the rule is that the jury, unintentionally it may be, but in fact none the less, are prejudiced, and the judge must take such course as he thinks proper. There can be no doubt at all that the judge has a discretion to order the jury to be discharged, if he thinks that the circumstances of the case render that course the proper one. He has that power, not only by virtue of the rules of practice, but also by virtue of the much wider rule that it is the duty of a judge to see fair play between the parties and to prevent any unfair appeal to the prejudices of the jury."

In some recent cases in England it has been suggested that the rule is now pointless as no jury can avoid knowing that motorists are by law compelled to be insured and that accordingly in the great majority of these cases the defendant is insured against third-party risks. But in this Colony, where there is no legal compulsion on a motorist to insure, it is clearly expedient and conducive to justice that the rule be given full force and effect.

Where the fact that the defendant is insured has been disclosed to the jury the trial judge may, in his discretion, discharge them and order another trial; *Grinham v. Davies* (*supra*). Alternately, the judge may endeavour to remove, so far as he can, the effect of the disclosure upon the minds of the jury; *Wright v. Hearson* (1916) *W.N.* 216: *Askew v. Grimmer* (1927) 43 *Times L.R.* 354.

From the record before us it does not appear that the impropriety of the disclosure was ever canvassed during the trial; nor that, if it were present to the mind of the learned trial judge (as we must assume it to have been), he made any effort to counteract its effect. The disclosure appears to have been made by inadvertence and no one concerned in the conduct of the trial paid any attention to it.

In these circumstances we cannot feel assured that there was a fair trial between the parties and that the jury was not influenced both in their finding on the question of negligence and in

their assessment of the damages by an unfair appeal to their prejudices.

We feel therefore that we must for this reason allow the appeal. The verdict of the jury and the judgment based thereon are set aside and we direct that the cause be remitted to the Court of Common Pleas for re-trial. . . . . The costs of the first trial will abide the event of the re-trial: there will be no order as to the costs of this appeal.

Solicitors: Carrington and Sealey for the appellant.

Hutchinson and Banfield for the respondent.

CUMMINGS *v*. DEMAS, HENRY and DAVIDSON.

(In the West Indian Court of Appeal. On Appeal from the Supreme Court of Trinidad and Tobago (Collymore, Malone, Worley, CJJ.) March 10, 1950).

False imprisonment—Arrest without warrant—Police constables' powers of arrest—Right to arrest person reasonably and honestly believed to be an offender—Common law—Statutory—Arrested person—Search and taking property found on person—Material evidence—Onus of proof.

On the 24th August, 1947, the appellant was the Manager of a Coney Island show at Sangre Grand, Trinidad. The respondents who are policemen were present at the show for the purpose of keeping order. Being of opinion that a game of chance was being played, they arrested one Romero who was in charge of the game. While the respondents were collecting the money lying on the gaming board, the appellant arrived and held the first respondent's hand and refused to release it on request. He was arrested for obstructing the police in the execution of their duty and violently resisted his arrest. He was eventually subdued and he and Romero taken to the police station and charged.

The Magistrate found that the game carried on by Romero was not a game of chance and dismissed the charge against him. The charges against the appellant for obstruction and resisting arrest were also dismissed. The appellant's action for damages against the respondent policemen for false imprisonment was dismissed by the trial judge on the ground that the respondents had reasonable and probable cause for believing that an offence was being committed and the appellant's obstruction and resistance were unjustified.

The plaintiff appealed.

Held: Once the arrest was proved, the onus was on the respondents to justify it. The appellant had committed no offence unless the respondents were acting in the execution of their duty. They were not justified in arresting Romero without a warrant under the Gambling Ordinance or at Common law. As he was not found committing an offence his arrest was also not valid under the Summary Jurisdiction Ordinance or the Police Ordinance and it was no defence that they honestly and reasonably believed that Romero was committing an offence at the time of his arrest. There is no general right to search a prisoner or to take and detain property found on or belonging to him, the right depends on the circumstances of each case.

Judgment of the Court.

The appellant in this matter brought an action against the three respondents, who are members of the Police Force of the Colony, to recover general damages for assault, wrongful arrest, false imprisonment, and malicious prosecution. He also claimed $113.10 special damages, being the costs incurred in defending himself against charges of assaulting and obstructing the police. The respondents, while putting the appellant to the proof of his arrest and imprisonment, averred that such arrest and imprisonment were executed and done in accordance with the provisions of section 21 of the Police Ordinance, Chapter 11, No. 1 of the Laws of the Colony.

The arrest and imprisonment were, in fact, admitted by the respondents in the course of the trial before the Chief Justice but the learned Judge held that, the respondents having acted with reasonable and probable cause, their acts were justified and dismissed the claim with costs. The appellant does not contest the judgment so far as it relates to the allegation of malicious prosecution, but he contends that on the facts found by the trial Judge judgment should have been entered for the appellant on the other issues.

The circumstances which led up to the arrest and imprisonment were as follows: On the 24th August, 1947, the appellant was the manager of a "Coney Island Show" at Sangre Grande. It is not clear from the record whether this Show was situated on Crown or private land, but Counsel agree that it was not enclosed and that the Show was open to the public without payment of any admission fee. The first-named respondent is a Sergeant of Police and, on the day in question, was in charge of the police station at Sangre Grande. The other two respondents were stationed there and acted on his orders. The first respondent had been asked to provide and had provided police constables to assist in keeping order at the Show and he had himself visited the place and had seen that, among other attractions, unlawful games of chance were being played. He determined to raid the place, and, accordingly, at about 6.05 p.m. on Sunday 24th August, took a party of police-to the Show and on arrival detailed his men to take charge of certain stalls. There is no evidence as to whether the constables were in uniform but Sergeant Demas himself was in plain clothes. Several persons were arrested and charged in respect of various games and some of them were subsequently convicted of offences under the Gambling Ordinance (Ch. 4 No. 20). Among those arrested was one Romero, who was in charge of a game called "penny-throw", which the respondent Demas honestly believed to be a game of chance. Demas told Romero that he was under arrest for carrying on this game and started to pick up the money lying on the gaming-board. At the trial there was a conflict of evidence as to what happened after that but we take the evidence of Demas which the trial judge appears to have accepted:—

> "While I was doing so Charles Cummings came up to me, held my right hand saying, 'Check the money first'.

> I told him to let me go, but he still held on to my hand. I told him I was Sergeant Demas. . . . . and that I had arrested Romero for conducting a game of chance. He still refused to let go my hand. I succeeded in pulling away my hand from his grasp and told him he was under arrest for obstructing me in the exercise of my duty and I laid hand on him. Romero had then disappeared—during my struggle with Cummings."

The appellant resisted arrest whereupon the other two respondents came to the assistance of the sergeant and appellant was taken in custody to the main road to be put in a waiting motor car with the other men arrested.

On reaching the road, Demas decided to search the appellant who resisted violently but was overpowered, searched and finally put into the car with the others and taken to the station. He was given bail the same night.

Romero was subsequently charged with carrying on a public lottery, contrary to section 7 (1) (e) of the Gambling Ordinance and was acquitted, the Magistrate being of opinion that the game in question was not a game of chance. The appellant was charged with assaulting Sergeant Demas and obstructing him in the execution of his duty and was acquitted. He then brought this action for damages.

The Chief Justice found (a) that the respondent Demas had reasonable and probable cause for believing and did believe, that an unlawful game of chance was in progress and, acting in that belief and in pursuance of his duty as a police officer, he seized the money which was under the appellant's control at the Show; and (b) that the appellant, with knowledge that the respondent Demas was a police officer, endeavoured to prevent him from so acting, and on being apprehended resisted arrest with violence: in the course of that arrest he was searched and rightly searched. The judgment then continues:

> "It is submitted that the defendant's acts in seizing the money was *prima facie* unlawful unless he could establish that the game was illegal. In other words that the onus was upon the defendant to prove that an illegal game of chance was being played. If he failed to establish this, it is argued that the plaintiff might lawfully assault, and resist and obstruct him, if he could not prevent him from taking the money by any other means. If this argument was valid no policemen could safely act in the reasonable belief that an offence was being committed. As I indicated during the trial I emphatically repudiate that dangerous doctrine. If a policeman acts with reasonable and probable cause, he is entitled to protection, even though he may eventually prove to have been mistaken."

With great respect, the learned Judge does not appear to have appreciated where the onus of proof lies in an action for false im-

prisonment. The gist of the action is the mere imprisonment: the plaintiff need not prove that the imprisonment was unlawful and malicious, but establishes a *prima facie* case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification and he is entitled to succeed if he pleads and proves that the imprisonment was legally justifiable. (Halsbury, Laws of England: 2nd Edition, Vol. XXXIII. paras. 67 and 80).

Accordingly, when the appellant had proved that he was arrested and imprisoned by the respondents, the onus lay upon them to justify their action. We agree that the action of the appellant in grasping the hand of Demas and so hindering him, even temporarily, from taking up the money lying on the gaming table constituted an obstruction, but it was not an offence unless Demas was at the time acting in the execution of his duty, and this depends upon the questions:

(a) whether the arrest of Romero was legally justified, and

(b) whether Demas had any right to seize the money either as a right ancillary to the arrest of Romero, or as a right independent of the right to arrest.

The first question necessitates consideration of the right of a member of the police force of the Colony to arrest without a warrant for offences under the Gambling Ordinance and for other summary conviction offences, and it is as well to approach the question from the standpoint of the position of the police at common law.

Although many statutory duties are nowadays imposed upon the police the principle still remains that, in view of the common law, a policeman is only "a person paid to perform, as a matter of duty, acts which if he were so minded, he might have done voluntarily", and, as Scott L.J. intimated in the Court of Appeal in his judgment in Leachinsky v. Christie (1945) 2 A.E.R. 395, the foundation on which the freedom of the individual rests is the protection afforded him by the Court against unauthorised arrests. Every arrest whether made by a policeman or by a private individual is unlawful and constitutes an actionable wrong unless it falls within one or other of the clearly defined cases where the law allows it.

A constable's powers of arrest are derived from three sources (i) the common law (ii) particular statutes and (iii) the warrant of a magistrate. We observe, firstly, that section 11 of the Gambling Ordinance provides that any Justice who is satisfied by proof upon oath that there is reasonable ground for believing that any place is kept or used as a common gaming house (and this Coney Island Show was being so used) may issue a warrant authorising any constable to enter such place, make search therein, arrest all persons there and seize all appliances for gambling and all moneys found therein. Moreover the section further provides that whenever, owing to the lateness of the hour or other reasonable cause,

it shall be inconvenient to obtain a warrant, then it shall be lawful for any commissioned officer of Police, or any non-commissioned officer of Police not under the rank of sergeant, by night or by day, without warrant, to enter any place which he has reasonable grounds for believing is kept or used as a common gaming house, and any such officer shall, upon such entry, have the same powers of search, arrest and seizure as may be exercised by a constable duly authorised by a warrant. It is however further provided that no such entry without, a warrant shall be made unless such officer is, at the time of entry, in the dress and uniform of the Police Force.

Sergeant Demas, had, it is admitted, not armed himself with such a warrant nor was any attempt made to bring his action within the purview of the above-mentioned provisos to the section. No other section of the Gambling Ordinance confers any power of arrest and the first-named respondent's action can therefore only be justified either at common law or under other particular statutes conferring a general power of arrest.

The common law powers of arrest without warrant are confined to treasons, felonies, and breaches of the peace, and these powers the police share with every citizen. The only additional power, under common law, that a constable possesses is the right of arrest on reasonable suspicion that a treason or felony has been committed and of the person arrested being guilty of it (Halsbury op. cit. Vol. XXV, para. 533). A breach of the peace may be committed when a person obstructs a public officer in the execution of his duty: Spilsbury v. Micklethwaite (1808) 1 Taunt 146 per Lord Mansfield C.J. at p. 151. The arrest of the appellant could therefore only be justified under the common law, provided that Demas was in truth and in fact acting in the execution of his duty when the appellant obstructed him, which brings us back to the justification of the arrest of Romero and/or the seizure of the money.

This arrest was not made under authority of a warrant nor was it justifiable under the common law or under section 11 of the Gambling Ordinance and there remain only two statutory provisions available to the respondents; these are section 104 of the Summary Courts Ordinance: Ch. 3, No. 4 and section 21 of the Police Ordinance, Ch. 11, No. 1. The former provides (omitting words irrelevant to our present purpose) "any person who is found committing any summary offence may be taken into custody without warrant by any constable." Sub-sections (1) and (2) of section 21 of the Police Ordinance are as follows:—

(1) It shall be lawful for any member of the Force to arrest without a warrant—

(a) any person committing any offence punishable either upon indictment or upon summary conviction;

(b) any person who shall be charged by any other person with committing an aggravated assault in any case in which such member of the Force shall have good reason to believe that such assault has

been committed although not within his view, and that by reason of the recent commission of the offence a warrant could not have been obtained for the apprehension of the offender;

(c) any idle or disorderly person whom such member of the Force shall find disturbing the public peace and any person whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanour, or breach of the peace, and any person whom he shall find between the hours of eight o'clock in the evening and six o'clock in the morning lying or loitering in any highway, yard or other place, and not giving a satisfactory account of himself.

(2) It shall be lawful for any member of the Force, and for all persons whom he shall call to his assistance, to arrest without warrant any person who within view of any such member of the Force shall offend in any manner against any Ordinance and whose name and residence shall be unknown to such member and cannot be ascertained by him.

It is convenient at this point to observe firstly, that sub-section (2) could not in this case have availed the respondents as the appellant was well known to the second-named respondent: secondly, and with this the Solicitor General who appeared for the respondents agreed, that neither paragraph (b) nor (c) would avail them, and, in particular, that the word "misdemeanour" in the latter paragraph is used in the narrow sense of a misdemeanour punishable on indictment and thirdly, that no distinction can be drawn between the two expressions "found committing" and "committing". The respondents did not, as they might have done, seek to re-open the issue of fact whether Romero did actually commit the offence with which he was charged, although in these proceedings and between these parties the issue was not concluded by the magistrate's decision (per Lord Wright in Barnard v. Gorman (1941) A.C. 378 at page 390).

The respondents' case therefore was based upon the contention that the two above mentioned sections, which confer upon constables a general power to arrest persons committing or found committing an offence punishable on summary conviction, must be construed as conferring by implication power to arrest persons reasonably suspected of committing such an offence: and in those few words lies the crux of this appeal.

The first observation on this is that if such were the intention of the Legislature, nothing would have been easier than to say so in express words. There are numerous instances in other enactments where such express words have been used when the Legislature clearly intended to confer the power to arrest upon suspicion; see for example, the Summary Offences, Ch. 4 No. 17, secs. 35, 44, 64, and the Larceny Ordinance, Ch. 4 No. 11, sec. 40. We would further observe that on this construction of paragraph (a) of sub-section (1) the whole of paragraph (b) would appear to be unnecessary. But these comparisons, though significant, are not conclusive, "Our duty is to take the words as they stand and

to give them their true construction, having regard to the language of the whole section and, as far as relevant, of the whole Act, always preferring the natural meaning of the word involved; but none the less always giving the word its appropriate construction according to the context" (per Viscount Simon L.C. in Barnard v. Gorman, supra, at p. 384).

> "It is the duty of the Court in construing sections of this nature", said Lord Wright in the same case at page 389 of the report, "to balance the two conflicting principles, the one that the liberty of the subject is to be duly safeguarded: the other that the expressed intention of the legislature to give powers of arrest beyond those existing at common law should not be too narrowly construed. But in the end the issue falls to be ascertained by deciding what is the correct meaning to be attributed to the words of the particular section which gives the power, read according to the recognized rules for construing statutes."

The construction of similar provisions in particular English statutes has been considered by the Courts there from time to time with results which are not always easy to reconcile. The cases are well-known and we do not propose to review them in detail. They were all considered in the House of Lords in the case of Barnard v. Gorman (supra). The highest at which the result of the English cases can be put is, we think, expressed in the note to Halsbury's Laws of England, 2nd Edition, Vol. IX, para. 119, note (f) in the 1949 Supplement (p. 419):

> "There is authority for the proposition that the natural construction of a section conferring a power of arrest in the case of the commission of an offence is that it confers a power of arrest in the case of an honest belief on reasonable grounds that the offence has been committed, if the character of the offence is such that in the interests of public safety, or on account of threatened danger to life, limb or property, prompt action is called for."

The authorities cited are Trebeck v. Groudace (1918) 1 K.B. 158 C.A.; Isaacs v. Keech (1925) 2 K.B. 354 C.A.; and contra, Ledwith v. Roberts (1937) 1 K.B. 232 C.A. See also Stevenson v. Aubrook (1941) 2 A.E.R. 476. The note continues:

> "This proposition also received certain approval of the Court of Appeal in Barnard v. Gorman, but the house of Lords regarded the question as depending upon the contents of the particular provision concerned rather than upon any supposed general rule of construction."

The problem which faces us is not, as in the English cases, the construction to be put upon a section having reference to particular offences or classes of offences, the character of which can be estimated with reasonable certainty. We have to construe a section which, we believe, has no statutory equivalent in England and which confers a power of arrest in respect of not only all felonies but also all offences punishable on summary conviction, that is to say, the thousand and one offences, mostly the creatures of modern statutes, which are triable in a Magistrate's Court.

Some of these are petty and some are grave; some may effect the public safety and threaten danger to life, limb or property; others are merely *mala prohibita* and may not even require the element of *mens rea* in the offender. It follows, therefore, that the construction contended for by the respondents, if accepted, will take us much further than any English decision has gone and will confer on the police a power to arrest for misdemeanours (using that term in the wider connotation of all offences other than treason or felonies) vastly greater than their common law powers.

We cannot accept that construction. In our view the rule which we must apply is that enunciated by Lord Wright in Barnard v. Gorman at page 393:

> "I thus here define the ambit of the power to detain from the actual language of the statute and not from any implication. I am not prepared to construe the power to detain by holding that 'offender' in the relevant section means actual offender and then reading in by implication as a further definition or extension of the power to detain such words as 'the offender (i.e., the actual offender) or such person as the officer reasonably and honestly believes to be an offender.' There are statutes where power to arrest without warrant on reasonable cause to suspect is given in express terms, but in general I think such an extension of the express power merely by implication is unwarranted. As Pollock C.B. said in Bowditch v. Balchin (5 Ex. 373) 'In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute'".
>
> "We must not give the statutory words a wider meaning merely because on a narrower construction the words might leave a loophole: if, on the proper construction of the section, that is the result, it is not for judges to attempt to cure it": (per Viscount Simon at p. 384).

In our view therefore the learned Chief Justice misdirected himself in holding that it was sufficient justification for the respondents to shew that they honestly and reasonably believed that Romero was committing an offence at the time of his arrest. So stated the terms of the proposition are far too wide and cannot be supported by authority.

We pass now to consider the Solicitor General's contention that the respondent Demas had a right to seize the money on Romero's table, if he believed that an unlawful game was being played, and that this right existed independently of any right to arrest Romero. No authority was given for this proposition and, in the absence of any special local statutory provision, the law on this point is the same as that of England, which is stated in Halsbury—op. cit. Vol. IX para. 130 as follows:

> "A constable, and also it seems, a private person may upon lawful arrest of a suspected offender take and detain property found in the offender's possession, if such property is likely to afford material evidence for the prosecution in

respect of the offence for which the offender has been arrested". The origin of the right is, as Pallas C.B. pointed out in Dillon v. O'Brien and Davis (1887) 16 C.C.C. 245 at p. 250, the interest of the State in the person charged being brought to trial which interest necessarily extends, as well to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. But this presupposes a lawful arrest.

The law is also stated rather more fully in Vol. XXV, para. 538 of Halsbury's Laws of England:

> "A constable may upon the lawful arrest of a suspected offender take and detain property found in his possession if the property is likely to afford material evidence in respect of the offence charged and may retain it for use in Court against the person arrested Until the conclusion of the trial. A constable should not take property not in any way connected with the offence, but the seizure and detention otherwise unlawful of documents and articles in the possession and control of a person arrested will be excused if it should subsequently appear that they are evidence of a crime committed by any one."

The seizure of the money could therefore only be justified by establishing either that Romero's arrest was lawful or that he or someone had committed an offence of which the money was material evidence. As the respondents have failed to establish either of these justifications, it must follow that they have not discharged the onus of shewing that Sergeant Demas was acting in the execution of his duty in seizing the money and that the appellant was committing an offence in obstructing him.

In an action for wrongful arrest and false imprisonment, evidence that the plaintiff was searched is admissible and relevant on the question of damages without being alleged as special damages: Dunphy v. Moore (1865) 13 L.T. 119. We have therefore to consider whether the appellant was rightly searched as the learned Chief Justice held. Again, in the absence of any special local enactment, the law applicable to this aspect of the case is the same as in England. It is stated in Halsbury op. cit. Vol. 25, para. 534:—

> "There is no general statutory right to search a prisoner, and the right of searching persons in custody depends upon the circumstances of the case. Thus a constable will be justified in searching a prisoner who has so conducted himself by violence of language or conduct as to make it prudent and right to ascertain whether he has about him the means of doing mischief to himself and others. A prisoner may also be searched if it be suspected that he has about his person any articles which may be material as evidence in respect of the offence with which he is charged."

In Leigh v. Cole (1853) 6 C.C.C. 329, Vaughan Williams J. after stating the rule, said:—

> "At the same time it is quite wrong to suppose that any general rule can be applied to such a case. . . the searching

> of such a person must depend upon all the circumstances of the case."

We fully appreciate that the police ought to be protected in the discharge of their onerous arduous and difficult duties and especially so in countries where the carrying of weapons by criminals is prevalent. But, on the other hand, it is equally incumbent on everyone engaged in the administration of justice to take care that the powers necessarily entrusted to the police are not abused or made an instrument of oppression. The police must understand the limitation of their powers and the proper mode of exercising them.

In the present case it is clear that the search was conducted merely as a matter of routine. In his examination-in-chief, the respondent Demas said:

> "While Cummings was at the road I decided to search him. It is customary for police to search arrested persons. Cummings then threw himself on the ground and started to bawl, at the same time kicking out. One of the kicks caught me on the forehead which was bruised and swollen. With the assistance of the other police constables I succeeded in getting him into the car."

Under cross-examination he said:

> "I always search arrested persons—in case they have dangerous weapons on them. That was why I searched the plaintiff. Found no dangerous weapon on him—only money and keys which I took and subsequently returned to him."

There is here no evidence that the respondent Demas reasonably or honestly thought that the appellant might have a dangerous weapon on his person, nor does he even plead any general police order or instruction. To search all persons who are taken into custody upon any charge, whatever it may be, regardless of the circumstances, is unjustifiable and, in our view, the respondents have failed to show justification in the circumstances of this case. The second and third respondents cannot rely upon the fact that the arrest and search were carried out on the orders of a superior.

With regard to the special damages claimed, the fact that the appellant was charged with a criminal offence or that he was put to expense in defending himself is not a matter to be considered in assessing the damage in an action of false imprisonment, although such matters form the subject of damages in an action for malicious prosecution: Chivers v. Savage (1855) 5 E. & B. 697: Guest v. Warren (1854) 9 Exch. 379. The appellant having abandoned his action for malicious prosecution must forego his claim for special damages.

For these reasons the appeal must be allowed: the judgment in the Court below is set aside and we direct that judgment be entered for the plaintiff-appellant against the respondents jointly for Four hundred and eighty dollars damages and costs. The respondents must also pay to the appellant his costs of appeal.

BHOOP SINGH (Claimant *v.* DAVID (Plaintiff and execution-creditor in re Davis v. Laljie).

(Civil Jurisdiction (Ward J.) February 13, 20, 25, 27 March 11, 1950).

Interpleader—Execution—genuine sale by debtor to claimant—Movables—Goods remaining in apparent possession of debtor—Receipt—Unregistered Bill of sale—Transfer of possession—Effect of registration under Motor Vehicles and Road Traffic Ordinance 1940 (*No*. 22).

On December 31, 1949, D obtained judgment against L for $1,360 and costs $60 and levied on a motor car in the possession of L on January 6, 1950. It was not denied that the claimant had purchased the car from L on July 18, 1949 and complied with the requirements of the Motor Vehicles and Road Traffic Ordinance 1940 (N.22). by registering and insuring the car in his name. After the sale by L to the claimant the actual physical possession of the car remained with L who used it and paid the claimant a daily rental of $2.00. The receipt evidencing the purchase of the car was not registered as a Bill of Sale.

Held: Receipts for the purchase money of goods when possession is not delivered at the time of sale, are bills of sale under section 3 of the Bills of Sale Ordinance Chapter 67 and require registration under section 8. That registration under the Motor Vehicles and Road Traffic Ordinance 1940 does not establish the real ownership of a vehicle, and as the receipt for the motor car was not registered under the Bills of Sale Ordinance, and the car remained in the apparent possession of vendor, the claim of the claimant failed as against the execution creditor.

J. Carter for execution-creditor.

C. L. Luckhoo for claimant.

WARD J.

The claimant, Mr. Bhoop Singh, is the purchaser of a motor car No. H6213 in which a levy has been made by the execution-creditor to satisfy a judgment pronounced in his favour against the execution-debtor for $1,360 and $60 costs on December 31, 1949. A levy was made on the 6th January, 1950.

The bargain and sale between the claimant and the execution-debtor took place on July, 18, 1949, and the claimant has tendered as evidence a receipt on that date setting out the receipt by the execution-debtor of the sum of $800 from the claimant "in full payment for car H6213 complete with tools and accessories, the same being my property at time of sale." On the following day, the claimant transferred the registration of the car into his name as owner and also transferred the insurance policy of the British Guiana and Trinidad Mutual Insurance Company as owner. The claimant left the motor car in the possession of the execution-debtor to whom he hired it at a daily rent of $2. The agreement herein was verbal and there is no documentary evidence of the receipt of payments, but the bona fide nature of the transaction has not been attacked by the execution-creditor and I find as a fact that there was a bona fide sale coupled with a hiring of the car by the claimant to the execution debtor.

Section 3 of the Bills of Sale Ordinance, Chapter 67 provides that receipts of purchases of goods are included among the Bills

of Sale required to be registered by Section 8 of the Ordinance. I have no doubt that this receipt falls within the definition of a Bill of Sale as it was clearly intended by the parties that a receipt should be part of the bargain to pass the property and the goods, and it is well settled that the Bills of Sale Ordinance applies to all transfers of chattels by means of a bill of sale, memorandum or receipt where the chattel is not delivered from the alleged vendor to the purchaser.

I do not accept the submission made by Mr. Luckhoo on behalf of the claimant that the transaction is exempted from the Bills of Sale Ordinance as being a transfer of goods in the ordinary course of business of any trade or calling. Neither the claimant nor the execution-debtor is a dealer in motor cars and the claimant has stated that he had no need of a motor car as he already had one in his possession and use and only bought the car to protect himself in respect of a debt owed him by the execution-debtor.

Mr. Luckhoo, however, contends that admitting the transaction falls within the provisions of the Bills of Sale Ordinance and the receipt is not registered, the claimant has effectively obtained possession of the motor car by registering it in his name as the owner. Section 3 of the Bills of Sale Ordinance provides that personal chattels shall be deemed to be in the apparent possession of the person making or giving a bill of sale so long as they remain and are in. any house, yard, land or any other premises occupied by him or are used and enjoyed by him in that behalf solely not withstanding that formal possession thereof has been taken by or given to any other person. If I understand the authorities clearly, and especially the case of Cookson v. Swire 9 App. cases 653, the principle is that if the purchaser has taken actual physical possession for some period of time however short the transaction does not fall within the provisions of the Bills of Sale Ordinance, but in cases where there is nothing more than a formal, as opposed to an actual physical transfer of possession, the goods remain in the apparent possession of the vendor. The question to be decided therefore, is whether the transfer of the licence into the claimant's name in accordance with Section 9, Subsection 1, paragraph (b) of the Motor Vehicles and Road Traffic Ordinance No. 22 of 1940 is an actual transfer of possession.

Section 9, Subsection 1, paragraph (b) provides that the registered owner and the new owner shall within seven days after any change of possession make application in writing signed by both of them to the Licensing Officer giving the name and address of the new owner and the date and change of possession and the Licensing Officer shall thereupon enter into the Register the name and address of the new owner and from such date the new owner shall, for the purposes of this Ordinance, be deemed to be the registered owner of the motor vehicle.

It appears that the significant words in this paragraph are "for the purposes of this Ordinance." Two persons may agree to a fictitious transfer of possession of a motor vehicle and comply with the provisions of the Motor Vehicles and Road Traffic Ordinance and, for the purposes of the Ordinance, the registered owner

will be the person deemed to be the owner in respect of any duties or liabilities under the Ordinance. In other words, the effect of this provision in the Motor Vehicles and Road Traffic Ordinance is not to establish the real ownership of a vehicle, but to make the registered owner liable for any delicts under the Ordinance or for any wrongs for which the owner would be liable in damages. Such a transfer does not, in my opinion effect that actual physical delivery of the chattel which will exempt the transaction from being subject to the Bills of Sale Ordinance.

I am fortified in this opinion by a recent decision of a County Court Judge in England in a case of which a husband made a gift to his wife of a motor car and transferred it into her name in the Register of Licenses for motor vehicles. The car, however, remained in his garage until a short time before execution was levied and it was held that the gift was imperfect as the car had remained in the apparent possession of the husband.

It may be that the claimant in this case is suffering a hardship, but it is his own fault, as the law clearly provides that unless he took possession of the chattel, or registered the Bill of Sale, in the circumstances of this case he always ran the risk of its being seized by an execution-creditor. The finding of the Court is that the motor car was in the apparent possession of the execution-debtor at the time of the levy, and the claim of the claimant fails. The claim is therefore dismissed with costs.

Solicitor: Miss E. A. Luckhoo for the claimant.

IN THE WEST INDIAN COURT OF APPEAL.

On Appeal by way of case stated by a Judge of the Supreme Court of British Guiana sitting in its Criminal Jurisdiction for the County of Demerara.

REX v. ANGAD SINGH.

West Indian Court of Appeal (Furness Smith, Collymore. Worley C.JJ.) March 13 16, 1950.

Criminal law—Murder—Provocation—Non direction.

The appellant was convicted by a jury on a charge of murdering his wife. At his trial his defence was that his wife had insulted him and confessed adultery and then assaulted him when he struck the blow which resulted in her death. The trial judge directed the jury that insults coupled with a confession of adultery was not provocation which the law permitted to reduce the crime from murder to manslaughter, but that if they believed he was assaulted, then that was the beginning of provocation sufficient to reduce the crime to manslaughter. No express direction was given to the jury that if they accepted the evidence of the assault they were entitled to refer back to the evidence of insults and confession of adultery and to regard them as part of the provocation to which the appellant was subjected.

Held: Had the jury been fully directed they may have acquitted the appellant of murder and found him guilty of manslaughter.

Conviction for murder set aside and conviction for manslaughter substituted.

C. L. Luckhoo for the appellant.

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

Judgment of the Court.

This is an appeal by way of case stated from the conviction of Angad Singh for the murder of his wife. The short point for determination, as presented in the case stated, is whether the trial judge in the course of his direction to the jury upon the circumstances of provocation, which, according to the prisoner's evidence at the trial occurred on the 1st August, 1949. (that is to say shortly before the killing), may have led them to suppose that they were not entitled to consider that part of the prisoner's narrative which included words of abuse and a confession of adultery. We have, unfortunately, no transcript of the actual directions given, and are dependent on the judge's recollection of what he told the jury as set out in the case stated. This is unfortunate because the argument of appellant's counsel was upon the meaning of a passage in the case stated which at first sight appears to indicate that proper and express direction relevant to the consideration of the effect of the insult and confession was in fact given to the jury, whereas the passage which immediately follows it seems to indicate that it was not given at all. The passage (page 9 of the record) is as follows:

> "The jury had been directed that the facts occurring on the morning of August 1st were to be considered as provocation; but, in case they considered Angad's account of an assault unreasonable, they were directed that the insult and confession of adultery, by themselves, did not constitute provocation. As soon as an assault came into the picture, the insult and confession fell to be considered as part of the provocation. This was expressed to the jury by telling them that the assault was the beginning of the provocation. As nothing further was said the jury may have been misled into believing that the insult and confession were not to be considered at all. The impression created by the original direction to consider all the facts may have been effaced by the actual words used; and there was no direction given to clear up the misapprehension, if misapprehension there had been."

At first sight it looks as if the words "as soon as an assault came into the picture, the insult and confession fell to be considered as part of the provocation" formed part of the express direction which is mentioned in the sentence which immediately follows these words, that is to say "this was expressed to the jury by telling them that the assault was the beginning of the provocation" seems to show that those words, formed no part of the direction which is mentioned in the sentence which immediately precedes them, but that their meaning is to be derived from the direction concerning "the beginning of the provocation" which is mentioned earlier in the case stated (pages 7 and 8). There the judge says that he referred in detail to the facts to be considered if Angad's explanation as to provocation was accepted,

and separated these incidents into stages. These stages are expressed as being five in number, but for the purposes of the point now under consideration, they may properly be referred to as two; the first stage being the insult and confession of adultery by the deceased on being informed by the prisoner of certain reports which he had received concerning her, and the second stage being several acts of assault by the deceased and others upon him. After referring to the circumstances of the first stage, the judge observed to the jury that so far these did not amount to provocation which the law permitted to reduce the crime from murder to manslaughter. Then, after referring to the first incident of assault in the second stage, the judge observed, "Now, gentlemen, you have provocation." This is the beginning of the provocation." We do not think that it is possible from such direction as this to derive the meaning that, "as soon as assault comes into the picture, the insult and confession fell to be considered as part of the provocation." Nor do we think that the jury could be expected to understand this from the converse case put to them in the words "in case they considered Angad's account of an assault unreasonable, they were directed that the insult and confession of adultery, by themselves, did not constitute provocation."

It seems clear from what we have said that express direction was never given to the jury on this point. Indeed at page 8 of the case stated the judge says "There was no specific direction to the jury, that, if they accepted Angad's account of an assault, they were then entitled to refer back to the insult and the confession of adultery, and to regard them as part of the provocation to which Angad had been subjected." We consider therefore that, in the absence of clear direction in that behalf the jury (assuming that they believed the prisoner's story) might have supposed from the direction actually given that they were not entitled to take into consideration the insult and confession as part of the circumstances of provocation; and it is possible that, had they felt themselves free to take into consideration these additional circumstances, they might have acquitted the appellant of the charge of murder and found him guilty of manslaughter.

The question submitted for determination in the case stated should therefore be answered in the affirmative. The conviction for murder and sentence thereon are set aside, and we substitute therefore a conviction for manslaughter and a sentence of fifteen years penal servitude.

SHIWPRASHAD *v.* JAMUNTI

(IN THE SUPREME COURT, DIVORCE AND MATRIMONIAL JURISDICTION (Stafford, J.) March 1, 15, 16, 1950).

Husband and wife—nullity—divorce—malicious desertion—non-consummation of marriage.

This was an undefended petition in which the husband prayed for a decree of nullity of marriage or, in the alternative, of dissolution of marriage on the ground of malicious desertion.

The parties were married on the 16th February, 1948, and on the 17th February, 1948, the husband attempted to have marital intercourse with his wife. She refused his advances and left the matrimonial home the following morning and returned to her mother's house. That same night the husband went to the house of his mother-in-law and requested his wife to return to him but instead she gave him back the wedding ring and refused to go back. From that date until the presentation of the petition she lived separate and apart from her husband and all efforts to return to the matrimonial home were unavailing. The marriage was never consummated.

Held: To found a decree of nullity the ground must be shown to have existed prior to or at the time of the marriage, and in the absence of evidence of impotence or incapacity the appropriate decree is one of dissolution of marriage on the ground of malicious desertion.

B. O. Adams for the Petitioner.

Stafford, J. (Acting).

This is an undefended petition wherein the petitioning husband prays a decree of nullity of marriage or, in the alternative, of dissolution of marriage on the ground of malicious desertion.

The marriage was celebrated according to Hindu rites at No. 64 Village, Corentyne, Berbice, on the 16th February, 1948, and was duly registered on the 19th February, 1948, under the provisions of section 143 of the Immigration Ordinance, Chapter 208.

According to the evidence adduced, after the marriage the parties repaired to the house of the petitioner, which was intended to be the matrimonial home, at Bush Lot Village, Corentyne. On the 17th February, 1948, the petitioner attempted for the first time to have marital intercourse with the respondent, but she refused. There was no other attempt and the marriage has never been consummated. On the morning of the 18th February, the petitioner left his home for his usual work on his farm and on his return in the evening found that the respondent had departed. He followed her to the house of her mother at No. 64 Village where he saw her later. There, in the presence of other persons, she refused to return to him and gave the wedding ring back to him. She has persisted in her refusal to return and has lived separate and apart from him ever since.

No evidence of physical incapacity was offered, nor have I been asked by counsel to infer it against the respondent.

The question arises: should the decree be one of nullity or one of dissolution on the ground of malicious desertion? Or should the petitioner be referred to the remedy of restitution?

The provisions of section 2 of the Matrimonial Causes Ordi-

nance, Chapter 143, prescribe that the Supreme Court shall exercise jurisdiction in divorce and matrimonial causes as completely as it did under the Roman Dutch common law and that such jurisdiction shall as far as possible be exercised in accordance with the same principles and rules as jurisdiction in those matters is exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice in England, and subject to any rules of Court made locally.

Express provision is made in section 9 of chapter 143 for dissolution of marriage on the ground of malicious desertion, a matrimonial offence under the Roman Dutch common law; but decrees of nullity are only obliquely referred to in sections 12, 14, 16, 19 and 20 of the Ordinance and the grounds for granting such decrees are not stated or defined.

According to the learned authors of Rayden on Divorce, 4th Ed. ch. 2, para. 75, wilful refusal to consummate the marriage was never accepted in England by the Ecclesiastical Courts as a ground for nullity, unless it could be referred to impotence or incapacity existing at the time of the marriage. This was the principle on which the Divorce Division administered the law. In Dickenson v. Dickenson, 1913, p. 198, Sir Samuel Evans departed from the principle, holding that the wilful, determined, steadfast refusal of the wife constituted a valid and sufficient ground and granted a decree nisi of nullity, but this decision was over-ruled in Napier v. Napier, 1915, p. 184 in which Pickford L.J. drew attention to the unsatisfactory state of the law and all the judges held that this new ground for nullity could only be introduced by legislation. It was so introduced by the Matrimonial Causes Act, 1937, S. 7 (1) (a).

In Roman Dutch law, according to van Leeuwen (Vol. I, lib. 1, cap. XV, para. 5) a decree of nullity might be granted on the ground of incapacity to procreate and van der Linden (Bk. 1, cap. III, para. VI) says that persons suffering from physical infirmity amounting to incapacity to procreate are incapable of marrying, but neither of these jurists mentions wilful refusal to consummate as a ground for nullity. The modern writer Nathan in his Common Law of South Africa (Vol. i, pt. iiiB, cap. IV, para. 494) in which country the system of law is still Roman Dutch, states that marriages may be declared by the Court to be null and void for causes which existed or arose prior to the marriage, such as consanguinity, minority, incapacity or ante-nuptial stuprum; but he also makes no mention in this respect of wilful non-consummation, *causa subsequens.* Nathan, however, does refer (ibid, Vol. IV, pt. IX, cap. V, para. 2054) to the case of Burnett v. Burnett (12 Cape Law Journal, 14) in which a wife, deserted by her husband immediately after the marriage ceremony and with whom the husband never cohabited, sued five years later in the High Court for restitution, failing which, for divorce. The Court (de Villiers C.J. and Steyn J; McGregor, J; dissenting) granted a decree. But Nathan omits to state whether for restitution or divorce, and the Cape Journal is not available in our local Law Library.

In Burgers v. Knight, 1916, South African Law Reports Natal Provincial Division, 399, three judges concurred in a decree annul-

ling a marriage of which there had been no consummation, but on a finding of incapacity inferred from the husband's refusal to submit to a medical examination and from a document in which he admitted that he was "unfortunately medically unfit to consummate the marriage."

The effect of the above authorities therefore is that both under Roman Dutch common law and English Ecclesiastical Law to found a decree of nullity the ground must be shown to have existed prior to or at the time of the marriage. In England non-consummation has now by statue been made a ground for nullity, as I have mentioned, but counsel has not been able to cite me any local enactment corresponding to 1 Edw. 8 and 1 Geo. 6, C. 57, S. 7 (1) (a).

Now as to non-consummation being a ground for a decree of malicious desertion; one of the Roman Dutch writers, Voet (Bln. XXIV, Tit N, para. 7), throws light directly upon the subject. He says that "a wife suffering from the obstinate and unkind abstinence of her husband ought, sooner than commit adultery, to apply to the Court even to the extent of asking for dissolution: for it makes no difference whether it is by his absence or in his presence that a husband reduces his wife to a state of widowhood."

As to desertion in English law, counsel for the petitioner cited de Laubenque v. de Laubenque, 1899, P.D. 42. In that case, the wife had been left by the husband immediately after the ceremony without the parties ever having cohabited or ever having had a matrimonial home. The respondent later committed adultery and the wife presented her petition on the ground of adultery and desertion, both of which had to be proved at that date in England if the petitioner were to succeed. During the hearing of the petition, which was not defended, reference was made to the earlier cases of Fitzgerald v. Fitzgerald, 1859 1 P. & M. 695 in which it had been laid down that desertion could only take place where an end had been put to an existing state of cohabitation, and Buckmaster v. Buckmaster 1869, 1 P. & M. 713, in which the petitioner had bargained away her right to insist on cohabitation for $100:—before any cohabitation had taken place subsequent to marriage. Sir Francis Jeune, President, held that in the circumstances proved, Mrs. de Laubenque had established the fact of desertion as well as that of adultery and granted her a decree of dissolution.

From the above authorities, I come to the conclusion that where the evidence in support of a petition establishes that one spouse has deliberately refused to consummate the marriage and has thereafter wilfully and without just cause or excuse separated himself or herself from the other against the will of that other and with the intention that the separation shall be permanent and final, in the absence of evidence of impotence or incapacity, the appropriate decree to be made is one of dissolution of marriage on the ground of malicious desertion, and not one of nullity of marriage. Decree accordingly.

Solicitor for the petitioner: *A. Vanier.*

Respondent in default of appearance.

MARKS v. BUTTS, in his capacity as executor of the estate of Harriet Butts, M. Butts, L. Butts and E. Perry.

(In the Supreme Court, civil jurisdiction (Worley C.J.) May 13, 17, 18, 19; October 7, 1949; March 31, 1950).

Immovable property—contract of sale—Alleged loan by third person to vendors—fraud—consent judgment obtained against vendors by third person—execution—interlocutory injunction—action to set aside consent judgment—judgment against person in capacity of executor void when loan made to third individual personally—set aside—opposition action to sale at execution declared abandoned—fresh action—alternative remedy.

Three of the four defendants contracted to sell immovable property to the plaintiff. They then fraudulently conspired with two others not parties to this action to sell the same land at a higher price to a person who also was not a party to this action. Subsequently the fourth defendant obtained a consent judgment against the first defendant in his representative capacity and against the second and third defendant and issued execution on the land sold 1o the plaintiff. The plaintiff opposed, the sale at execution and filed a statement of claim but took no further step and the action was certified as abandoned and incapable of being revived under Order XXX 25 (2) Rules of court 1900. The plaintiff then filed another action claiming a declaration that the consent judgment was void, specific performance of the original contract and an injunction restraining the fourth defendant from levying or proceeding with his levy on the land in question.

It was objected on behalf of the fourth defendant that he had not complied with order XXVI r. 42 which provides for filing a notice of opposition with regard to sales at execution.

Held: The first defendant had borrowed money in his personal capacity and the estate was not liable. The second and third defendants had a beneficial interest on the land sold but not legal ownership and the consent judgment by the first three defendants was void.

Held further: It is open to a plaintiff to elect not to enter opposition but to seek the alternative remedy of an injunction. If an opposition action is brought and it is withdrawn or abandoned, the opposer is estopped from again interposing an opposition and from seeking an injunction in the same proceeding, but if the same property be re-advertised in such circumstances as to constitute the re-advertisement or different proceeding, then the former opposition will be no bar to an opposition or an injunction on the same grounds in the later proceeding.

Specific performance of the contract in favour of the plaintiff decreed.

Robertson v. Yarde 1919 L.R.B.G. 55.

Obermuller v. de Souza 1917 L.R.B.G. 34 explained.

S. L. Van B. Stafford K.C. for the plaintiff.

P. A Cummings for the defendant.

Worley C.J.

The estate of Harriett Susannah Butts, deceased, or that part of it which is in dispute in this case, comprises three small parcels of land known as lots 1, 2, and 3 parts of Plantation Chester West Coast, Berbice and has been the bone of contention in previous proceedings in these Courts. By the last will and testament of the deceased these lots were bequeathed to her sons, the second and third-named defendants. The first-named defendant was the

husband of Harriett and is the father of the second and third defendants. Reduced to its simplest terms for position in the present action is that the plaintiff in September 1940, January 1941 and July 1943 entered into contracts with the first, second and third-named defendants to purchase the interests of the second and third defendants in these lots, paid part of the purchase-price, entered into possession as purchaser and has remained in possession ever since. In pursuance of the bargain made in the first two contracts John Ernest Butts obtained a grant of probate of Harriet's will on 13th March, 1941, but took no steps to transport the land and the plaintiff is asking the Court to order specific performance of the contracts. In the meanwhile, namely on the 16th January, 1942, the fourth-named defendant obtained a consent judgment against the other three defendants for money due on two promissory notes and has taken the three said lots in execution. The plaintiff therefore asks the Court either to declare that the consent judgment is void or alternatively to restrain the fourth defendant from proceeding with any execution upon the land in question.

The issues both of fact and law are complicated. The earlier history of the matter is fully and carefully set out in the judgment of Duke J. (acting) in Action No. 284|41 Marks v. Fausett and Ross (1942 L.R. B.G. 320) and I do not propose to repeat it here. The issues in that case can be summarised as follows:—

After the three Buttses had contracted to sell the land in question to the plaintiff, they fraudulently conspired with Fausett and Ross to sell the same land at a higher price to one Dhanwantie. Fausett and Ross purported to act as executors by a chain of representation of Harriett Susannah Butts. In September 1941 Fausett and Ross advertised the proposed transport to Dhanwantie; the plaintiff Marks, entered opposition on 27th September and filed his Writ on 6th October, 1941. In the result, on September 30th, 1942, the Court, directed Fausett and Ross to pass transport to the plaintiff. The judgment of Duke J. was set aside in June 1943 by the West Indian Court of Appeal on the ground that the suit and the opposition were based upon a misconception of the legal position of Fausett and Ross who at no time had become the personal representatives of the estate of Harriett Susannah Butts; they therefore had no interest to transport nor authority to do so. (See Fausett and Ross v. Marks 1943 L.R.B.G. 354). This judgment however in no way affects the facts found by the learned trial judge.

Meanwhile, the present fourth named defendant Perry had made his appearance on the scene. On 18th December, 1941, in Action No. 359|41 he issued a specially indorsed writ claiming from John Ernest Butts, in his capacity as the sole surviving executor of the estate of Harriett Susannah Butts, deceased, and Mervyn Outridge Butts and Lloyd Vernon Butts, the sum of $255:— as due and payable by them jointly and severally as makers of two promissory notes for $60:— and $195:— dated 26tn August, 1941 and 18th September 1941, respectively and costs.

The promissory notes purports to be "for value received" and are signed "Susannah Butts by her executor John Ernest Butts,

Mervyn O. Butts and Lloyd V. Butts." On 30th December, 1941, John Ernest Butts, Mervyn O. Butts and Lloyd V. Butts signed a consent to judgment for the full amount claimed and costs and judgment was entered accordingly for the plaintiff Perry on 16th January, 1942. Application for a writ of execution to levy on the property of the defendants was made the same day and in pursuance thereof the lots in question were taken in execution as being the property of the estate of Harriett Susannah Butts on 12th February, 1942. The defence filed in the present action by the defendant Perry admits these facts and pleads that "the executors" of the estate assented to the devise of the said lots and delivered possession thereof to the devisees, the second and third-named defendants. If this plea is intended to refer to the acts of Faucett and Ross it is invalid as they were never executors. The act of John Ernest Butts in joining in the contracts entered into with Marks did, I think, amount to an assent (see Mangru v. Kalla 1931-37 B.G.L.R. 414 at p. 430) but it is difficult to see how that can avail the fourth defendant herein. The evidence before me contradicts the allegation that the second and third defendants were put in possession.

The third named defendant, Lloyd Vernon Butts, alias Lloyd Vernon Drysdale Butts, was born on 11th April, 1921 (Ex. O) and become of age on 11th April, 1942. He was therefore an infant when he signed the promissory notes and consented to judgment but this fact was not disclosed to the Court. Also he was an infant when he made the contract with Marks in January 1941.

In due course the property was advertised for sale at execution and the present plaintiff on 30th March, 1942, began Action No. 104|1942 against the present four defendants claiming an injunction restraining the sale on the ground of fraud and collusion; a declaration that the judgment obtained in Action 359|41 was fictitious and obtained by fraud and should be set aside; a declaration that the execution levied was null and void and an order for specific performance of the contracts of sale of the land. On 18th May, 1942, the plaintiff obtained an interim injunction and filed his statement of claim, but after entry of appearance on 20th May, no further step was taken and on the 9th August, 1943, the Registrar certified the action as abandoned and incapable of being revived in terms of Order XXXII Rule 5 (2) of the Rules of Court 1900.

There is more than one probable explanation of the apparent laches of the plaintiff in this matter. The trial of Action No. 284|41 took place before Duke J. in September 1942, and the appeal therein was heard in June 1943. About this time also, plaintiff's solicitor, Mr. Eleazar, took ill and subsequently died. Moreover, in July, 1943, after the disposal of the appeal there was a "rapprochement" between the plaintiff and the Buttses and on the 20th of that month the third defendant, Lloyd, who had by then come of age, entered into a fresh agreement (Ex. P.) with the plaintiff, wherein he agreed to sell his undivided half share of the lots in question to the plaintiff for $185:— ($10:— more than the previous price) and to credit the $57:— previously received to the purchase price under the new contract. A further $10:—

was paid and received, the balance of $118:— being payable on the passing of transport. One of the witnesses to this agreement was John Ernest Butts.

The Buttses however still took no steps to implement their agreements or to pay off the judgment creditor, Perry. When the plaintiff learnt that Action No. 104|42 had been declared abandoned, he filed the Writ in this present action, wherein he claims:—

1. a declaration that the consent judgment obtained by the fourth named defendant in Action No. 359|41 is void and rescission thereof;
2. specific performance by the first, second and third-named defendants of the contracts of sale;
3. an injunction restraining the fourth-named defendant from levying upon or proceeding with any execution upon the lots in question;
4. costs.

The first three defendants have not appeared or sought to defend the action: the fourth-named defendant has appeared and defended.

On 1st November, 1943, the plaintiff obtained ex parte an interim injunction restraining the defendant Perry from proceeding with the sale at execution and on December 4th of the same year, Duke J. ordered the continuance of the injunction until the trial of action on the usual undertaking as to damages: this order has never been perfected. A statement of claim was filed in June, 1944, the defence of the fourth defendant filed in June 1945 and after two abortive fixtures in 1945 and 1947, the action came on for hearing before me in May, 1949.

With regard to the two promissory notes the plaintiff has pleaded that the first-named defendant signed them as executor of Harriett Susannah Butts although at the date of making the notes he had no power or need as executor to borrow money as the fourth-named defendant well knew, nor was the estate indebted to the fourth-named defendant; and further that the sums in question were borrowed by the first-named defendant who disclosed to the fourth-named defendant that he required the loans for the purpose of repaying Dhanwantie.

In his defence Perry denies these allegations and pleads that the moneys which he lent to the other defendants "were used to repay administration expenses, to pay for board and lodging of the third defendant and for the use of the second defendant."

Counsel for the plaintiff having opened his case and led evidence, Mr. Cummings claimed that he was entitled to submit that the plaintiff had not made out a case of fraud and if overruled, could then lead evidence on the other issues in the case. I disagreed and put him to his election. Mr. Stafford referred to O. XXXXIII rr. 6 and 9 and submitted that the defendant had already adduced evidence and thereby given him a right to reply upon the whole case. The basis of this submission was that the defendant's counsel had cross-examined one of the plaintiff's witnesses upon

his evidence given at the trial before Duke J. and, in order to discredit his answers, had tendered in evidence a copy of that judge's notes of the witnesses's previous evidence. I overruled this submission on the ground that when previous statements made by a hostile witness are put in to discredit him, this is merely a part of the cross-examination to credit and does not amount to adducing evidence to prove any part of the defendant's case. Mr. Cummings thereupon elected to call no evidence.

I shall deal later in this judgment with a preliminary objection made by Mr. Cummings and now pass on to consider the main issues in the case. The plaintiff endeavoured to show that about the middle of 1941 (that is while the case against Fausett and Ross was pending) the first defendant endeavoured to "buy him off" with an offer of $165:— and for that purpose borrowed money from Perry. I have no doubt that this attempt was made but I do not accept the evidence of the plaintiff's witnesses Shariff and Shepherd that John Ernest Butts told them that he had borrowed the money therefor from Perry. Shepherd's evidence on this point was inconsistent with his evidence at the trial before Duke J. who found on the evidence before him that the sum of $165:— was obtained from Dhanwantie or one Chublall (Hublall) her son and that when the plaintiff refused to accept it, the money was, according to John Ernest Butts, handed to the then defendant's solicitor for legal fees and expenses, with the exception of $45:— paid to the two Butts boys. In that case there appears to have been no mention of Perry as the lender of the money: he does not appear on the scene until that manoeuvre had failed.

The plaintiff's case to have the judgment set aside or the execution restrained must therefore rest upon the contentions:—

(a) that the loans were not received by John Ernest Butts in his capacity as executor and that, assuming the money was in fact borrowed, it was John Ernest Butts personally who became liable therefor and not the estate of his testator;
(b) that the facts that the notes purport to be signed by him as executor for loans made to him as executor did not and could not bind the estate;
(c) that the consent to judgment signed by John Ernest Butts could not bind the estate of his testator;
(d) that the judgment, if valid at all, was only valid as against Mervyn Outridge Butts and was invalid as against Lloyd Vernon Butts whose infancy was not disclosed to the Court;
(e) in any event, the judgment against the two devisees under the will, in whom title had never been vested, did not authorise the judgment creditor to go against the estate of the testator though it might give him a right to oppose if title were vested in the devisees and they then proposed to transport to the plaintiff.

In my view, all these contentions are sound.

The position now is that there is no evidence at all before me as to the purpose for which the monies were borrowed. I feel considerable doubt as to whether the promissory notes represent genuine transactions because it seems to me very improbable that

Perry would have lent money to the Buttses without prior inquiry and that such inquiry would not have disclosed the proposed transport to Dhanwantie. This was advertised on the 13th, 20th and 27th days of September, 1941, and one would have expected Perry to enter an opposition.

Moreover it has been pleaded (but not proved) that some un-specified portion of the money was lent to John Ernest Butts for the purpose of his "repaying administration expenses." There is no evidence that John Ernest Butts incurred any expense except the fees for obtaining probate (about $5) fifteen years after the death of the testatrix, and any expenses incurred on account of the intermeddling by Fausett and Ross would clearly not be a proper charge on the estate. Further, in so far as the transaction represented a contract for the repayment of money lent to the infant, Lloyd Butts, it is void under the provisions of section 2 of the Infancy Ordinance (Chapter 141).

But, apart from these considerations, the judgment obtained by Perry is void as a judgment against the estate of Harriett Susannah Butts and cannot stand. Neither the second nor the third defendant had power to bind the estate: although they had the beneficial interest they had not the legal ownership, wherein lies the distinction between this case and that of Mangru and Kalla 1936 (1931-37 L.R.B.G. 414) upon which Mr. Cummings relied. The only one of the defendants who could bind the estate was John Ernest Butts the executor and he could not do so by these transactions. If authority be required for this it will be found in Farhall v. Farhall (1871) 7 Ch. App. Cas. 123, where Sir G. Mellish L.J. said (at p. 126).

> "It appears to me to be settled law that, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator."

And Sir W. M. James L.J. in the same case points out that the contract is with the executor.

> "There is no loan to the estate: there is no credit given to the estate: the credit is given only to the person who borrows, though the money may be borrowed for the purposes of the estate."

Mr. Cummings referred me to the case of Barry v. Gibbons (1873) L.R. 8 Ch 747 and to other cases cited in Williams on Executors 11th Edition Volume I p. 696 note (x): but those cases deal with such questions as the power of an executor to sell, mortgage or pledge the assets of his testator and whether it is incumbent on the purchaser, mortgagee or pledgee to see the money properly applied. But I am dealing not with a case where the executor pledged an asset, but with one where he purported to pledge the credit of the estate generally so as to make the person with whom he contracted a creditor of the estate. That is what he cannot do and for that reason alone the judgment cannot stand.

Mr. Cummings argued that a necessary preliminary to having a judgment set aside is to obtain leave of the Court. It appears from Jacques v. Harrison (1884) 12 Q.B.D. 165 that, when the

application is made in the action in which the judgment was obtained by default by a person who was not a party to that action, he should, if not entitled to use the defendant's name, apply for leave to have the judgment set aside. That would clearly be necessary if the application is made in the same action. I cannot see any necessity for it where the claim to have the judgment set aside is brought in a collateral proceeding where all the necessary parties are before the Court or have been served, nor have I been referred to any authority appropriate to such a case. There is nothing in the report of the case of Hukumi v. Mooteah and Seepersaud (1938) B.G.L.R. 167 to indicate that such leave was required or given. The point taken, even if sound, is a mere technicality for, if leave had been necessary and had been applied for, I cannot envisage a refusal in the circumstances of this case.

But in case I should be in error on this aspect of the case and the matter should go further, I will say that in my view the plaintiff is entitled to the alternative or additional remedy of an injunction to restrain the execution. A Court of equity will prevent a party from taking advantage of a judgment if it is inequitable that he should do so. It is almost beyond dispute that the first three defendants were acting fraudulently from the time they conceived the plan of selling the land to Dhanwantie up to their signing the consent to judgment, and I know of no rule of law or evidence which requires me to accept that consent as conclusive evidence that the money claimed or any part of it was ever lent by Perry. The circumstantial evidence points strongly to Perry having acted in collusion with them to defeat the plaintiff's claim. I have already referred to the improbability of his lending money to the Buttses at the time alleged. The peculiar use of the deceased's name may perhaps be attributed to ignorance: but Perry's own silence and his failure to adduce any evidence as to the reality of the transaction of loan suggest that it was a mere colourable transaction.

I will refer briefly to a submission made by Mr. Cummings that the contract made for the sale of the interest of Lloyd Vernon Butts was null and void as being a contract for the sale of an infant's share in immovable property made without the approval of the Court. He based this submission on the case of Nasiban & ors. v. Alves & ors. (1917) B.G.L.R. 11. It is sufficient to say that Sir Charles Major C.J., in holding in that case that an alienation or encumbrance by a guardian of the immovable property of his ward without the sanction of the Court was null and void, was deciding the case upon the Roman-Dutch common law then applicable and pointed out that his pronouncement of that law would be of purely academic interest. In an earlier case, Bhudin Singh v. Ramcharan and Potia (1915) B.G.L.R. 196, the same learned judge, in a suit for specific performance of a contract entered into by a testamentary guardian for the sale of an infant's immovable property, which had not received the sanction of a judge, held that the Court was competent to determine the question whether such sanction should be given or withheld. This was followed by Duke J. in Marks v. Fausett & Ross in the following passage: "I decline to express any opinion as to whether such jurisdiction exists where the proceedings are instituted after the

minor has attained his majority. But I hold that where, as in this case, the proceedings in which the order approving or sanctioning a sale by a minor of his immovable property is asked for, are instituted during his minority, the Court or a judge has jurisdiction after the minor has attained his majority, to make an order approving or sanctioning the sale. And in the exercise of my discretion and on the facts of this case I make such order and I direct that it should take effect from the 13th January, 1941."

These cases, however, appear to me to be irrelevant since the plaintiff is asking for specific performance of the second contract entered into by Lloyd Vernon Butts in July 1943 after he had attained his majority.

So far I have dealt only with the merits of this matter but I now pass on to consider an objection preferred by the defence to the procedure followed by the plaintiff in this matter. This was first raised by Mr. Cummings as a preliminary objection which I overruled but, after considering some authorities which had not been cited to me in the first instance, I heard further argument and reserved the matter for consideration. Mr. Cummings' argument in its final form comprised the two following propositions:—

(a) A person having a right to oppose the sale at execution of any immovable property is bound to enter an opposition in the manner and within the time prescribed by Order XXXVI r. 42 and to follow it up by instituting an action within the fourteen days, after entry of opposition prescribed by rule 43 of the same Order, unless he can show a court of equity that it is just and convenient to grant him an injunction. What is just and convenient will depend on the circumstances of the case and is a question for the exercise of the Court's discretion in accordance with well established principles. Such discretion, he suggested, will only be exercised in favour of a plaintiff where there is shown to exist equitable fraud; and

(b) if it is open to a plaintiff to seek the equitable remedy of an injunction he must do so within the time limited by the Rules of Court 1900 for commencing an action to enforce an opposition.

Mr. Stafford for the plaintiff contended that the procedure of opposition is not the only remedy open to a person who has an interest in land which is being taken in execution for the debt of another. Opposition is not a right given by statute but is a common law right derived from the Roman-Dutch Law and all that the rule-making authority has done is to regulate the procedure by which that right can be enforced, but it has not precluded a plaintiff from seeking the equitable jurisdiction of the Court. In the instant case, the plaintiff elected to bring his original action for an injunction instead of opposing under the rules and, he submitted, if that action were properly brought the fact that it was abandoned could *per se* create no estoppel.

Mr. Cummings rested the first limb of his argument chiefly on the decision of Sir Charles Major C.J. in Robertson v. Yarde (1919) L.R.B.G. 55, which he urged has always been preferred to

the conflicting decision of Dalton J. in Obermuller v. de Souza (1917) L.R.B.G. 34. In Obermuller v. de Souza a property was advertised for sale at execution and the sale was opposed by Obermuller but the opposition action became deserted and abandoned. The sale was then re-advertised and Obermuller started a second action claiming a declaration that the levy was illegal and damages. He obtained an interlocutory injunction restraining the sale until the hearing of the action. At the hearing counsel for the defendant objected that the plaintiff was not entitled to maintain the proceedings by injunction and was estopped from maintaining the action by the previously instituted proceedings. Dalton J. ruled against the defendant on both issues and said — "The first point to decide is whether the first action is a bar to these proceedings. I am quite satisfied that it is not. That action never went to judgment and its discontinuance is no admission on the part of the plaintiff that he has no claim, nor does it not preclude him from bringing his action again."

On the second point, as to whether the plaintiff could maintain the action by way of an injunction, Dalton J. said:— "Proceedings by way of opposition are in fact a simplified method of obtaining an interdict or injunction, the claim in such proceedings being such an order as is sought here, and the claimant being bound down to the reasons for opposition entered by him in the book kept for that purpose. As is clear from the notice of re-advertisement no further opposition is called for, but that cannot mean that no one who has a valid claim to the property to be sold is debarred from protecting his interests. I think it is clear from the decision of the Full Court in the case of Administrator General v. Estate of Stewart Gardner (G.J. January 16th 1900), although that is a case relating to an opposition to a transport, that the limitations placed on the entry of opposition by the Rules of Court could not affect the question of vested interests, as where a person has some clear right to the property of which the transport or sale at execution sought to deprive him, and which right could be protected by interdict." Then, after referring to earlier cases, the learned judge continued "It is clear that there are precedents for proceeding in these cases by way of injunction and not by way of opposition. Stress is laid in (Russell v. Roberts) upon the fact that an interdict will lie only where the plaintiff is remediless but that appears to be his position here. He certainly had the right of opposition at some earlier date, which indeed he exercised; that right, owing to delay on the part of his lawyer, he was unable to pursue to finality, and now he takes the only course open to him. I must hold the proceedings to be quite correct and proper." In the later case of Gangadia v. Barracot (1919) L.R.B.G. 216, Dalton J. expressed the view that upon the re-advertisement of property for sale at execution, after dismissal of an opposition, it would be open to any person interested to apply for an injunction (assuming opposition proceedings were not open to him) to have the sale stayed.

But in Robertson v. Yarde, Sir Charles Major, C.J. held otherwise. In that case the plaintiff opposed a sale at execution of a property but abandoned the opposition, and did not follow it up

with an action. Thereafter, the property was again advertised for sale and the plaintiff issued a writ to restrain the sale and set aside the levy: the statement of claim repeated the grounds of the opposition and an interlocutory injunction was granted. At the hearing, on objection taken that the plaintiff having started proceedings by way of opposition had abandoned the proceedings, Sir Charles Major held that she was thereby estopped from entering opposition a second time or from obtaining an injunction restraining the sale. In his judgment the learned Chief Justice said:—

> "It is clear that the plaintiff could not, after the Order of Court (that is the order declaring the opposition abandoned) and without having it set aside, notwithstanding the re-advertisement of sale for a later date, enter opposition a second time. Moreover, an opposer cannot bring an action to restrain a sale unless he has previously entered opposition and stated the grounds thereof which are, by subsequent adoption, his statement of claim. But this is precisely what the plaintiff has done. She has ignored the abandonment of opposition and the Order of Court declaring that abandonment which cannot now be set aside, and brought her action to restrain the sale reasserting, as I have said, her ground of opposition thereto."

He then cited some earlier cases and referred to the second passage cited above from the judgment of Dalton J. in Obermuller v. de Souza, saying "If these words mean that in the opinion of the learned judge a person who has entered opposition but abandoned it and not proceeded to institute the action prescribed by the rules for giving effect to the opposition, whereupon an order of desertion and abandonment has gone against him, may nevertheless institute the action, I regret that I am unable to agree with him for that, it seems to me, would be to do away entirely with the mandatory terms of the rules that govern opposition to ah execution sale."

The plaintiff Robertson appealed from this decision but the matter was settled and the conflict of opinion has remained unresolved. It appears to me to arise from the different method of approach adopted by each of the learned judges and, in order to appreciate this difference, it will be necessary to consider briefly the relevant rules of the Roman-Dutch common law, their modification by local enactment and practice, and other decisions bearing on the same issue.

In the Roman-Dutch law the actual sale at execution was provisional and had to be ratified later by the court at the addictio, or adjudication of property to the highest bidder, which took place on a certain day after the oppositions made to the sale by the debtor or others had been filed and disposed of: see Burge on Colonial and Foreign Laws 1838.(Vol. II Chap. 4 at p. 574 et seq.) At p. 581 the author says "In the interval between the first publication of the sale and the final addictio all those who have an interest in the property are, by the publication of the advertisements, apprised of the intended sale and are cited to appear and offer their opposition to it."

The learned author then sets out the cases in which a person would have the right to oppose and continues (p. 581) "There are some cases in which the right is preserved notwithstanding there has been no opposition in the sale interposed. Thus it need not be interposed where the right of the third person is manifest in *oculos omnium incurrit;* or if the right be established by the general law and known to attach to the property. Neither can the omission to make his opposition prejudice the person who is in the actual possession of the property in his own behalf unless indeed the possession had been fraudulently transferred to him for the purpose of defeating the execution. Neither are those who are absent prejudiced by the omission to interpose their opposition if they are not represented by attorney." Other exceptions are given which I need not set out. At p. 852 the learned author says 'The preceding principles were adopted by the law of Holland and the other states in Europe. They continue to govern the sales which take place by vendue in the counties of Demerara and Berbice. Various regulations have been introduced for the purpose of giving effect to them, and of protecting the interests of those who have encumbrances on the property exposed to sale." The author sets out details of the regulations then current, but the above passages are sufficient to show that in his view the regulations were introduced not with a view to cutting down these principles but in order to give effect to them.

The excepted cases under the old law in which opposition was not necessary are also enumerated in the dissenting judgment of Sir David Chalmers C.J. in In *re* the petition of Vankinschot which is printed as Appendix C to the Report of the Titles to Land Commission for the County of Demerara 1892. (Minutes of the Supreme Court January — February 1882). He cites the foregoing passage from Burge and also Matthaeus — de Auctionibus liber.

Statutory provision that every person wishing to oppose a sale at execution shall be at liberty to enter opposition in the Marshal's book within fourteen days after the first advertisement of the sale is found at least as early as 1846 (see the amended Manner of Proceeding Ordinance 1846: No. 5 of 1846.) In 1855 a change was introduced by the Amended Manner of Proceeding Ordinance 1855 (No. 26 of 1855) which came into force on May 1st 1856. (This Ordinance is sometimes cited as Ordinance No. 5 of 1855 and the relevant sections are sometimes given different numbers). Section 219 of this Ordinance repeated the provision above recited for entering opposition in the Marshal's book and then provided "All the provision relative to oppositions to transports and mortgages shall be applicable to oppositions to execution sales." The significance to this is that section 217 enacted that "After the time for entering an opposition, as provided in section 211 (i.e. to passing of a transport or mortgage), has elapsed, no petition for interdict nor any other process or proceeding whatever, whereby the transport or mortgage may be prevented or delayed from being passed, shall be allowed or granted upon any ground, reason or pretext whatever".

Further, section 252 of the same Ordinance after repealing

Ordinance No. 5 of 1846 and a number of earlier Ordinances and regulations also repealed "all laws customs, and usages now or at any time heretofore established or in force in the counties of Demerara and Essequebo and Berbice — so far as such rules, ordinances, laws, customs and usages are in any wise repugnant to or at variance to this Ordinance."

The Ordinance appears to have remained in force until it was repealed, as from October 1st, 1901, by the Second Schedule of the Supreme Court (Civil Procedure) Ordinance 1901. The Rules of Court 1900 made under the Supreme Court Ordinance 1893 came into force on the same day, namely, October 1st, 1901.

It would seem that, while the Manner of Proceeding Ordinance 1855 was in force, a petition for an interdict or any other process to restrain or delay the sale had to be brought within the time limited for entering an opposition and this, together with the repeal of repugnant law or custom effected by section 252 may nave been what Chalmers C.J. had in mind when he said, in the judgment previously cited, "the procedure in execution in our system is the result of positive enactments and of a class of enactments which are subject to strict construction; it is hard therefore to say on what justification the procedure can be extended beyond the terms of the enactments."

But this legislation merely prescribed a limitation of time for remedies other than opposition and the Courts of this Colony have never held that opposition was the only remedy available. Hill J. in Newark v. Higgins et al (1915) L.R.B.G. 187 said at p. 190 "It has been held for well over a century in this Colony that letters of decree follow automatically the evidence of sale and purchase and payment of purchase money, where no opposition has been entered, but the Judges have held that there are exceptions to the general rule that no right of action exists if no opposition has been entered, or where there has been fraud or irregularity the Court would not hold itself bound by the conditions of sale." He then refers to the exceptions enumerated in Matthaeus and Burge. See also Abdool Rohoman Khan v. Boodhan Maraj (1930) L.R.B.G. 9 at pp. 16 and 17.

In Obermuller v. de Souza two examples are cited. In the earlier one Russell v. Roberts (Minutes of the Supreme Court June — July 1888 p. 41 Atkinson & Sheriff J.J.), the plaintiff had obtained a mandament of interdict to restrain the sale at execution of certain articles of furniture in satisfaction of two sentences in the Inferior Court of Civil Justice and had pleaded that he was remediless unless by way of interdict. It was held that as the sentences with respect to which the interdict was granted were sentences of the Inferior Court, the proper remedy was by way of opposition; but in the judgment the Court said:—

"Some cases were brought to our notice in which defendants had proceeded in the Supreme Court by way of interdict and not by way of opposition, viz, Austin v. Gullifer (March 1852) and Bean v. Dornburg (February 1853) but it is to be observed that these were cases in which the plaintiffs sought to have the defendants interdicted from proceeding to execution on sentences of

the Supreme Court. There is no question that in such cases the parties may proceed by way of interdict." The records of the two cases referred to are missing, but it seems clear from the comment of Dalton J. in Obermuller v. de Souza that he considered this decision governed cases where the plaintiff was otherwise remediless.

(It should be noted that the provisions of the 1846 and 1855 Ordinances relating to opposition 1o execution sales affected "any property" whether movable or immovable, whereas the corresponding provisions of the Rules of Court 1900 affect only immovable property).

The other case cited is the Administrator-General v. the Assignees of Stewart Gardner and the Colonial Bank. (G.J. 16 1. 1900 Full Court). The main question decided is not material, but the report is of interest as the Court indicated its view that even if the plaintiff's opposition were invalid he would be entitled to the interdict which he was also claiming.

It must also be borne in mind that a person who could have opposed the sale but had not done so could present a petition praying that title be not granted to the purchaser at execution sale: or bring an action to set aside the sale: see Ferreira v. Ho-a-Hing (1896) L.R.B.G. 78: Ori v. Phuljaria (1917) L.R.B.G. 127: Mangia v. Safayan (1917) L.R.B.G. 58 and In re Robertson: Robertson v. Yard (1920) L.R.B.G. 151.

In the Rules of Court 1900 the rules as to opposition to transports and mortgages were originally contained in Part II Order II and rule 10 thereof repeated in effect the prohibition against any petition or proceeding after the time for entering an opposition had elapsed whereby the transport or mortgage might be prevented or delayed from being passed. The rules as to oppositions to execution, however, were contained in Part I Order XXXVI and there is no provision corresponding to section 219 of the Manner of Proceeding Ordinance 1855 which applied to oppositions to execution sales all the provisions relative to oppositions to transports and mortgages. In 1901 Roman-Dutch law was still the common law of the Colony and it would seem that the statutory repeal of the application by reference of section 219 to execution sales, had the effect of reviving the rules of the old common law governing the cases in which opposition was not necessary if, indeed, they had ever been abrogated.

This brief historical survey is sufficient to shew that it was never a rule of Roman-Dutch law that opposition was the only remedy available for a person claiming an interest in the land to be sold at execution and that the Courts of this Colony always recognized exceptional cases in which the remedy of interdict or injunction was available.

The actual decision in Robertson v. Yarde turned upon the question of estoppel, but there is in the judgment of Sir Charles Major a passage which appears to support the view that opposition is the only remedy available to *s* person having an interest in the land. After referring to the "mandatory terms" of the rules, he said:

"In prescribing therefore an action to restrain the sale, the rules have prescribed an action for an injunction. If this be not so, then persons may disregard the conditions precedent to opposition of a sale at execution under the rules, not appear on the Marshal's books as opposers at all, but issue a writ in the same form as is directed to be issued to enforce prescribed opposition, namely, to restrain the sale . . . . . ."

This passage appears to be obiter and I can find no support for it in the other case upon which Mr. Cummings relied, Seerpaul v. Grace Dennison (Action No. 379 of 1946) in which Boland J. indicated a contrary view. It is contrary to what I understand to be the generally accepted view and practice in this Colony, and would, in my view, be incompatible with the application of the principles of equity introduced by the Civil Law Ordinance, 1916. I feel no doubt that it is open to a plaintiff to elect not to enter opposition but to seek the alternative remedy of an injunction and that the only question is whether, if he does so elect, he must do so within the time limited for bringing the action to enforce the opposition.

This brings me to Mr. Cummings' second proposition which he based upon the maxim "equity follows the law" and the decision of Boland J. in Seerpaul v. Dennison. The classic expression of the maxim is in the oft quoted passage in the speech of Lord Westbury in Knox v. Gye 1872 L.R. H.L 656 at p. 674 "When the remedy is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a court of equity acts by analogy to the Statute and imposes on the remedy it affords the same limitation." Mr. Cummings' argument was that, assuming the plaintiff entitled to invoke the equitable jurisdiction by bringing an action for an injunction in lieu of the legal remedy of opposition, yet he must do so within the time limited for the latter, and although his abandoned action No. 104|1942 was brought in time, the present action was brought out of time.

It is settled law that the discontinuance of an action or even an order for discontinuance does not of itself (and apart from any question of limitation) operate as a release or an extinguishment of the claim or in any way bar further proceedings (Owners of the cargo of the Kronprinz v. Owners of the Kronprinz: The Ardhandhu 1887 12 A.C. 256 at p. 262). The abandonment of the previous action would therefore in itself be no bar to the present action, unless that action was itself subject to the limitation of time imposed by the rules for bringing an action to enforce an opposition.

Before considering Seerpaul v. Grace Dennison I propose to examine a number of decisions in which the Courts have interpreted and applied the statutory limitation of time for entering an opposition and bringing the subsequent action for an interdict or an injunction.

Sir David Chalmers in the judgment above cited said "Going back to the Procedure Ordinance. . . . there is an enactment that after the lapse of the time prescribed for entering opposition no interdict or other process for delaying the transport shall be

allowed.....I am unable to see that this is in any way conclusive of the question. There are necessary limitations of time in all matters of procedure, for without such limitations the period at which the tribunal would be at liberty to exercise its faculty of judgment would never arise, but a limitation of time for receiving adverse claims or oppositions does not in itself confer or take away any right, it merely puts the tribunal in a situation to exercise its judgment and to act according to the truth of the matter before it."

In order to understand some of the decisions it is necessary to bear in mind the current statutory provisions prescribing advertisement of transports and sales. The Manner of Proceeding Ordinance made statutory provision for the advertisement of intended transports, mortgages and execution sales and section 213 of the Amended Manner of Proceeding Ordinance 1855 provided "in case of opposition such transport or mortgage shall not be passed till such opposition has been removed, or statutory security given, nor after the expiration of three months from such removal without re-advertisement", and section 219 applied this by reference to oppositions to execution sales.

As regards transports and mortgages this provision for re-advertisement was continued by the Rules of Court 1900 Part II Order II r. 11 and subsequently by the Deeds Registry Ordinance, Chapter 177, Second Schedule rule 10; but in Order XXXVI of the Rules of Court there is no statutory provision for the re-advertisement of execution sales. Nevertheless it has been the practice for many years, when an opposition has been withdrawn or abandoned, for the marshal to re-advertise the sale on the instructions of the execution creditor, and such re-advertisement is clearly necessary if the date originally fixed for the sale has passed. But in the re-advertisement the marshal does not include the invitation to persons interested to come to forward and oppose.

Bearing in mind these enactments, I think it is possible to discern a uniform principle underlying the decided cases though it may not always have been very clearly expressed. That principle I would express as follows:— if an opposition has been entered and withdrawn or abandoned the opposer is estopped from again interposing an opposition and from seeking an injunction in the same proceeding; but, if the same property be re-advertised in such circumstances as to constitute the re-advertisement a different proceeding, then the former opposition will be no bar to an opposition or an injunction on the same grounds in the later proceeding.

I turn now to the reported decisions. The first is Pickett v. St. Kitts & Wegman (L.J. 12th October 1901). In that case the plaintiff entered opposition to a sale at execution hut withdrew it before the date advertised for the sale and a formal order was made declaring the opposition deserted and abandoned. The Registrar then published an advertisement that the sale would take place on the date originally fixed, the opposition having been withdrawn. The plaintiff again sought to oppose but Swan ag. J. dismissed the action saying "In a word they brought the same case

again although it had been definitely disposed of. I consider it is not competent for the plaintiff to oppose the second advertisement."

In James v. Da Silva and Louistall (L.J. 8. 11. 1901) a sale at execution was advertised and opposition entered by X. This opposition was withdrawn on 16th December, 1900 and the Registrar published an advertisement that the sale would take place on December 29th. Plaintiff then entered an opposition to this advertisement. Swan J. held that the plaintiff, not having opposed the first advertisement as prescribed by law, was debarred from opposing the re-advertisement and said "There is in my opinion no necessity for such re-advertisement unless it is required for the purpose of calling the attention of the public or possible purchaser to the date when such postponed sale will take place. If, however, three months have elapsed since the removal of the opposition the sale could not take place without re-advertisement and in that case any person having a right to do so could enter an opposition."

In other words, the learned Judge was treating a re-advertisement made within three months of a removal of opposition as a repetition of the previous advertisement; but he regarded the statutory re-advertisement as a fresh proceeding.

Joseph & anor. *v.* Abott (L.J. 31. 10. 1911) was a case relating to opposition to a transport. In September 1908 the plaintiff opposed the passing of a transport advertised by the defendant but failed to institute an action as prescribed by the Rules of Court 1900 Part II O. II r. 5. No order was made declaring the opposition abandoned and deserted but the defendant did not seek then to pass transport. In January 1910 the defendant published a fresh advertisement of transport of the same land and the plaintiffs again opposed and brought their action within the prescribed time. Berkely J. following James v. Da Silva, held that the plaintiffs were not debarred from entering opposition and bringing their action and said "a fresh advertisement — after the time has lapsed within which a transport can be passed — is in effect a beginning de novo." In Mangru v. Kalla (1931-37) L.R.B.G. 414 at p. 420 de Freitas J. appears to have approved of Robertson v. Yarde, but does not mention Obermuller v. de Souza.

Wills v. Eleazar (1941) B.G.L.R. 12 also related to opposition to a transport. Camacho C.J. at p. 15 refers to a decision of Verity J. in a case where the plaintiff had entered opposition and started his action within the prescribed time but had allowed it to become deserted and abandoned and within three days thereof started a second action for the same cause. Verity J. dismissed the second action and the learned Chief Justice said "The writ in the 1937 action was issued more than a year after the time allowed by rule 7. The rule is mandatory and must be rendered effective . . . . . if the action is not brought within the prescribed time, the right to maintain the action on the stated grounds of opposition is extinguished, that is to say, the cause of action founded on the notice of opposition disappeared."

In Sooklal v. Gaurisankar & Lachu (1942) B.G.L.R. 56 which was also a case of opposition to transport, Luckhoo J. in referring to this passage said "the learned Chief Justice never meant in that statement to convey that a right of action in any one shall be wiped out. He did not decide that if the land is advertised again and a right of action is still in the whilom opposer, that opposer cannot enforce his right by opposing again . . . . . In my view if the right of action, in other words, the right in a person to claim, as distinguished from the cause of action, is still extant an opposition to a fresh advertisement of the transport gives another cause of action to the person in whom that right exists." The actual decision of Luckhoo J., as set out in the headnote to the report, was that a person who fails to prosecute to finality an action which he has instituted to enforce an opposition entered by him to the passing of a transport loses the right which, by virtue of the entering of the opposition, he acquired to restrain the passing of that transport. But if the advertisement of that transport is withdrawn or abandoned, and transport is subsequently advertised to be passed in favour of another person, the person who had entered opposition to the first transport is at liberty to enter opposition to the second transport.

In Seerpaul v. Grace Dennison Boland J. took the same view, saying "with every respect it seems to me that it is somewhat confusing to use either the term cause of action or right of action in this connection. Obviously what Camacho C.J. intended to convey by his remarks was that the right to the remedy of an injunction against the passing of the said transport for the same reasons given in the opposition proceedings had been lost or extinguished by the lapse of the time prescribed by rule 7." And further on in the judgment he says:— "It is conceded that the mere striking out of a proceeding does not preclude the institution of fresh proceedings for the same relief if not barred by the statute of limitations and I incline to the view that this Court can never be entirely shut out from the exercise of its jurisdiction to grant an injunction in a proper case merely because of a certificate issued or an order made in opposition proceedings unless such order was made in the action to enforce the opposition upon which a plea of res judicata can successfully be based." The view expressed in this passage may be difficult to reconcile with the earlier decisions and seems to indicate that the learned judge considered the matter from the standpoint of English equitable rules rather than from the traditional standpoint.

I may also refer to my judgment in Mangar v. Rohan Singh and Hardeo (Action No. 571 of 1946 Demerara, unreported) in which I took the view that when an opposition to a levy is cleared away, the levy still holds good and, in effect, that the re-advertisement of the property on the instructions of the judgment-creditor who has levied is merely the repetition of the original advertisement for the purpose of completing the sale.

If I have correctly interpreted these cases the decision in Robertson v. Yarde is consistent with a strong current of authority. In that case, the opposition was on 24th June declared abandoned and on the 29th the sale was re-advertised to take place on the

15th July. The levy was still in force and the re-advertisement was merely for the purpose of announcing the date of the postponed sale: there was no beginning "de novo."

In Obermuller v. de Souza the levy was made in 1914, opposition entered on 31st July 1914 and the action commenced within the prescribed time. The report does not give the date on which the action became absolutely abandoned, but it is immaterial as by that time the statutory requirement of re-advertisement after three months had been repealed with respect to sales at execution. No fresh levy was made but the sale was re-advertised as usual without any notice to persons to come forward and oppose. There was here no "beginning de novo" and if the other decisions cited above are correct (as I think they are), Dalton J.'s decision was wrong. With great respect to the learned judge it seems to me that his answer to his own first question begs the question. Admittedly the discontinuance of an action is not necessarily an admission on the part of a plaintiff that he has no claim but the question was whether the plaintiff was precluded, in the circumstances of the case, from bringing his action again. Dalton J. said he was not but gives no reasons; I think all the other learned judges whose decisions I have cited would have held that in the circumstances she was estopped.

The learned Judge then passes on to consider whether, if the plaintiff had lost his right to oppose, any alternative remedy was open to him, and he finds the answer in cases decided under the Roman Dutch law. Dalton J. was deeply versed in that law and it is no matter for surprise that his mind turned back, perhaps nostalgically, to see what alternative remedies that law would afford. But in 1917 Roman-Dutch law had, by the operation of section 3 of the Civil Law Ordinance 1916, ceased to be the common law of the Colony and, apart from local enactment, the law to be applied was the common law of England including therewith the doctrines of equity as administered by Courts of Justice in England. In ex parte Humphrey & Co. Ltd. (1920) L.R.B.G. 141 the same learned judge said "With the exceptions which are set out in that Ordinance, the old common law, Roman-Dutch law, has been abrogated. Unless it can be shewn to be excepted from the general repeal, and to be retained as part of our present law, this remedy must then come within the Ordinance." It is true that one must still look to the Roman-Dutch law as modified and applied by the Courts of this Colony if one wishes to find out what classes of persons may oppose, because opposition is a concept derived from that law and unknown to English law. But once having ascertained the answer, if one wishes to know whether any, and if so what, other remedies are available to such persons and under what limitations one must seek the answer, not in the rules of the Roman-Dutch common law, but in the rules of the common law and the principles of equity as administered in England.

While therefore I would not presume to question the correctness of Dalton J.'s interpretation of the Roman-Dutch law, I think with all respect that he was at fault in applying that law to the case then before him.

In Seerpaul v. Grace Dennison, the plaintiff claimed specific performance of a contract with the defendant for the sale of certain property and an injunction restraining the defendant from transporting that property to one Biram, and damages in the alternative. The plaintiff had entered opposition to the transport but failed to bring his action to enforce it within the prescribed time and the defendant obtained an order of Court declaring it abandoned. The plaintiff thereupon filed a writ in the action and obtained ex parte an interim injunction restraining the sale and was seeking to have this injunction continued until the hearing. The defendant took out a summons to have the claim for an injunction set aside on the grounds that the plaintiff's cause of action had become non-existent and that the plaintiff was estopped by the order declaring the opposition abandoned. The passages already cited from the judgment shew that Boland J. was not inclined to accept either of these propositions but he decided that the only ground alleged for the failure to commence the action to enforce the opposition, namely, the inadvertence of the plaintiff's solicitor, was not sufficient to refute the imputation of laches or to cause the Court to refuse to act by analogy to a statute of limitations. He therefore set aside the writ so far as it related to the claim for an injunction and subsequent proceedings thereunder; he was however careful to point out that he was not debarring the plaintiff from pursuing his claim for specific performance (which might still be effective if the transport to Biram was abandoned) or his claim for damages.

I have considered all these cases, both out of respect for the arguments of counsel and because I trust that this review may help to clarify the somewhat difficult and confused position which has arisen from the engrafting of English common law and equitable principles upon a concept derived from the Roman-Dutch law. But I have still to consider Mr. Stafford's argument that if the plaintiff elects, as he is entitled to do, not to proceed by way of opposition, then he is not bound by the limitation of time imposed by the rules governing oppositions. Put in these terms I think the proposition is too wide. If the principal or only remedy which the plaintiff seeks is analogous to the legal or statutory remedy of opposition then in my view the rule laid down in Knox v. Gye must apply. It is settled law that where it is only a question of the remedy and you come into equity for the purpose of getting equitable relief then the equity of the Court acts by analogy to the Statute of Limitations (per Romer L.J. in Molloy v. Mutual Reserve Life Insurance Company 94 L.J. 756 at p. 761) and if Mr. Cummings' arguments had been addressed to the judge on the application for an injunction in the instant case, they might have been entertained; but the injunction was, by consent, continued until the hearing of the action and the substantial claims upon which I am now asked to adjudicate are whether the plaintiff is entitled to have the judgment in Action No. 359 of 1941 set aside and to have specific performance of the contracts decreed. Neither of these claims is limited by the rules governing opposition or barred by the abandonment of the previous action. The former claim distinguishes this case from those I have been considering where the plaintiff was attacking not the judgment-

creditor's judgment, but his right to levy on the particular property involved. In the present case the interlocutory injunction is merely ancillary to the principal remedy sought: if the judgment is set aside the basis of the levy will be gone and it must automatically lapse.

I have already expressed by view that the judgment is void at least as against the estate of Hariett Susannah Butts: it was a fraud upon the Court and would never have been obtained had the Court been fully apprised of the relevant circumstances. In my view therefore I should be stultifying myself and doing not equity but iniquity if I refused the plaintiff the relief he seeks.

Mr. Cummings also sought to rely upon the line of cases beginning with Gangadia v. Barracot (1919 L.R.B.G. 216) which have established the rule 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 debts; but the rule only governs cases in which there is no attack on the judgment and do not preclude the purchaser from shewing that there has been fraud or collusion or that the judgment is otherwise invalid.

I therefore declare that the consent judgment obtained by the fourth-named defendant as plaintiff in Action No. 359 of 1941 is void and set it aside and set aside the levy made thereunder.

I decree specific performance by the first, second and third-named defendants of the contracts of sale made between themselves and the plaintiff herein; and failing such performance direct the Registrar to effect transport of the land. The defendants must pay to the plaintiff his costs to be taxed and the plaintiff may set off against those costs any balance due to the second and third defendants on the contracts. I will hear counsel on the form the order should take and the further directions necessary to enable this order to be put into effect.

Solicitors: R. G. Sharples for the plaintiff.

W. D. Dinally for the defendant.

MELBOURNE *v*. MELBOURNE.

Divorce and Matrimonial Jurisdiction, (WARD, J.) March 14, 15, 16, 30. April 3, 1950.

Divorce—Malicious desertion—Persistent refusal of marital rights of intercourse—Roman Dutch Law—Conduct short of legal cruelty—its consequences.

On November 30, 1949, the petitioner left the matrimonial home and filed his petition for divorce on January 14, 1950. He alleged that his wife had persistently refused him the marital right of intercourse from 1949, that she had assaulted and threatened him repeatedly and as such conduct affected his health his wife was guilty of cruelty and malicious desertion.

Held: Malicious desertion is unknown to English law and must be interpreted in accordance with the concepts and established practice of Roman Dutch Law under which a persistent refusal of marital intercourse evidencing a final determination to with-hold this marital right was malicious desertion.

Cruelty which falls short of legal cruelty may justify one spouse in leaving the other, but it must be of grave and convincing character.

As the petitioner had failed to prove malicious desertion or cruelty the petition must be dismissed.

P. A. Cummings for the petitioner.

E. W. Adams for the respondent.

Ward J:

JUDGMENT.

In this case the petitioner prays the Court to decree a dissolution of his marriage with the respondent on the ground that the respondent by her conduct has caused him mental and bodily suffering so as to affect his health and to make him apprehensive of a still greater affection of his health and has by this conduct made it impossible for him to live with her, and has thus maliciously deserted him.

The evidence shows that the petitioner and the respondent were married on June 5th, 1943, and lived and cohabited at Duncan Street, Kitty, and at 83, Lamaha Street, Alberttown. The petitioner is a corporal of police and the respondent a registered nurse-midwife, actively practising her profession. As to the actual relations in the household there is a great conflict of evidence between the petitioner and the respondent and the evidence of witnesses other than the two spouses is not of great assistance in resolving this conflict. According to the petitioner's evidence there have been continual quarrels in the household since 1944. This is denied by the respondent who fixes the beginning of the Strained relations in the latter half of 1949. The petitioner alleges a series of assaults and threats by the respondent in 1947, 1948 and 1949, but there is no corroboration of these matrimonial offences by the witness called by the petitioner. On the contrary, this witness Mr. Smith, who was a neighbour on close terms of friendship with both parties, agrees with the respondent that until October, 1949 there was no serious quarrel between the petitioner and the respondent. His evidence on this point is clear; "When they went to Lamaha Street first they got on well together—a loving pair. In October 1949 I noticed a little difference in the house—a little loud talking now and again." The evidence of Miss Adora Callender, the respondent's aunt, is to the same effect.

There is a second point on which the conflicting stories of the spouses may be tested by evidence other than their own statements. In his evidence in chief the petitioner alleged that the respondent refused to have sexual intercourse with him in 1948. His statement was specific and detailed: "During 1948 the position became worse. She refused having sexual intercourse with me in 1948. Since October 1948 she has never allowed me to have sexual intercourse with her. I asked her to allow me to do so and she refused. I resented this attitude as it interfered with

my health. She only said she wasn't feeling well and she don't want me. I asked her to see a doctor and sent her to Dr. Jardine, who treated her. I continued my approaches and she continued to refuse me." In the course of his cross-examination he was confronted with a prescription by Dr. Jardine for his wife dated July 8th, 1949, and admitted that this was the period at which she was treated by Dr. Jardine. On another minor point the petitioner's evidence is proved to be untrue by Mr. Smith. He alleged that on October 24th he did not dismantle the bedstead—a double bed—in which he and the respondent usually slept. He asserted that the bed fell against the partition during a scuffle and on October 29th all he had to do was to put back the mattress on the bed. Smith categorically contradicts this statement: "I saw from the outer room that the bedstead was taken apart—dismantled." Finally as to the visit of Miss Callender on November 2nd, 1949 the petitioner's denial is refuted by the evidence of Miss Callender.

In assessing the value and truth of the evidence of the petitioner and respondent I must necessarily pay attention to these misstatements by the petitioner, and I have reached the conclusion that his testimony is less reliable than that of the respondent. I accept her statement that the estrangement began in the latter part of 1949 and I do not accept petitioner's statements as to incidents with a bread-knife and scissors or as to the assault with a brass pot in 1947 and 1948. It would certainly be strange if incidents of this nature were taking place over a period of two years and a next-door neighbour and constant visitor, as Mr. Smith admittedly was, failed to notice any signs of an estrangement. Apart from petitioner's statement there is no particle of evidence that the respondent 'foully abused him and members of his family within public hearing." I therefore find as a fact that the allegations contained in the particulars set out in paragraph 6 of the petition have not been sufficiently proved.

The allegations contained in paragraph 7 of the petition are unsupported by any evidence except that of the petitioner. Here again I accept the respondent's statement supported as it is by the evidence of Mr. Smith. The respondent was away from home for a long period during May and June, 1949 on night duty, during the latter part of this period acting as night nurse to the late Mr. Justice Luckhoo. The petitioner alleges that he expressed disapproval of his wife's undertaking night duty as a nurse, as she was unable to prepare his meals. The respondent's story is that she prepared his mid-day meal, cooked and washed and performed her domestic duties after her return home on mornings and before she slept. She also prepared his evening meal. All that petitioner had to do was to prepare his breakfast which was partially prepared before she left the home on the previous evening. I have no doubt that her absence at night over this extended period did inconvenience the petitioner. He was not on night duty and was so deprived of the company of the respondent, who admits that the strain of this work did affect her health to such an extent as to make her unresponsive to his sexual embraces. Sensibly she saw a doctor and I accept her statement that she not

only took the medicine prescribed but had the prescription repeated. I also accept her statement that she did not refuse her husband sexual intercourse, but believe that he ceased to find satisfaction because of some degree of frigidity on her part.

It is proper, I think, for me to add here a comment on a point which was taken in the course of the argument before me. It was asserted by the petitioner that the respondent refused him the marital rights of intercourse, and it was suggested that under Roman-Dutch law this constituted malicious desertion. It is clear to my mind that in interpreting the meaning of malicious desertion under the Matrimonial Causes Ordinance recourse must be had to the concepts and established practice under Roman-Dutch law, since malicious desertion, as distinct from desertion, is unknown to English law. I must take it, as Verity J. did in Matthews v. Matthews 1936 L.R.B.G. 459 that the Legislature in using this term intended to retain the principles of Roman-Dutch law as to malicious desertion. I have examined the old authorities on the point submitted, and I have no doubt that a persistent refusal of marital intercourse, evidencing a final determination to withhold the enjoyment of this marital right from the other spouse, was held to constitute malicious desertion. Van Zyl in his treatise on Judicial Practice in South Africa at p. 522 quotes Cos over de Boedelminging at p. 248 as follows: "If either spouse obstinately and persistently, and without any reasonable cause, refuse the other the privileges of marriage, it is also a ground of divorce." Van Leuwen in his Treatise on Roman-Dutch law says at p. 120: "A perpetual withdrawal from the connubial bed is held to amount to malicious desertion." This aspect of marriage was discussed in the recent case of Lennie v. Lennie 65 T.L.R, at p. 764 where Lord Normand quoted from Lord Elchies Annotations on Stair a quotation taken by that learned author from Voet's Commentaries De Divortio Sect. 7 p. 8: "There is the same reason for dissolving a marriage for wilful abstinence as for non-adherence." It is, however, to be noted that the Dutch jurists based their conclusions on this subject on the authority of St. Paul who added desertion to adultery as a ground for divorce. St. Paul was careful to point out, and in this the jurists follow him, that it is permissible for a spouse to withdraw from the connubial bed for a season for good cause; and it is therefore necessary, where refusal of this marital right is alleged as a ground for a decree of dissolution of marriage, that there must be shown a permanent and irrevocable intention without just cause to withdraw from the marriage bed. Such an intention has not been proved in this case even if I accepted the petitioner's evidence on this point; but as I have indicated I accept the respondent's story as to the sexual relations between the parties.

Finally there is the question of separation. It is noteworthy that the petitioner in his petition at paragraph 9 (b) alleges that he was compelled to leave the matrimonial home on November 30th, 1949. His evidence is to the effect that respondent refused to accompany him to the new matrimonial home at Eve Leary where suitable quarters had been assigned to him as a Corporal of Police. The evidence of the witness, Wilson, shows that the

respondent was in a temper on the evening on which the furniture was moved from Lamaha Street to Eve Leary and expressed an intention not to reside in "Nigger quarters". Respondent, though denying this incident, admits that during the quarrel on October 24th she had said "how can I be expected to live in quarters at Eve Leary when you behave like this?" But even if it is granted that she did refuse to accompany petitioner on November 29th was this refusal "a deliberate, definite and final repudiation of the marriage state by her?" The evidence shows that this is clearly not the case. Mr. Smith testified that the respondent asked him to intercede with petitioner to resume cohabitation and that he communicated this to him. Respondent also alleges that she asked Mr. De Mattos to speak to him. Finally there is the precipitate action of petitioner in filing this petition and the respondent's offer made both by counsel at the beginning of this trial and constantly since then by the respondent herself to resume cohabitation. I have no doubt, whatever, that the respondent's offer was made in good faith and with a genuine desire to make a success of the marriage; but the petitioner has not accepted that offer. The furthest limit of his concession is that if he were certain the offer was genuine and she intended to change her ways he would consider resuming cohabitation.

Neither party in this cause has alleged marital infidelity against the other, though there is evidence of jealousy on the part of both spouses. Petitioner has not denied his friendship with Nurse Bonous and it is proved by Smith and the respondent that during one of the quarrels in October 1949 the petitioner did say that he would marry Nurse Bonous and if she didn't behave herself he would kick her out and marry another woman. It appears to me from the evidence that both petitioner and respondent are quick-tempered and there is no doubt that the respondent knows nothing of the soft answer which turneth away wrath. The husband showed little consideration for his wife and as soon as his creature comforts were curtailed or affected through his wife's unusual spell of night work he began to work up all the little disagreements of the past in his mind until they assumed the proportions of an obsession. At the same time he began, owing no doubt to the absence of his wife, to see more of Nurse Bonous than was good for him. The heady wine of a new attraction led to a devaluation of his wife and her charms and this in turn caused her to nourish suspicions which no doubt malicious rumour was quick to magnify. In October 1949 petitioner was habitually coming home late and the explosion occurred on October 24th when he returned from Church after 11 p.m. As a result of this quarrel he took down his bed and slept at the Alberttown Station. Then on October 29th, after pressure by Mr. Smith he returned. But he made no attempt to placate his wife, who now had just cause for mistrust and a final quarrel ended in the division of the wedding presents and his visit to Miss Callender's house. From that date he ceased marital relations. He removed his clothes, and his two radios from the house. He slept continuously at, Alberttown Station and when Miss Callender visited his house to discuss the situation he rudely ignored her. After his removal he never visited his wife although he knew that she was living

within a few yards of Eve Leary. Neither he nor his solicitor ever wrote inviting her to return and I express grave doubts as to his statements about telephone conversations with respondent and an appointment to meet her outside her aunt's house. He sent her $16.00—less than 1|6 of his salary—for her maintenance and within a month and 11 days after their separation he swore to the petition which he filed on January 14th, 1950.

It has been argued by Mr. Cummings for the petitioner on the authority of Horton v. Horton (1940 3 All. E.R. 381 that the respondent's course of conduct has affected the petitioner's health and amounts to legal cruelty. The petitioner has produced no evidence that his health has been affected apart from his own statement. He has not given evidence that he consulted a doctor nor has he tendered evidence of the result of any medical examination. From outward appearance he seems to be a robust young man in excellent health. Undoubtedly the law is that conduct which falls short of legal cruelty may justify one spouse in leaving the other, but it must be of grave and convincing character. As L.J. Asquith pointed out in Buckler v. Buckler (1947) P. 25 "it must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other for better or for worse. The ordinary wear and tear of conjugal life does not in itself suffice." In this case there is nothing more than the ordinary wear and tear of conjugal life; and it is significant that Mr. Smith, a man with 25 years' experience of married life, expressed the opinion both in evidence and personally to the petitioner that there was no sufficient cause for breaking up the marital home.

The legal implications of Section 9 (2) of the Matrimonial Causes Ordinance which provides that a marriage may be dissolved on the ground of malicious desertion have been carefully considered in the case of Mathews v. Mathews (1936) L.R.B.G. 459, and the judgment of Verity J., as he then was, has been consistently followed by judges in this Colony. "Malicious desertion", he said "must at least include a deliberate, definite and final repudiation of the marriage state by one spouse against the will of the other and without just cause or legal justification." In this matter I can find no evidence that the respondent at any time had any such deliberate definite intention to break up the marriage. On the contrary the evidence is clear that it is her wish to continue the marriage state and that with but little encouragement she would immediately return to her husband and resume their matrimonial life. I can find nothing in her conduct as proved by the evidence to justify the conclusion either that her conduct has been such as to entitle her husband to leave the matrimonial home or that she had at any time or has now a deliberate intention to repudiate the marriage. While I am anxious to say no unnecessary word which might in any way hinder a reconciliation of these two spouses, I am in duty bound to express my conviction from a consideration of the evidence and the conduct of the parties both prior to and since what I hope is a temporary separation that it is the petitioner who formed the inten

tion of putting an end to the matrimonial state, and that for this he had no legal justification. The petition is accordingly dismissed and the petitioner must pay the respondent's taxed costs.

Solicitors: H. A. Bruton for the plaintiff.
A. Vanier for the respondent.

D'AGUIAR *v.* GONSALVES AND GONSALVES.

(In the Full Court on appeal from the Licensing Board for the County of Demerara (Worley C.J. Ward, Stafford JJ) April 4, 18, 1950).

Appeal—Intoxicating Liquor licensing Ordinance—Application for licence—Condition of premises—Statutory requirements—Time for compliance—Date of Final adjudication.

Sub-section 2 of Section 12 of the Intoxicating Liquor Licensing Ordinance provides that "No premises shall be deemed to be fit for the purposes of a tavern or a spirit shop which contain any dwelling or living room having an internal communication with that part of the premises wherein intoxicating liquor is sold and that part of the building shall be separated from the rest by a partition built up to the roof".

The respondents applied to the Licensing Board for the County of Demerara for a licence to sell intoxicating liquor on their premises. At the time of the application the respondents' premises contained a living room which was not separated from the part where intoxicating liquor was to be sold by a partition built up to the roof. The Board heard certain evidence and informed the respondents that their premises did not appear to comply with the provisions of subsection 2 of section 12 of the Ordinance and adjourned the hearing of the application. Between the date of the Board's expression of opinion and the adjourned hearing the premises were so constructed as to conform with the requirements of the Ordinance. A majority of the Board inspected the premises and the Board granted a licence to the respondents.

Held: The time at which the premises must be judged as to fitness for the purposes of a tavern or spirit shop is the time when the Board makes its final adjudication in the matter. It was not necessary that all the members of the Board should have inspected the premises.

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

W. J. Gilchrist for the respondents.

Judgment of the Court.

This is an appeal from the decision of the Licensing Board for the County of Demerara which granted the respondents' application for a licence to sell intoxicating liquor on premises situate at Farm, Mahaicony, East Coast, County of Demerara. The application was opposed by the appellant and by D'Aguiar Ltd., a company operating a shop for the sale of spirituous liquor in the same area. At the hearing before the Board several grounds of objection were presented; namely, that the premises were not fit for the purpose of retailing intoxicating liquor, that the requirements of the Intoxicating Liquor Licensing Ordinance, Chapter 107, had not been complied with, that there was a sufficient number of

premises already licensed to meet the needs of the neighbourhood, that the grant of another licence would not be conducive to the good order of the district, that the sale of liquor on the premises would constitute a fire hazard, and that the full quota of licences permissible in this area under the Intoxicating Liquor Licensing (Restriction) Order 1949 made in accordance with the provisions of section 5 of the Intoxicating Liquor Licensing Ordinance 1930 would be exceeded if another licence were granted. On all these grounds of objection the Board decided against the Company and the appellant.

In his grounds of appeal the appellant has repeated the objections taken before the Board and has added three further grounds; viz., that the Board has taken extraneous matter into consideration, that the grant of the licence is affected by a specific illegality in that two only of the three members of the Board inspected the premises and that the Board exceeded its jurisdiction m purporting to give directions for structural alterations of the premises. It is sufficient to say with respect to these numerous grounds of appeal that counsel for the appellant, wisely in our opinion, argued seriously only one ground of appeal. It is clear that the Licensing Board had ample evidence for coming to the conclusion that the grant of a licence in respect of these premises would not create a fire hazard, or infringe the Order with respect to the permitted number of licensed spirit shops in the area. It was relevant for the decision as to whether there was a sufficient number of licensed premises to meet the needs of the neighbourhood that the Board should take into consideration evidence as to the increase of population in the district; and there was evidence on which the Board could reasonably find that another retail spirit shop was needed in the neighbourhood and that its presence would not affect adversely the good order of the district. Nor is there, in our opinion, any substance in the objection that only two of the members of the Board inspected the premises, since by section 7 of the Intoxicating Liquor Licensing Ordinance Chapter 107 it is provided that any power exercisable by a Licencing Board may be exercised by a majority of its members.

The substantial question raised in this appeal is whether it is permissible for an applicant for a licence under the Intoxicating Liquor Licensing Ordinance to comply with the requirements of the Ordinance at some period between the application for and the grant of a licence. Sub-section 2 of Section 12 of the Ordinance provides that "no premises shall be deemed to be fit for the purposes of a tavern or a spirit shop which contain any dwelling or living room, having an internal communication with that part of the premises wherein intoxicating liquor is sold, and that part of the building shall be separated from the rest by a partition built up to the roof." It appears from the evidence that on the first day on which the application was heard there was a room or part of a room being used as sleeping quarters for someone on the premises, and a cloth screen was used to separate this from the remainder of the room. The Board expressed an opinion that, in order to comply with the requirements of the Ordinance, this part of the room should be separated by a partition going up to

the roof. On December 2nd, 1949, the applicant had this structural alteration done, and at the adjourned hearing on December 8th the Board was satisfied that the premises conformed to the requirements of the Ordinance.

Mr. Humphrys for the appellant argued most ably that, since at the time of the application the requirements of the Ordinance were not complied with, the application should have been refused, and that the Board had no authority to consider the state of the premises as on the day of the adjourned hearing or to give any directions with respect to structural alterations in the building. It appears to us that for the purposes of his argument counsel for the appellant must interpolate into sub-section 2 of section 12 of the Ordinance the words "at the time of the application." He contended that if the Board paid regard to the condition of the premises as at the time of final adjudication only, an opposer might find his principal ground of opposition cut away by the subsequent action of the applicant. We have given consideration to this possibility and its consequences, but, unless it is forced ex necessitate to do so, a Court is loth to add words to what the Legislature has seen fit to enact. The words of subsection 2 of Section 12 bear without any difficulty the interpretation that the Board must take into consideration the condition of the premises at the time when it makes its final adjudication in the matter.

Moreover the question has been decided in this sense in the courts in England and New Zealand. In the case of Reg. v. Montagu (1884) 49 J.P. 55 the applicant applied for the renewal of his licence. He was informed that an objection would be taken on the ground that the premises did not conform to the statutory requirements as to annual value. Before the adjourned hearing the applicant called in an architect and made substantial additions to the premises so as to bring them above the annual value required by the Act. The Licensing Justices refused to grant the application on the ground that though the house was of sufficient value when the application was heard at the adjourned annual meeting, it had not been so at the date of the application. The Queen's Bench held that the justices had exceeded their jurisdiction and accepted the argument of counsel for the applicant that the grounds of objection to the grant of a licence relate to the time of the final hearing of the application and not to some antecedent period at which it was immaterial whether the premises were of sufficient value or not. The same reasoning was applied in the case of Ex parte Maughan (1875) 1 Q.B.D. when a grocer, who was not at the time of his application duly qualified in accordance with Section 8 of the Wine and Beerhouse Act, 1869, put in a second application to the adjourned Licensing Sessions after he had qualified himself by taking out a wholesale dealer's licence to sell spirits. In the case of Re O'Driscoll's application, Ex parte Gaukrodger (1901) 20 N.Z.L.R. 660 (noted in the English and Empire Digest Vol. 30 p. 26) the Supreme Court of New Zealand held that it is not necessary that the requirements with regard to accommodation should be complied with at the time of giving notice of intention to apply for a licence, and that it is sufficient if they are complied with at the time of the granting of the licence.

These decisions appear to us to be in accordance with the natural meaning of sub-section 2 of section 12 of the Ordinance and to support the view that the time at which the premises must be judged as to fitness for the purposes of a tavern or spirit shop is the time when the Board makes its final adjudication in the matter.

Finally it appears to us that, although the Board in its reasons for decisions speaks of giving directions for structural alterations to be made, the language used is neither apt nor precise to express the action which was taken. We understand it to mean, as Mr. Gilchrist for the respondent explained, that the Board expressed an opinion as to what was required to comply with the Ordinance. The applicant acted in accordance with that expression of opinion, but it was in no sense of the word a command or direction. The applicant might have elected to remove the cloth screen and the bed and chairs and have left this apartment as part of the room as it appears on the plan submitted with the application. In any case this would not affect the question in issue since the Board on December 21st when it made its final adjudication was concerned solely with the condition of the premises on that date.

The appeal must accordingly be dismissed with costs.

Solicitors: J. E. deFreitas for the appellant.
Carlos Gomes for the respondents.

D'AGUIAR *v.* GONSALVES AND GONSALVES

(In the Supreme Court, Civil Jurisdiction (WARD, J.) February 13, 18, 1950).

Intoxicating Liquor Licensing Ordinance—Grant of certificate—Appeal—Summary Jurisdiction (*Appeal*) *Ordinance—Suspension—Injunction—Who may obtain.*

The defendants applied for the grant of a certificate under the Intoxicating Liquor Licensing Ordinance, Chapter 107, in respect of their premises at Mahaicony and their application was approved by the Board. The plaintiff who was managing director of a company carrying on a retail spirit business at Mahaicony had opposed the grant of a certificate and when it was approved by the Board, gave notice of appeal in accordance with the provisions of section 25 of the Intoxicating Liquor Licensing Ordinance.

Although the appeal was not determined the defendants opened a spirit shop and carried on business.

The plaintiff sought a declaration that the defendants were not entitled to carry on a retail spirit shop until the final determination of the appeal and an injunction restraining them from carrying on a retail spirit shop.

Held: Section 12 of the Summary Jurisdiction (Appeals) Ordinance which suspends the execution of a decision under appeal until the appeal is determined by the Court or abandoned is incorporated by section 25 of the Intoxicating Liquor Licensing Ordinance and the defendants were wrongly carrying on their spirit shop business. The plaintiff, however, had not proved that he was suffering damage to some right of property by the defendants' contravention of the Ordinance and accordingly the action failed.

L. M. F. Cabral for plaintiff.

W. J. Gilchrist for defendants.

WARD, J.

In this action the plaintiff claims:

(a) a declaration that the defendants are not entitled to carry on a retail spirit shop at Farm, Mahaicony, East Coast, Demerara, pending the final determination of an appeal by the plaintiff from the decision of the Licensing Board of the County of Demerara dated 21st December, 1949; and

(b) an injunction restraining the defendants their servants and agents from carrying on a retail spirit shop on the same premises.

It was agreed by the parties that the trial of the summons should be the trial of the action.

The facts are simple and not in dispute. In September, 1949, the defendants applied for the grant of a certificate under the Intoxicating Liquor Licensing Ordinance Chapter 107 in respect of premises situated at Farm, Mahaicony, East Coast, Demerara. After several hearings in November and December, 1949, the Licensing Board for the County of Demerara granted a certificate to the defendants on December 21st and on December 22nd, the

defendants delivered the certificate to the District Commissioner, paid the requisite licence duty and received a licence to sell intoxicating liquor on the premises. On December 28th, the plaintiff gave notice of appeal to the Full Court against the decision of the Licensing Board in accordance with the provisions of Section 25 of the Intoxicating Liquor Licensing Ordinance. On January 5th, 1950, the defendants opened a retail spirit shop on the premises under the licence issued on December 22nd. The shop is still in operation.

It is the plaintiff's case that the defendants in carrying on the spirit shop are acting in breach of Section 25 Sub-section 2 of the Intoxicating Liquor Licensing Ordinance. . . . . This section, according to the plaintiff's contention, incorporates Section 12 of the Summary Jurisdiction Appeals Ordinance Chapter 16 which provides that when an appeal has been perfected, the execution of the decision under appeal shall be suspended until the appeal is determined by the Court or is abandoned.

It is admitted that if Section 12 of the Summary Offences Appeals Ordinance is incorporated by Section 25 of the Intoxicating Liquor Licensing Ordinance, the grant of the certificate would be suspended until the hearing and determination of the appeal. It is settled that in the absence of express statutory provision, an appeal does not operate as a stay or suspension of execution pending the hearing or determination of the appeal. This was clearly stated by Lord Campbell C.J. in Kendall v. Wilkinson, Ellis & Blackburn p. 880 and it has been consistently followed since and in Re Wilmott 30 L.J.M.C. 161 the Court comprising Cockburn C.J. Crompton, Blackburn and Hill JJ held that there is no power in the court to suspend the operation of a warrant unless it is so provided expressly. Crompton J: says "the authorities are very clear that an appeal does not suspend the commitment; it may seem therefore a hard thing to keep him in prison when he ought to have an appeal, but it is clear there is no suspension of the warrant unless it is clearly so expressed to be."

In the eighth edition of Paley on Summary Conviction at p. 375 there is the following statement: "In some cases execution is expressly stayed pending the appeal; in others it is stayed on certain conditions; in some cases where no such express terms are found in the action it may be right to allow execution to go notwithstanding the appeal in order to give full effect to the intention of the Legislature but, as it has been stated, in the vast majority of cases it would be exceedingly improper in the justice to grant a warrant after the notice and recognisance and before the hearing of the appeal or before the time for hearing it has expired."

Mr. Gilchrist for the defendants has argued that this provision suspending the execution of a decision creates a substantive right and is not comprehended under the terms of Sub-section 2 of Section 25 of the Intoxicating Liquor Licensing Ordinance which refers only to procedure fees and powers of the Court. It is to be observed that Section 93 Sub-section 2 of the same act

refers to the procedure regulating appeals from magistrates in relation to convictions and fines under the Intoxicating Liquor Licensing Ordinance. Although the wording is not exactly similar Section 93 is of assistance in the interpretation of the meaning of section 25.

It appears to me to be clear from these two sections that the Legislature intended that all the consequences which follow from an appeal in a case before a magistrate in his summary jurisdiction should also attach to appeals from the decisions of a Licensing Board. Further there is a close similarity between a stay of execution in a civil matter pending an appeal and a statutory suspension as provided for by Section 12 of the Summary Offences Appeals Ordinance. A careful analysis from a juridical point of view will, I think, show that the grant of a right of appeal is the creation of a new right but the consequences which follow the exercise of this right, although defined either by Ordinance or by Rules of Court are, not in themselves substantive rights but ancillary to the right of appeal itself. They are in fact the procedural consequences of the exercise of the right of appeal and as such, fall within the terms of Sub-section 2 of Section 25 of the Intoxicating Liquor Licensing Ordinance as part of the procedure of an appeal under the Summary Offences Appeals Ordinance. I am therefore satisfied that Sub-section 2 of Section 25 of the Intoxicating Liquor Licensing Ordinance incorporates Section 12 of the Summary Offences Appeals Ordinance and that therefore the execution of the decision by the Licensing Board is suspended until the hearing and determination of the Appeal. It may be that this creates a hardship for the defendants or for any applicant whose time for operating a spirit shop under a licence is curtailed, but it is no greater inconvenience than is suffered by any litigant and this consideration cannot over-ride a clear statutory provision.

A further question, however, remains: whether the plaintiff can claim an order restraining the defendants from contravening this statutory provision. That the Attorney-General, on behalf of the public, has the right to see that the law is obeyed is clear, but an individual, before he can invoke the equitable remedy of injunction, must show that the infringement affects some rights of property enjoyed by him. The first principle says Lord Justice Turner in Maxwell v. Hogg (1867) 2 Ch. App. 307 which applies to every case is that "the plaintiff must show some property right or interest in the subject matter of his complaint." The court has no jurisdiction to prevent the commission of acts which are merely criminal or illegal unless they affect some right of property either to the public or to an individual, and where only the public right is affected, the claim for an injunction can only be brought by the Attorney-General. In this case, the plaintiff in his affidavit asserts that he is the Managing Director of D'Aguiar's Ltd., who carry on a retail spirit shop at Mahaicony, but he does not state whether he has any pecuniary interest in this Company. The Company was one of the opponents of this application before the Licensing Board but is not a party to this action nor has it

entered an appeal against the decision of the Licensing Board. It is possible, of course, that the operation of a spirit shop might have the effect of withdrawing custom from the spirit shop at present operated by the Company, D'Aguiar's Ltd., though no allegation to this effect has been made, but it is difficult to see what right of property of the plaintiff has been threatened or affected. To enable the plaintiff to claim an injunction successfully, he must prove affirmatively that he is sustaining damage to some right of property by the contravention of the Ordinance.

In my opinion he has failed to prove that this breach of the Ordinance involves an interference with some private right of his own or that he has suffered some damage special and peculiar to himself and different from the interference with the public right.

The action accordingly fails and must be dismissed. At the same time, I would remark that now that the Court has expressed its opinion that the notice of appeal suspends the execution of the decision of the Licensing Board, the defendants would be ill advised to continue the operation of the spirit shop at the premises at Farm, Mahaicony, as they might render themselves liable to an action by the Attorney-General on the relation of the plaintiff or of some other person having an interest in the matter.

On the question of costs the plaintiff has failed as to the second part of his claim, and, although I do not think he is entitled to a declaration, the decision is that the defendants are acting in breach of Section 25 Subsection 2 of the Intoxicating Liquor Licensing Ordinance. For this reason I think that the defendants are entitled to no more than one half of the taxed costs of the action and I order accordingly.

Solicitors: J. E. deFreitas for the plaintiff. Carlos Gomes for the defendants.

DEEN *v.* Mc DONALD.

In the West Indian Court of Appeal. On Appeal from the Supreme Court of British Guiana. (Furness-Smith, Collymore, Worley, C.J.J.). March 15, 16, 20, April 21.

Malicious prosecution—Prosecution instituted on advice of counsel—True facts not disclosed to counsel—Absence of reasonable and probable cause—Malice.

The appellant prosecuted the respondent indictably on a charge of perjury which contained three counts. The proceedings terminated in the respondent's favour and thereafter brought an action for malicious prosecution against the appellant. The trial judge found that with regard to two of the counts for perjury, the appellant, who had instituted the proceedings on the advice of counsel, had no reasonable and probable cause for preferring them and was actuated by malice in so doing. The respondent was awarded $600 damages with costs.

On appeal it was argued that (i) the judge erred in fact in finding malice and in finding that the appellant could not have believed in the respondent's guilt and knew that the statements upon which his information was based were false and (ii) that the judge erred in law and fact in holding that the appellant did not have reasonable and probable cause for prosecuting and was not protected by the advice of his counsel.

Held: There was ample evidence to support the judge's findings. The circumstances indicated that the appellant did not believe in the

justice of his own prosecution and that being so there was no reasonable and probable cause for it.

L. M. F. Cabral for the appellant.

John Carter for the respondent.

Judgment of the Court:

JUDGMENT:

This is an appeal from an order of the Supreme Court of this Colony in an action for malicious prosecution, adjudging that the respondent (plaintiff in the Court below) should recover $600 damages and costs against the appellant-defendant. The material facts are fully set out in the written judgment and need not be repeated here: it will suffice for our present purposes to say that the appellant prosecuted the respondent indictably on a charge of perjury, which contained three assignments or counts, namely:

(a) "He has never given me any receipt when I bought on other occa-"sions from him."

(b) "I bought some yeast from Wieting & Richter, Limited, before I "went to defendant's stall for the first time. I got no bill for the "yeast I bought. I bought half pack of yeast."

(c) "I do not know what is called margarine."

This charge was laid on 26th October, 1942, but was never actively pursued: it lay dormant from 16th December, 1942, until 27th May, 1947, was subsequently called several times in the Magistrate's Court and was finally withdrawn on 15th April, 1943, appellant's counsel stating that he offered no evidence, whereupon the respondent was discharged. The explanation offered for the withdrawal of the charge was that a necessary witness had died and that certain exhibits material to the charge had been lost or misplaced in the Registry of the Supreme Court.

The learned trial judge found that the appellant had reasonable and probable cause for laying the assignment (b) in the information which he swore against the respondent and we are not further concerned with that. The judge found, however, that in relation to the assignments (a) and (c) the appellant had no reasonable and probable cause for preferring them and was actuated by malice in so doing.

The grounds of appeal are:

(i) that the judge erred in fact in finding malice and in finding that the appellant could not have believed in the respondent's guilt and knew that the statements upon which his information was based were false;

(ii) that the judge erred in law and fact in holding that the appellant did not have reasonable and probable cause for prosecuting and was not protected by the advice of his counsel;

(iii) that the damages were excessive.

It will be convenient to consider (ii) in the first place, since proof of the existence of malice was not fatal to the defence in this

action, if the other facts proved that there was in existence some fact or facts which the appellant was entitled to regard as reasonable and probable cause for the prosecution: per Greer L.J. in Herniman v. Smith: (1936) 2 All E.R. 1377 at p. 1385.

Counsel for the appellant conceded that the trial judge correctly directed himself in law on this issue, if it be assumed that the respondent was innocent of the offence charged; but that this assumption was not justified as the plaintiff had not discharged the onus which lay on him to prove his innocence. It was further contended that if, in fact, the respondent were guilty of the offence charged, the absence of reasonable and probable cause is thereby negatived even though the appellant did not believe him guilty of the charge. The correctness of this proposition is doubted by the learned editor of the chapter on malicious prosecution in the Tenth Edition of Clark and Lindsell on the Law of Torts (p. 820) out it is not necessary for us to examine it in this appeal.

The termination of the criminal proceedings in the respondent's favour having been admitted on the pleadings, he had then to give some evidence tending to establish the absence of reasonable and probable cause operating in the mind of the appellant. This he sought to do by shewing the circumstances in which the prosecution was instituted, and that the real facts established no criminal liability against him. From the nature of the allegation in the first assignment, which related solely to transactions between the appellant and respondent, it necessarily followed, if the respondent's evidence as to the real facts were accepted, not only that he was innocent of the charge but also that the real facts must have been within the personal knowledge of the appellant at the time he instituted the proceedings.

The trial judge believed the respondent's evidence as to these transactions and rejected the appellant's version. It is true that he makes no express mention of the respondent's innocence but such a finding is implicit in the whole of the judgment and follows meluctably from his conclusion that the appellant knew of the falsity of his information.

It was, however, further urged on behalf of the appellant that the trial judge had misdirected himself in fact on the first count by confusing the question of the truth of the contents of the three bills said to have been delivered to the respondent by the appellant with the question as to whether the bills were in fact delivered and it was said that the judge's reasoning was based on the assumption that the bills, though false in content, were in fact delivered. We do not think that the judgment read as a whole can be so interpreted. The learned judge states explicitly that he was satisfied that, at the time when the appellant laid the information about the bills before his solicitor, he knew that this information was false. An essential part of the information was that the bills had been delivered to the respondent and we see no good reason for supposing that the trial judge had not this part in mind when expressing his conclusion.

As to the third assignment, it was contended that the judge misdirected himself by merely finding that the appellant's story

of the sale of margarine to the respondent was untrue and had failed to ask himself the correct question, namely, whether that story was true or not, did the appellant honestly believe, even though erroneously, at the time he laid the information that the respondent was lying when he swore that he did not know what was called margarine? If he did so believe, it was argued, then such belief would be inconsistent with the absence of reasonable and probable cause.

Here again, although this question is not expressly posed in the judgment, we are unable to accept the argument that the judge did not have it in mind. Counsel for the appellant throughout his argument laid stress on the question of the onus of proof and on the burden laid on the plaintiff in this type of action to establish facts which show an absence of reasonable and probable cause. But, in truth, the question of the onus of proof is no different in these cases from that in any other civil action: the burden is not constant but is continually shifting. "The question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests": per Bowen L.J. in Abrath v. North Eastern Railway Co. (1883) 11 Q.B.D. at p. 456. In the present action this third assignment of perjury arose out of an alleged sale of margarine by the appellant to the respondent, which the judge found was not in fact true, and he further bad before him the respondent's evidence, which he accepted, that in 1942 he did not use margarine for his business as a baker and did not in truth then know what it was. On this evidence taken in conjunction with the circumstances of the institution of the proceedings (to which reference is made later in this judgment), the judge might reasonably hold that the onus had shifted to the appellant and that it was incumbent on him to shew the existence of an honest belief. The appellant, however, in rebuttal, merely said "He (the respondent) as a baker must in my opinion have known what was margarine."

"The evidence which is to determine the question whether there was reasonable and probable cause, must consist of the existing facts or the circumstances under which the prosecution was instituted": per Brett M.R. in Abrath v. North Eastern Railway Co: supra at p. 450. When the facts and circumstances of this case are examined it is abundantly clear that there was ample evidence to justify the judge's findings. The accusation of perjury was the sequel to a conviction of the appellant on a charge of "profiteering" from which he appealed: but, without waiting for the result of the appeal, he instituted proceedings against the respondent who had been the informer and a principal witness against him. The appeal against conviction was dismissed early in 1943 and, after that, the appellant appears to have lost all further interest in the prosecution which he had launched as he said, "because he knew the statements were false and wanted to see justice carried out." The exhibits which are now missing were sent to the Registry of the Supreme Court for the purpose of the criminal appeal but it appears that the appellant made no enquiries for them until after the inordinate delay from 1943 to 1947. We cannot accept counsel's suggestion that the appellant was in no

degree responsible for this delay and was debarred from proceeding by the pressure of business in the Magistrate's Courts. In our view, all these circumstances indicate that the appellant did not believe in the justice of his own prosecution and, if that is so there was no reasonable and probable cause for it: See Williams v. Taylor (1829—31) 6 Bing: 183.

Little remains to be said on the question of malice and the quantum of damages. Where, as in this case, a prosecutor has launched proceedings based on information which the judge finds he knew to be false and it is shewn by the circumstances and his subsequent conduct that he had no faith in the justice of his accusation, the imputation of malice is irresistible: and we see no reason for reducing the damages awarded.

For these reasons the appeal is dismissed with costs and the judgment of the Court below affirmed.

Solicitors: S.M. A. Nasir for the appellant.

H. A. Bruton for the respondent.

de FREITAS *v.* de FREITAS LIMITED.

In the West Indian Court of Appeal. On appeal from the Supreme Court of British Guiana (Collymore, Malone, Worley, C.J.J.). March 20, 21, 22, 23, 24, May 8.

Contract—Question of fact—Trial judge's findings—contract not pleaded—Detinue—Statute of Limitations—Disbelief of plaintiff's and defendants' case—dismissal.

The appellant, plaintiff in the Court below, claimed from the respondents, the defendant company, (a) a declaration that he was the owner of two punts in possession of the respondents, and that they held them in trust for him, (b) an account of the use of the punts from December 1941 up to such time as the punts should be delivered to him, or alternatively, damages for their detention, and (c) delivery of the punts and their accessories or payment of their value $12,000.

His case was that the punts were built for him with respondents' money and the cost debited to his account. Substantial sums were earned by the punts in transporting the respondents' property and those sums were credited to his account as part payment of his indebtedness. By an oral agreement in December 1941, the respondents took over from him the punts with a view to purchasing them and held them in trust for him since then.

The respondents denied the agreement of 1941 and claimed that the punts were always their property.

The trial judge did not accept either the appellant's or respondents' version of the alleged agreement of December 1941 but made a finding which amounted to a contract not pleaded by either side. He found that the punts were, prior to December 1941, the property of the appellant but as they were delivered to respondents as a result of what he thought was the true contract, the Statute of Limitations applied. The claim was dismissed.

Plaintiff appealed and the respondents cross-appealed.

Held: The judge's finding regarding the contract of December 1941 could not be supported as neither party pleaded such a contract and there was no evidence from which it could reasonably be inferred. But the appellant's case was based on an express contract of bailment which collapsed and the Appeal Court could not speculate as to the intentions of the parties for the purpose of constructing a new case out of the ruins.

The facts are fully reported in the judgment.

L. M. F. Cabral for the appellant.

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

Judgment of the Court.

The issues in this appeal and cross appeal will be most conveniently approached by way of a recital of the admitted facts. The respondent Company (hereinafter referred to as the Company) is a private company incorporated and registered in this Colony in 1927 under the provisions of the Companies (Consolidation) Ordinance Chapter 178. It is of the type sometimes described as a "family company" and was formed in 1927 by the parents of the appellant, Maximiano Jose de Freitas, his father, and Germana Teixeira Brazao de Freitas, his mother. They held respectively fifty and four hundred and forty shares of the value of $100 each, and ten shares were allotted to the eldest son Cyril. On June 11, 1934, a further four hundred and forty shares were allotted to the father and sixty to the mother. There were five children, issue of the marriage; four sons, Cyril, Virgil, Norberto (the appellant) and Alvaro, and one daughter, Ursula. The Company operated a saw-mill and also carried on business as dealers in stone and general merchants in Water Street, Georgetown. The father was the Managing Director and Cyril the only other Director; the latter was also manager of the saw-mill and Virgil was the manager of the hardware business. The appellant and Alvaro worked as clerks in the office, the appellant being the person in charge with the other employees of the Company under him.

At some date prior to the matters now under consideration, the shares of the parents were redistributed as to five hundred of them (including the ten shares originally allotted to Cyril) to the five children in proportion of one hundred each, the remaining five hundred being held by the father and mother equally. It is not disputed that the father and mother intended by this distribution to provide for their children, who made no payment for the shares transferred into their names. None of the children married and all continued to live in the family house during the lifetime of their parents and afterwards up to the time of the, trial of the action. The mother died about July 1944, and the father in January, 1945. The four sons who worked in the business each received a small salary of $19.80 a week which was, presumably, no adequate recompense for their services.

The timber and stone which provided the raw material for the saw-mill and the stone business were obtained from Essequebo and conveyed to Georgetown by sea in barges or, as they are called locally, punts. In 1940 the Company was hiring bar-

ges for this transport and paying high freight rates because of the shortage of sea-going vessels. Late in that year they contemplated entering into a contract with one Swilden, under which the Company would advance the materials and money for the construction of barges which were to be the property of Swilden and were to be used by him for transporting the Company's timber and stone at agreed rates of freight. This arrangement, however, fell through and in January 1941, the appellant entered into a contract with one Nicholson for the construction of two punts with accessories. The timber and other materials used in the construction of these barges were supplied by the Company on charge bills made out to the appellant and debited at the usual sale prices against his account in the Company's ledger. The Company also advanced money for wages which was similarly debited against the appellant. The first barge was completed and delivered in the month of June 1941 and licensed in the appellant's name as Norberto I, and was thereafter regularly used in the Company's service. Freight was calculated at the rate of 8 cents a cubic foot of lumber, and after each trip two cheques were issued by the Company, one payable to the appellant calculated at 6 cents a foot and the other to the captain of the barge (for himself and the crew) at the rate of 2 cents a foot. The appellant paid back to the Company all the cheques received by him, the amounts being set off against his debit in the ledger, save that on one occasion he retained for his own use a portion of the amount paid on one cheque. The second barge named Norberto II. was completed and delivered in November 1941. It was similarly used and freightage paid in the like manner.

On December 22, 1941, the appellant's indebtedness in respect of the construction of these two barges stood in the Company's books at $11,528.78 and the amounts paid in by cheque against this totalled $6,701.28. About Christmas of that year a change occurred, the nature of which is the principal issue in dispute and which we shall consider fully later in this judgment. Thereafter, although the use of the barges continued as before, no further credits were made to the appellant's account and no further cheques were issued to him. The Company was in financial difficulties and the books were not being kept up to date. The financial year ended in March but the balance sheet for the year ending March 1942 was not made up until March (or as the appellant contended May) 1943. In that balance sheet there appears an account under Assets, "Lighters, Tugs and Barges" which includes the sum of $11,291.72 as the capital cost of the two barges with no cross entry showing any liability to or clue from the appellant. At the same time an account corresponding to this was opened in the Company's ledger but antedated to March, 1941 and the appellant's ledger account was closed by transferring his outstanding debit of $4,590.44 to profit and loss account where it was, in effect, written off as a bad debt. The barge Norberto I is still in the Company's possession and used in its service under the name of Ampa I; there is a conflict of evidence as to whether Norberto II has or has not been sold.

After the death of the father, Cyril was the only remaining Director and, on January 25, 1945, an extraordinary general meeting of the share holders was held at the office of the Company's solicitors for the purpose of appointing a director or directors. All the five children were present and a dispute arose over the nomination of Alvaro to which the appellant objected. He then, as the minutes record, "threatened taking action for $18,000 for punts and barges, his property, taken by the Company." It was finally agreed that all the shareholders be appointed Directors until the next ordinary general meeting. The appellant continued to work with the Company and at some subsequent time advanced to it the sum of $2,500 which was afterwards repaid without interest. In 1946 a further quarrel occurred between the appellant, Cyril and Virgil and the appellant was dismissed from service but re-employed after seven weeks; he was again dismissed, this time finally, in October, 1946. On October 16, he wrote to the Company as follows:

> "I am to call on you, to settle my account, with respect to the working of my barges I and II by the Company. It is not fair to me to be kept on waiting any longer for the Company's financial position to improve. Furthermore, I do not intend to allow the Company to work my punts any longer. I had decided to work them for myself without any more delay or excuses."

No reply having been received to this, the appellant's solicitor wrote to the Company on the 22nd October demanding the immediate delivery of two punts and accessories "all the property of Mr. Norbert de Freitas and in your possession" and demanding an immediate statement of account of the working of the said punts by the Company. On the 24th October, the Company's solicitors replied denying that the appellant was the owner of the two punts or that he had been put off for a long time by promises or had made any claim on the Company for the barges until recently. They stated that the costs of building and maintaining the punts were paid by the Company out of its own funds and that the sum of $11,291.72, being the debit balance in respect of these punts, was transferred to the Lighters Account of the Company in 1942 and added:—

> "It would appear that your client is basing his claim on the fact that the original entries in respect of these punts were debited, on his instructions, to an account in his name, but he has omitted to inform you that these entries were rectified on the instructions of his parents at the end of the Company's financial year in 1942, and that he has not paid any part whatever of the costs of building and maintaining these punts."

On October 31, the appellant's solicitor replied refuting these statements, but no further correspondence ensued. The writ in this action was issued in December 1946 but the matter did not come on for trial until February 1948: judgement was delivered in February 1949.

In his statement of Claim the appellant pleaded that in or about the month of December 1941, it was orally agreed at George-

town between him and the Company that the Company would take over from him the two barges with a view to purchasing them later and that, pending agreement on such purchase, the Company would hold the punts in trust for him, operate and maintain them and pay him for the working of the punts at a reasonable rate, being not less than 4 cents nett per cubic foot of timber transported; provided that the Company should pay as for not less than four fully laden trips per month for each punt, and that the Company would render him an account of the working, crediting themselves with the balance of what was due to them in connection with the construction of the punts. He further pleaded that it was an implied term of the agreement that the Company would decide and agree (if at all) with him on the purchase price and the working of the punts within a reasonable time and that such a reasonable time would have been nine months; that in pursuance of the agreement, he had delivered the punts with their accessories to the Company, which had operated and used them from December 1941 up to the time of action brought; that the Company never decided nor agreed to purchase the punts and had failed to render accounts or to pay for their use but had put him off from time to time with promises; and, eventually, in the month of October, 1946, had refused to deliver the punts to him or to pay him for the use thereof and were now claiming the punts as their property; wherefore in the circumstances the Company had wrongfully detained and were detaining the punts and accessories.

The appellant therefore claimed:

(a) a declaration that he was (at the time of action brought) the owner of the punts and that the defendants held them in trust for him;
(b) an account of the use of the punts from December, 1941 up to such time as the punts should be delivered to him or, alternatively, damages for their detention;
(c) delivery of the punts and their accessories or payment of their value $12,000;
(d) further or other relief; and
(e) costs.

By their defence the Company specifically denied having made any agreement with the appellant as alleged in the Statement of Claim or at all and pleaded that they had paid the whole cost of building and equipping the two punts out of their own funds and that the appellant at no time paid any part of such cost or of the cost of maintenance; and that the appellant himself, without their authority, debited such cost to an account in his own name in their books. They pleaded that at the end of the financial year 1942, the debit of $11,291.72 in this account, was, on the instructions of the Managing Director (i.e. the appellant's father) and the appellant's mother, transferred to the Company's Lighters Account. The Company specifically denied that the appellant delivered the punts to them as alleged or at all and averred that, if the punts had ever been in the possession of the appellant (which was denied), his possession had been that of the Company whose servant and agent he was. They further

averred that the transfer of the account above referred to was well known to the appellant at the time when it happened and that he neither took any step nor made any protest in respect thereof but acquiesced therein and was therefore guilty of laches and delay. The defence further pleaded any statute of limitations that might be applicable. The appellant replied by a general joinder of issue.

The appellant's case was that, when he heard his father and his brothers, Cyril and Virgil, discussing the matter of Swilden's agreement, he suggested that they might well give him a chance to build the barges instead of allowing an outsider to do so; and that in the month of January, 1941 at the Company's Office, as the result of an agreement reached between the four of them, the Company agreed to assist him in building the two barges by supplying him with the timber and other materials needed for their construction and to advance him the money to pay the boat builders; that all this was to be charged up to an account to be opened in his name in the books of the Company and that this agreement was performed as set out above. In support of his claim to ownership, he relied principally upon the charge bills and cheques issued by the Company and the entries in his account in the Company's ledger. He said that about December 1941, his brothers Cyril and Virgil became envious of the money he was earning with the punts and that, in the result, the Company agreed to take over the punts on the terms alleged in his Statement of Claim. As part of the alleged agreement, freightage earned subsequently to the taking over was to be credited to him against his outstanding indebtedness to the Company but it is common ground that no such credit was made. He further said that in October 1942, he called upon the Company to exercise the option to purchase but was told by his father that the Company had no money with which to pay him so he accordingly consented to extend the time of the agreement. Further extensions were asked for on the same grounds and granted by him and when, early in 1945, after the father's death, he called upon Cyril and Virgil to settle with him they also said the firm had no money and secured his agreement to another extension until the end of the year. The climax to these continued extensions was, however, reached in 1946 when his brothers wanted a further extension. This led to a quarrel which resulted in his dismissal.

The appellant's explanation of the transfer of the cost of the barges to the Company's capital account was twofold. In January—March, 1943 he was involved in litigation which seemed likely to end unfavourably for him and he was faced with the possibility of having an order for costs made against him. He wished to protect his assets against a levy in execution and, with this object, transferred his shares in the Company to his father for a nominal consideration of $5, his savings bank account to his brother Virgil and the apparent title to the punts to the Company. He also contended that the form of any transfer of the punts made in the Company's ledger, whereby the punts were shewn as having always been the Company's property, was adopted in order to make it appear that the punts were clear assets free of liability

and could be so shewn in a balance sheet prepared for the purpose of securing a further overdraft. Counsel for the appellant stated, and it was not contradicted, that in a similar manner and for the same reason, the sum of $64,000 representing dividends declared and due to the share holders was shown in this same balance sheet as an asset described as "special reserve".

The Company's case was that the barges were built in the name of the appellant in order to protect the company against claims by seamen or others which might arise out of the management of the barges; and that, although the records in the Company's books might, ex facie, raise a presumption of the relation ship of creditor and debtor, yet the true explanation was as stated above and that the appellant's alleged ownership had no foundation in truth and in fact. It will be noted that the Company abandoned the defence that the appellant had debited the cost of the punts to his own account without authority. They said, however, that when in December 1941 Alvaro discovered and reported to his mother that receipts for the payment of freight were being issued in Norbert's name, the mother objected and demanded that the punts be transferred to the Company's account; that when this was done the appellant did no demur and thereafter Alvaro looked after the punts. They relied upon the cessation of credits in the appellant's account as confirmation of their case.

The trial judge found as a fact that the relation of debtor and creditor was formed between the appellant and the Company when the account was opened in the name of the appellant; that there was no evidence to support the Company's allegation that the appellant himself made the entries in this account without authority; and that the appellant was the owner of the two barges up to the end of December 1941. He further found that when the total cost of the two barges was ascertained in that month and compared with the amount credited for freight earned, it was felt by the appellant's brothers that his indebtedness was being too quickly liquidated; that a dispute arose shortly before Christmas; that the appellant consented to hand over to the Company the two barges and their accessories and that the ownership in the barges thereby passed to the Company. He rejected the alleged agreement pleaded by the appellant on the ground that the weight of evidence, the probabilities of the case, the general circumstances and the entries in the books far outweighed the oral testimony of the appellant and his witness Callender. He therefore rejected the appellant's case based on a bailment and wrongful detention and, having come to the conclusion that the ownership of the barges had passed to the Company, likewise rejected the appellant's claim for delivery.

The judgment then goes on to consider four alternative findings, which the judge notes as having been submitted by the appellant's counsel in his final address. The first three of these are alternative agreements, each based upon a bailment, all of which he rejects out of hand as he had already found that the Company never entered into the agreement or agreements alleged in the Statement of Claim. The fourth is noted as "agreement to trans-

fer ownership at once and operate the punts without liability to pay freight".

On the appeal, counsel were, unfortunately, unable to agree whether this alternative was actually put forward on behalf of the appellant or whether it came as a suggestion from the Bench, but we accept the latter view. The learned judge states, quite correctly that if there were an agreement to transfer ownership at once in December 1941 without a price being fixed, the appellant would be entitled to claim the value of the punts as on that date, in which event the punts would not have been held in trust by the Company, nor could a claim for detinue arise in respect of them but the appellant would have the right to sue for a reasonable price: Sale of Goods Ordinance; section 10 (i). The judge finds as a fact that the value of the barges with their accessories was their actual cost of construction and that, as the appellant still owed the Company $4,590.41, he would only have been entitled to immediate payment of the difference namely, $6,701.28. In effect, he finds that there was a sale of the barges by the appellant to the Company at a reasonable price, which he finds to be the cost price.

The judge then goes on to consider the question of limitation and after referring to the minutes of the general meeting held on January 25, 1945, says:

> "From those minutes it would seem that the plaintiff was calling the attention of those present at the meeting that the defendant Company had either wrongfully taken possession of the barges at the time they did, or when they did so lawfully the barges were worth $18,000; in either case his cause of action for conversion or the price would instantly have arisen. If it did more than three years before the action was filed and the Statute of Limitation is pleaded, as it is in this case, the plaintiff must necessarily fail in his claim unless within that period there is some written acknowledgement to take it out of the operation of the Limitation Ordinance."

After considering section 6 (1) and section 8 of that Ordinance, the judgment proceeds: "I have already found that the cause of action for the price of the barges arose at the end of December 1941, and the Writ of Summons was only filed on the 5th day of December, 1946." Then, after considering the relevant law and evidence, the judge states that he cannot find any sufficient acknowledgement of the Company's indebtedness to the plaintiff and conclude: "In the circumstances, the plea of the defendants of the Limitation Ordinance is well founded and judgment must be entered in their favour." The order of the Court was that, the action having failed, judgment be entered for the Company each party to bear his own costs.

The appellant now asks that the whole of this decision and judgment of the trial judge may be reversed except in so far as it is found that the barges were the property of the appellant during the year 1941 and that the relationship of the debtor and creditor existed between the appellant and the Company as re-

gards the cost of their construction; and he asks that this Court may:

(a) declare that he was at all material times and is the owner of the barges and that the Company held and holds them in trust for him;
(b) order that the Company do forthwith deliver the barges to him or pay to him their value, $12,000;
(c) order that the Company shall render him full account of the use of the punts as from December 1941 or, alternatively, pay damages for detention.

The grounds of the appeal are many and detailed but in substance they are:

(i) that the judge erred in not accepting the evidence of the appellant as regards the agreement made with the Company in December 1941;
(ii) in not finding that the barges were held by the Company in trust for the appellant, and that a cause of action had arisen for their wrongful detention;
(iii) in not finding that the appellant was entitled to any payment or damages whatever for the use or detention of the barges;
(iv) in finding that there was a transfer of ownership in December 1941 and that the Company was under an obligation to pay a reasonable price for the barges at or about the end of December 1941; and
(v) in finding that the action was barred by limitation.

The Company has lodged a cross-appeal contending that the decision be varied in so far as the judge found that the two barges were the property of the appellant during the year 1941 and that, instead thereof, it should be found that the barges were always the property of the respondent and that no relationship of debtor and creditor existed between the appellant and the Company.

The next succeeding portion of this judgment is based upon the assumption that the trial judge's finding of fact as to the ownership of the barges in 1941 was correct.

To deal first with ground (iv); it is clear to us that the finding of a contract for sale at a reasonable price in December 1941 cannot stand. Neither party pleaded such a contract and, with all deference to the learned judge, there was no evidence in the case from which such a contract could reasonably be inferred. As Scrutton L.J. said in Blay v. Pollard and Morris (1930) 1 K.B. 628 at p. 534:

> "Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case, the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course."

The Court cannot make for the parties a contract which they themselves do not claim to have made, and which is inconsistent with the pleadings and the evidence.

Counsel for the respondent Company has suggested that the judgment only puts forward the contract of sale at a reasonable price as a hypothesis, and that the judge made an independent finding of a complete divesting of the appellant's interest in the barges coupled with an unconditional transfer of ownership to the Company consistent with a gift. If the learned judge did indeed so find, it is remarkable that he has not said so in express words for that would have been the end of the appellant's case and it would not have been necessary to consider the Sale of Goods Ordinance and the Limitation Ordinance. But when the judgment is read as a whole, it is, we think, evident that the judge found that ownership was transferred by way of sale and that the real ratio decidendi was that the appellant's right to sue for a reasonable price was statute-barred.

We pass now to consider grounds (i) and (ii). Ground (i) is an appeal against a finding of fact and was not pursued with any marked determination, counsel for the appellant stating that if this Court should find in his favour on ground (ii) he would leave the questions of the quantum of value, or payment for use or damages to the Court. No good reason has been shewn for disturbing this finding of fact and, indeed, the profits to accrue to the appellant under the alleged agreement, when calculated, are seen to be so high as to make the story highly improbable.

Ground (ii) is the issue upon which the appellant mainly relies and his argument may be tabulated thus:

(a) there was an agreement to sell the punts, by which the transfer of the property in them was to take place in future, namely when and if the Company should agree to buy, and the transfer was subject to certain conditions as to hire et cetera;

(b) in pursuance of this agreement to sell, the appellant gave the Company possession, and they thereby became bailees of the punts and trustees thereof for him;

(c) the Company had never exercised their option to buy nor fulfilled the conditions and are wrongfully detaining the punts;

(d) although the judge found that the Company made no agreement with the appellant as alleged or at all, yet he should have found that a bailment and a consequent implied trust was created by his own findings of fact, namely, that the punts were the property of the appellant and that he consented to hand them over to the Company;

(e) given such a bailment, no cause of action for failure to redeliver could arise until after demand made and the statutory period of limitation (three years) would run only from the date of the demand; *i.e.* from October 1946, or, at the earliest, from January 1945;

(f) that the onus lay on the Company to show either that the appellant had parted with the property in the punts, or that for any reason he is not entitled to recover them or to receive compensation for their value and use, or damages;

(g) that the burden of proving the defence of limitation is on the respondent who must show the date from which the statute begins to run;

(h) that the Company, having put forward a claim to the punts which the judge rejected, had failed to discharge this onus.

It is of course trite law that where there is a bailment there is also a trust. "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 redelivered in either their original or an altered form, as soon as the time or use for, or condition on which they were bailed shall have elapsed or been performed." (Halsbury's Laws of England 2nd Ed. Vol. I para. 1196). In order to succeed in an action for failure to redeliver the chattels bailed the bailor must prove that he is entitled to the delivery of the chattel and that the bailee is wrongfully detaining it. (ibid: para. 1270). Therefore, in so far as the appellant's action lies in detinue, he must at least show that he is entitled to immediate possession: in so far as he seeks to claim relief against the Company as trustees, he must at least establish a bailment. He sought to do this by proving an express agreement which the trial judge rejected. Is there any evidence on which this Court can properly find an implied contract of bailment which would entitle the appellant to all or any of the remedies he seeks? The circumstances indicate that there was some arrangement made, but we do not know what it was. It is true that the judge rejected the Company's claim to have been always the owners of the punts, but he also rejected the evidence of the appellant as to the agreement and there is, accordingly, no satisfactory evidence to show why and on what terms the punts were transferred. The judge found that the appellant, "who was practically in charge of the Company's office" knew of the transfer of the account and it is clear that he acquiesced therein and made no protest. The appellant admits that he knew that no payments for freight were made or credited to him after December 1941 and his explanation that he made no enquiries because the calculation of the amounts was merely a matter of arithmetic is unsatisfactory, implying, as it does, that he was content to accept the stipulated minimum. He appears to have acquiesced in the transfer of the licences to the Company and, except for his own evidence and Callender's (which the judge rejected), there is no evidence that he ever made any demand for the return of the punts or their value, until after his father's death. There is also the significant fact that the appellant's bank account and his shares in the Company were transferred back to his name, probably in 1944; but the transfer of the punts to the Company's account was not reversed. All these circumstances indicate that, whatever may have been the arrangement made, the return of the punts to the appellant was not part of it and if there was no such term there could be no bailment. The appellant and his brothers presumably know the truth of the matter; the judge has found that none of them has told the truth but melior est conditio possidentis et rei quam actoris. The appellant's case based on an

express contract of bailment collapsed and this Court cannot speculate as to the intentions of the parties for the purpose of constructing a new case out of the ruins. A Court of equity will not be indulgent towards a suitor who pleads that he put his property into the hands of the defendants with the object of defeating his own creditors and who is found to have acquiesced in a form of transfer made to deceive the defendant's creditors. It may be that none of the parties in this matter have come into Court with clean hands, but it is of little avail to a suitor in equity to point to the hands of his opponents when his own are not clean. In Muckleston v. Brown (6 Ves. 52 at p. 68) Lord Eldon said that if a plaintiff comes to equity to be relieved against his own dishonest act and the defence is dishonest, "between the two species of dishonesty the Court would not act but would say. 'Let the estate lie, where it falls'," In the case of Gascoigne v. Gascoigne (1918) 84 L.J. Rep. K.B. 333 it was held, on appeal, that the plaintiff could not be permitted to show that, with his wife's knowledge and connivance, he had put property in her name, while retaining the beneficial interest, for the purpose of misleading, defeating and delaying present or future creditors.

We must now consider the respondents' cross-appeal by which it is sought to vary the decision of the trial judge in so far as he found that the two barges or sea punts were the property of the appellant during the year 1941, and that the relationship of debtor and creditor existed between the appellant and the respondents as regards the cost of the construction of the two barges; this Court is asked to find instead that these barges were always the property of the respondents. The essence of the cross-appeal is, as Counsel submitted, that the arrangement whereby the barges became the property of the appellant who was then, and still is, a shareholder in the respondent company, of a part of the assets of the company, and thus an unauthorised reduction of capital, and therefore void and ultra vires the respondent company.

There was, as we have already pointed out, ample evidence to support the findings of the learned trial judge that the appellant was the owner of these two barges up to the month of December, 1941, and also that the relationship of debtor and creditor was formed between the appellant and the respondents in March 1941. We do not propose to review the evidence here, and although it is possible for this Court to differ from the conclusions at which the trial judge arrived, it must nevertheless bear in mind the principles which should guide a Court of Appeal in coming to a decision in cases of this kind. These well-known principles have been enunciated many times, and are to be found in the familiar cases of Powell v. Streatham Manor Nursing Home (1935) A.C. 243; Yuill v. Yuill (1945) p. 15; and Watt (or Thomas) v. Thomas (1947) 1 All E.R. 582. Applying these principles in this cross-appeal, there can be no reason to disturb the findings of the trial judge which have been referred to above.

It was contended, however, by Counsel for the respondents that the transaction whereby the appellant became the ostensible owner of these two barges was an illegal one and ultra vires the

respondent Company. It is therefore necessary to examine the circumstances which give rise to this contention.

From time to time in the course of the respondents' business it became necessary to transport lumber from places many miles distant, to their saw mills at Georgetown, and we have referred to a proposal for a contract with one Swilden which the respondents had under consideration and which did not materialize. It was a term of this proposed contract that the respondents would undertake to advance the money for the purchase or building for Swilden of such craft as would be needed by him. The craft would be Swilden's property and any loss of, or damage to, them would be borne by him. These negotiations fell through.

The appellant was at this time an employee and a shareholder of the respondent company, and it would appear that he approached his father (M. J. de Freitas) who was the Managing Director of the company, and proposed that he, the appellant, should enter into an agreement with the respondent company on somewhat similar lines to the agreement proposed by Swilden. To this the Managing Director agreed and undertook that the respondents would advance to the appellant the money and materials for building the barges which would be needed for the transport of lumber to Georgetown. These barges would then be the property of the appellant who would be entitled to receive the amounts payable by the respondents for freight on the lumber and stone transported by the barges to their saw mills in Georgetown. Any indebtedness of the appellant to the respondents for moneys advanced for building and operating the barges was to be liquidated by the payment to the respondents of the appellant's share of the freight earned. The appellant engaged the services of a shipbuilder; one barge was built, and some months later, another; they were used for transporting the respondents' lumber and other materials to their saw mills at Georgetown, and freight was paid by the respondents at the rates mentioned above. The appellant handed back his share of the freight to the respondents who placed it to the credit of his account in their books, applying it towards repayment of the advances made by them to the appellant in connection with the building and operation of the barges. It is quite obvious that if the barges had been lost or damaged, or if the freight earned was insufficient to meet the operating expenses, any loss sustained would have fallen upon the appellant, and not upon the respondents. A total loss of, or serious damage to, the barges appears to have been by no means a remote contingency, and if this had occurred at a time when the appellant's account in the respondents' books showed a debit balance, not only would the appellant have had to pay this balance (which might have been a large sum of money), but he would have lost the means by which he hoped to pay off this debt, and also a potential source of income. The arrangement undoubtedly proved remunerative to the appellant, but the advantage which the respondents gained by it, and in our view a substantial one, was that they were relieved entirely from liability for any loss or damage to the barges.

At the end of December 1941 an arrangement was made be-

tween the appellant and the respondents whereby the barges were handed over to the latter, and the appellant's debt to them was cancelled. This arrangement does not, however, seem to us to affect the question raised on the cross-appeal.

It must be remembered that in March, 1941, when the building of the barges was commenced, the respondent company was a going concern, it appears to have been financially embarrassed, but there is no evidence that it was insolvent or on the verge of being wound up, and in the circumstances then existing it was quite competent for the Company to enter into contracts and to make payments out of its funds for matters which were reasonably incidental to or consequential on the business it was authorized to carry on. Clearly a contract or arrangement for transporting lumber to the company's saw mills would be reasonably incidental to or consequential on the company's business.

It was, however argued by counsel for the respondents that although the, arrangement made between the appellant and the respondents was one which the respondents could have made with an outsider, it was not one which could be made with a shareholder of the respondent company for, when the substance of the transaction is examined, it amounts to a reduction of the capital assets of the company. It was submitted that the moneys advanced to the appellant were to be utilized in building barges for transporting the respondents' lumber and as the freight earned by the use of these barges was to be applied in repayment of advances made to the appellant, the appellant in the course of time would become owner of barges for which he had not paid any of his own money. This argument appears to us to be unsound. The respondents were a going concern and did nothing illegal or improper in making advances to the appellant for the purpose of building barges. Their books show that these advances were repayable by the appellant, and constituted a debt which he was under a liability to pay. The barges when built were the property of the appellant, the risk of loss or damage was his, and whether the barges were lost or not his liability to repay the advances which the respondents had made to him remained. When the barges were used for the transport of the respondents' lumber the respondents became liable for payment of the freight. The freight though earned by transporting the respondents' lumber was not earned by the respondents but by the appellant. If the respondents had refused to pay the freight the appellant might have recovered it from them by legal process. We are unable to conclude that in circumstances like these there was any gift to the appellant of any part of the assets of the respondents, or that the barges were the property of the respondents at any time before the 31st December, 1941. Even if there had been a gift, there can be no assumption that it was made out of capital and not out of profits. The principle will be found in a judgment of the Judicial Committee of the Privy Council delivered by Lord Russell of Killowen in Hill v. Permanent Trustee Co. of New South Wales (1930) A.C 720; 144 L.T. 65; sub nom, Re Hill (Richard), Hill v. Permanent Trustee Co. of New South Wales, 99 L.J.P.C. 191; Digest Supp. and in Re Sechiari (deceased) Argenti v. Sechiari (1950) 1 All E.R. 417 at p. 419.

The appeal and cross-appeal are therefore dismissed with costs; there will be no order as to the costs of the trial.

Solicitors: Joseph Gonsalves for the appellant; J. E. de Freitas for the respondent.

JONES *v.* PEREIRA

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago (Furness-Smith, Collymore, Worley C.J.J.) April, May, 1950).

Landlord and tenant—assignment—consent of landlord—pleadings—allegations not specifically traversed—effect.

The appellant owned a piece of land which he leased to the owner of a house situate on the land. The house was sold to the respondent and the lease transferred but the appellant refused to accept the respondent as a tenant.

The respondent sought a declaration that she was a tenant of the appellant and asserted in her statement of claim that the lease had been assigned to her. The appellant did not specifically traverse that allegation.

The trial Judge held that as the appellant had not denied that the house was assigned to the respondent the declaration as prayed must be granted.

Held: The allegation of the assignment of the tenancy not being traversed must therefore be taken as admitted and the effect of the pleadings was to establish an admission by the landlord that the tenancy was effectively assigned by the tenant to the purchaser. The assignment of a monthly tennancy in the Colony of Trinidad and Tobago is not required to be in writing.

Judgment: (Furness-Smith, Collymore C.J.J.)

In the case from which this appeal comes the plaintiff-respondent sought and obtained from the Court a declaration that she is a tenant of the defendant-appellant by virtue of the circumstances which are set out in the Statement of Claim. It is clear from the terms of the Statement of Claim and the Defence, and, indeed, it was admitted by Counsel on each side during the appeal, that, when the pleadings were drafted, the legal advisers of both parties were under some misapprehensions as to the law governing the plaintiff's right to a declaration of tenancy in the circumstances, and the primary issue in the present appeal is concerned with the meaning of the pleadings and, in particular, whether there is a clear allegation of assignment of the tenancy to the plaintiff in the Statement of Claim, and, if so, whether this allegation has been traversed by the defendant. The reasons given by the trial judge for his decision in the plaintiff's favour are as follows:

> "The case was contested purely on the pleadings, plaintiff alleging that her statement of claim was not specifically traversed in any material particular in which event it was admitted.

> Defendant's counsel on the other hand argued that the Statement of Claim disclosed no cause of action, a submission which I rejected. He then decided to call the defendant whose evidence in no way altered the position except that it showed that the notice to quit which he served on Dannett" (the alleged assignor of the tenancy) "was worthless".

In these circumstances the terms of the pleadings require careful scrutiny. In the first place it will be convenient to narrate briefly the circumstances which preceded this action, which are not in dispute. One Dannett, being a monthly tenant of the defendant in respect of the disputed land, and the owner of a chattel-house thereon, sold the chattel-house to the plaintiff. On the 25th June, 1946, the plaintiff visited the defendant, and handed him a letter which he refused to accept. This letter has not been produced, but it would appear from another letter (exhibit X) which was sent to the defendant by the plaintiff's solicitor dated 26th June, 1946, that the earlier letter was a notification of "the sale of 11A Bossiere Village" (the premises in dispute) and a request "to transfer the tenancy" to the plaintiff. The defendant in his evidence states (and this statement is not disputed) that at this interview the plaintiff, whom he had not previously known, said that she was "now his tenant", that he refused to accept her as his tenant, and immediately instructed his solicitor to take ejectment proceedings against Dannett. As a result of those instructions notice of ejectment was served upon Dannett in the following month (exhibit A.E.P.1). One of the grounds for ejectment stated in that notice was that Dannett had parted with possession without the consent of the landlord. It appears from paragraph 4 of the Statement of Claim that proceedings for ejectment pursuant to that notice were in fact taken in the Magistrate's Court. The defendant states in his evidence that they have "not yet come to an end." The plaintiff commenced the present action in January, 1947.

> The material part of the Statement of Claim is as follows:
> " 2. On the said 25th day of June, the plaintiff, for valuable consideration, purchased the said chattel house from the said Charles Cecil Dannett who desired and purported to transfer to the plaintiff the whole of the said premises.
> " 3. In order to implement the said transfer, both the said Dannett and the plaintiff sought the permission of the defendant, which permission the defendant has unreasonably withheld.
> " 4. In spite of the premises, the defendant has sought to deprive the plaintiff of the use and|or enjoyment and|or occupation of the said land by instituting ejectment proceedings No. 22521 of 1946 in the Magistrate's Court at Port-of-Spain against the said Dannett, who, to the knowledge of the defendant no longer has any beneficial interest in the said premises."

The Defence is as follows:

> " 1. With regard to paragraph 1 of the Statement of Claim the Defendant admits the contractual tenancy of Charles Cecil Dannett, but denies its determination implied in the opening words of the said paragraph.
> " 2. With regard to paragraph 2, the Defendant was so informed by his tenant, Dannett, after the completion of the alleged transaction.
> " 3. The Defendant denies that either|both the said Dannett or|and the Plaintiff sought the consent of Defendant. The Defendant further denies that he withheld such consent unreasonably or at all.
> "4. The Defendant admits the proceedings referred to in paragraph 4, but denies the motive imputed to him. The Defendant looks no further than his tenant, Dannett.
> " 5. Save as is hereinbefore expressly admitted, the Defendant denies each and every allegation of fact in the Statement of Claim appearing as if the same were set out herein and traversed seratim."

The first questions which we have to decide are — Does the Statement of Claim contain a clear and unambiguous averment that Dannett had assigned his tenancy to the plaintiff, and, if so, is that allegation traversed in the Defence? It will be observed that the expression used in paragraph 2 of the Statement of Claim is that Dannett "desired and purported" to transfer to the plaintiff the whole of the premises. There is no room for doubt that "the whole of the premises" includes Dannett's interest in the land on which the house stands and of which Dannett was the contractual tenant. On behalf of the defendant it was argued that the words "desired and purported" can only mean that an actual assignment had not then taken place. In paragraph 3 of the Statement of Claim it is stated that "in order to implement the said transfer" the defendant's consent was sought and unreasonably refused. From this it was argued that if the assignment had already taken place it would require no implementation. It is, indeed, clear that the plaintiff's advisers thought that a transfer of the tenancy would not be effective without the landlord's consent, and it is equally clear that the defendant's advisers thought the same. Since it is common ground that there is no provision in the present tenancy against assignment without consent, the belief that the defendant's consent was necessary to implement a transfer by Dannett to the plaintiff was without foundation, and this was recognised by counsel on both sides in the present appeal. This mutual misunderstanding of the law explains the use of the word "purported" in paragraph 2 of the Statement of Claim. I have no doubt whatever that, in its context, the expression "purported to transfer" means that Dannett had in fact transferred, but that the transfer was thought to be inoperative until the landlord had consented to it. That the defendant and his advisers so understood it is manifest from the fact that, on being informed of the transfer, proceedings were immediately taken to determine Dannett's tenancy on the ground that he had parted with possession

without consent of the landlord. Being satisfied, therefore, that the Statement of Claim contains a clear averment of assignment, the question remains whether that averment has been traversed. An allegation of fact in a pleading may be traversed either by denial (specific or by necessary implication) or by stating that it is not admitted (see volume 25 Halsbury's Laws of England (Hailsham edition) paragraph 411). How is the allegation of assignment in paragraph 2 of the Statement of Claim answered? Paragraph 2 of the Defence says:

> "With regard to paragraph 2, the defendant was so informed by his tenant Dannett after the completion of the alleged transactions."

If it was intended to put the plaintiff to the proof of the assignment, one would expect either a specific denial of the allegation or at least a statement that it was not admitted. The truth seems to be that the defendant was not concerned to deny it, because he thought that it was wholly without validity unless he consented to it. It is to be observed that, where it was sought to put the plaintiff to the proof of his allegations in paragraph 3 of the Statement of Claim there is in paragraph 3 of his Defence, a specific denial of them. It would appear from that denial that the defendant was contending that the allegations were untrue, but no attempt was made at the trial to disprove them, and it may be that the intention of that pleading was merely to put the plaintiff to the proof of them, in which case the proper answer was, not a denial, but a statement that the allegations were not admitted. However this may be, when paragraphs 2 and 3 of the Defence are contrasted, it is manifest that in the latter paragraph there is an unevasive traverse of the allegations there mentioned, while in the former paragraph there is not. My conclusion is that the allegation of assignment of the tenancy has not been traversed, and must therefore be taken as admitted. It was argued that the general denial contained in paragraph 5 of the Defence should be regarded as a traverse of the allegation of assignment contained in paragraph 2 of the Statement of Claim. Whatever might be the merits of such a submission in other circumstances, I regard it as without validity in respect of an allegation which is specifically answered in paragraph 2 of the Defence, and is not therein specifically traversed.

This conclusion makes it unnecessary to consider, as was submitted on behalf of the appellant, whether the plaintiff's claim was in truth based upon a misapprehension of the effect of the amendment to the Rent Restriction Ordinance effected by Ordinance 46 of 1946 which was enacted shortly before the issue of the writ in the present action. Whatever misapprehensions the plaintiff's advisers may have entertained in that regard, and notwithstanding the mutual misapprehensions of the parties as to the necessity for the landlord's consent to validate an assignment of the tenancy, the effect of the pleadings is to establish an admission by the defendant that Dannett's tenancy of the premises was effectively transferred to the plaintiff.

It has however been argued on behalf of the appellant, and

this was the principal contention in the appeal, that there cannot be an effectual assignment except by deed; that, whether or not the point is taken by the defendant in his pleadings, the Court cannot give effect to a supposed assignment which is not shown to have been made by deed; that such a defect is fatal to an assignment of every description of tenancy, including a tenancy such as the present for a term of less than three years; and that, assuming the creation of an equitable assignment by virtue of such defect, the equitable assignee is not entitled to the declaration sought in the present action until he has obtained the legal estate.

It was submitted on behalf of the respondent that the appellant is precluded by Order XX, rule 15 of the Supreme Court Rules from reliance upon such a defence which was not pleaded; that he is precluded by his admission in the pleadings from contending that the assignment was defective and that the Court can only examine the validity of a transaction which is admitted in the pleadings where the defect complained of is inimical to public policy or tainted with illegality. In my opinion this last mentioned submission is correct. Counsel for the appellant has referred to the case of the Royal Exchange Assurance Corporation v. Sjoforsakrings Aktiebolaget Vega (1902) 2 K.B.D. 384 which is sighted in the 1948 Annual Practice at page 385 under the note headed "Illegality". In that case there was an agreement between the parties that the infringement of the Stamp Acts should not be raised as a defence in an action under a policy of marine insurance. It was held that by virtue of paragraph 14 of the Stamp Act 1891, it was the duty of the judge to take any objection which may arise under that Act notwithstanding that the parties had agreed to waive it; and presumably in like circumstances such an objection would have to be taken by the Court, if apparent on the pleadings, notwithstanding that the transaction in question was admitted. The case is no authority for the submission that, whereever the law declares a particular transaction to be void by reason of some defect of a formal character, the Court is bound to enquire into the validity of the transaction where the party to be bound by it has omitted to traverse it. It is manifest, on the ground of public policy, that, where the circumstances which render a transaction void are such as to exhibit illegality, or where, as under section 14 of the Stamp Act 1891, there is a specific requirement that the judge shall take notice of infringements of the Act, the Court cannot be relieved of that duty by agreement of the parties or by their admissions. I know of no authority, however, and none has been cited to me, for the proposition that a similar duty is cast upon the court in other circumstances.

These conclusions must result is the dismissal of this appeal. But because the submission that every assignment of a tenancy is required by law to be by deed, if correct, is of far-reaching importance in the Colony, and because it has been fully argued before me, I consider it my duty to express my opinion upon it. The submission is based on the decision in Botting v. Martin 170

E.R. 970, and on section 10 of the Conveyancing and Law of Property Ordinance (Chapter 27, No. 12) the material part of which reads as follows;

> " 10 (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.
>
> (2) This section does not apply to —
>
> (c) leases or tenancies or other assurances not required by law to be made in writing;"

This section it is said, substantially reproduces the provisions of the English Law of Property Act, 1925, which reenact those of the Statute of Frauds, 1677, by virtue of which Botting v. Martin was decided. The short answer to this submission is that the local Ordinance above cited does not substantially reproduce the material sections of the English Act, but reproduces only section 52 in almost identical terms. It is section 53 (1) (a) of the English Act when read with section 54 (2) which reproduces section 3 of the Statute of Frauds and expressly prohibits oral assignments. Neither of these latter provisions is reproduced in the local Ordinance. If it be the case that, prior to the enactment of Chapter 27, No. 12, the Statute of Frauds, being a Statute of general application, was in force in Trinidad, it appears to me that it is not so now, except in so far as any of its provisions have been expressly retained. Certain of the provisions of the Statute of Frauds have been expressly retained, but section 3 has not. I am aware of no express provision in Trinidad law which requires the assignment of a monthly tenancy to be in writing, and it is certainly not to be found in the Law of Property Ordinance. Subsection (1) of that Ordinance, which renders void all conveyances of interests in land unless made by deed does not, by virtue of subsection (2), apply to leases and tenancies and other assurances which the law does not require to be made in writing. Unless therefore some provision of law can be found which requires an assignment of the kind now under consideration to be made in writing, I am unable to understand how it can be said that the requirements of subsection (1) apply to it. I am clearly of the opinion that they do not.

The appeal should be dismissed with costs.

JUDGMENT:

I have had the advantage of reading the judgment of the learned President and agree that this appeal must be dismissed for the reasons he has given. This decision based on the result of the pleadings makes it unnecessary to consider the other points which were argued on the appeal, but I will refer briefly to one of them which is of general importance, namely, whether an assignment of a monthly tenancy is void unless made by deed.

It is common ground that although a monthly tenancy can be created by parol, yet the assignment of such a tenancy must be made by deed in accordance with the provisions of section 10 (1) of the Conveyancing and Law of Property Ordinance (Chapter 27 No. 12) unless it can be brought within the exception of paragraph (c) of subsection (2) of the same section, as being "an

assurance not required by law to be made in writing". There can be no doubt that in England the law requires the assignment of any periodic tenancy to be made by deed: this is the effect of section 52 (1) and (2) (d) of the Law of Property Act, 1925 read with section 53 (1) (a) and section 54 of the same Act. The case of Botting v. Martin (1808) 1 Camp. 317: 170 E.R. 970 is therefore still good law in England though decided under provisions of the Statute of Frauds 29 Car II C. 3 which were replaced with amendments by the sections above cited in Act of 1925.

In the present appeal, the point was argued on the basis of the assumption that the relevant law of the Colony is the same as the law of England but, in my view, this assumption is mistaken or at least of doubtful validity.

The provisions of section 10 (1) and (2) (c) of the Conveyancing and Law of Property Ordinance correspond to and were obviously taken from section 52 (1) and (2) (d) of the Law of Property Act, 1925; but the Ordinance does not contain any sections corresponding with or similar to section 53 (1) (a) or section 54 (2) of the Act of 1925, and it is necessary to look elsewhere to see whether there is any provision of law in the Colony which requires that the assignment of a monthly tenancy must be made by deed.

I have been unable to find any such provision framed either in the terms of section 52 (1) (a) of the Act of 1925 or in the terms of section 3 of the Statute of Frauds 1677. This latter enactment was never, so far as I know, expressly enacted in this Colony but it may have been enacted by reference in 1880 as a "statute of general application of the Imperial Parliament" through the operation of the enactment which now appears in the Laws of Trinidad and Tobago 1940 as section 19 of the Judicature Ordinance (Chapter 3 No. 1). Assuming that to have been the case, it seems to me very doubtful whether the Statute is still in force in the Colony. Statutes thus introduced by reference are declared to be in force in the Colony subject to the terms of the Ordinances of the Colony in force on 1st March, 1848 and "of any Ordinances passed subsequently thereto." Sections 1 and 2 of the Statute of Frauds are now substantially reproduced by section 10 of the Conveyancing and Law of Property Ordinance and section 3 of the Landlord and Tenant Ordinance (Chapter 27 No. 16): section 4 of the Statute is substantially reproduced in section 4 of the former Ordinance and in section 4 of the Mercantile Law Ordinance (Chapter 31 No. 4). It seems to me that, when it is seen that the Legislature of the Colony has expressly enacted the greater part of those provisions of the Statute of Frauds which relate to the conveyance of land or the creation or disposition of an interest in land, but has refrained from including in those enactments certain other provisions, the proper inference is that the provisions so omitted are no longer to be deemed to be in force in the Colony. It is possible that the history of the earlier relevant legislation in the Colony might clarify the position but the necessary material is not available to me at present.

26th April, 1950.

N. A. WORLEY,
Chief Justice, British Guiana.

ASHBY *v.* JEROME

(In the West Indian Court of Appeal. On appeal from the Supreme Court of Trinidad and Tobago (Furness-Smith, Collymore, Worley C.J.J.) May 1, 1950).

Landlord and tenant—Assignment of tenancy—Specific allegation in statement of claim—Not specifically traversed in defence—Admission.

The appellant brought an action in the Supreme Court claiming a declaration that he was a monthly tenant of the respondent by reason of the fact that the previous tenant of the respondent had verbally assigned the tenancy to him.

The trial judge dismissed the action on the ground that there was no assignment in writing as required by law.

On appeal it was conceded that the parties in the Court below had mistakenly assumed that the consent of the landlord was a prerequisite to a valid assignment owing to a misconception of the effect of the provisions of Rent Restriction Legislation and it was not appreciated that unless there is a term in the tenancy agreement prohibiting an assignment without the consent of the landlord then no such consent is necessary.

It was argued on appeal that the respondent had not traversed the appellant's allegation that the tenancy had been assigned and consequently the assignment of tennancy was admitted.

Held: The defence was so drawn that the alleged assignment must be taken to have been admitted by reasonable intendment and it was not competent without amendment to raise the defence that the assignment was not valid unless it was in writing.

JUDGMENT.

In the action out of which this appeal arises the plaintiff claimed a declaration that he is a monthly tenant of a parcel of land known as 13 Belmont Valley Road, Port-of-Spain, by reason of the assignment of the tenancy to him on the 14th January, 1944, by the then tenant Emily Flatts. The action was dismissed on the ground that there was no valid assignment because there was no instrument in writing as required by law. The authority cited for this proposition was Botting v. Martin 170 E.I. 970. The issues which were to be decided by the trial Court do not clearly emerge from the pleadings, and it was admitted during the appeal, at least by Counsel for the respondent, and is indeed manifest from the pleadings themselves and from the correspondence prior to the action, that the legal advisers of each party erroneously thought that, whether or not the terms of the tenancy agreement required the landlord's consent thereto, an assignment without such consent would be ineffective to transfer the legal estate in the tenancy to the assignee. This error seems to have arisen from a misconception of the effect of the provisions of paragraph (m) of section 14 (1) of the Rent Restriction Ordinance as they stood prior to the proviso added by Ordinance 46 of 1946 requiring that the landlord's consent should not be withheld unreasonably. The existence of the error is important only for the purpose of understanding the meaning and effect of the pleadings, and we need say no more about it except to observe that, where, as in this case, there was no term in the tenancy agreement prohibiting

assignment without consent, the position of an assignee without consent would be affected by the Rent Restriction Ordinance to the extent only that he might be ejected at the suit of the landlord on proof that his refusal to consent was reasonable. An assignee under a valid assignment becomes the tenant of the landlord and so remains unless and until an order for the recovery of possession or for ejectment is obtained against him.

As we have said, the issues in this case do not clearly emerge from the pleadings. The Statement of Claim asserts that the plaintiff is the owner of two chattel-houses on the land of which the defendant is owner and Emily Flatts was formerly tenant (paragraph 1); that on 14th January, 1944, Emily Flatts sold the two houses to the plaintiff and assigned to him her tenancy of the land (paragraph 2); that the plaintiff had thereafter frequently requested the defendant "to accept him as tenant" and to "transfer the tenancy" to him, but the defendant had persistently refused to do so (paragraph 3). There follows a claim for a declaration that the plaintiff is "entitled to the tenancy". The defendant asked for particulars of the requests mentioned in paragraph 3 of the Statement of Claim, and on receiving them filed her Defence the relevant parts of which are as follows: She admits that Emily Flatts was a monthly tenant of "part" of the land and the owner of one chattel-house thereon, but denies that she was tenant of the remaining portion (paragraph 2). She denies that Emily Flatts was the owner of any other house or sold any house whatsoever to the plaintiff (paragraph 3). She states that Emily Flatts died in September, 1946 (paragraph 4) and makes a general denial of any allegation in the Statement of Claim not specifically admitted (paragraph 5). Then follows a counterclaim alleging trespass by the plaintiff in February, 1944, upon the said remaining portion, his refusal to give up possession of the whole of the premises, and claiming damages and|or mesne profits in respect thereof.

The case for the defendant-respondent as presented by her counsel on appeal was, first, that no evidence was offered of any actual assignment at all, and, next, if there were an assignment, it was invalid because it was not made by deed as required by section 10 (1) of the Conveyancing and Law of Property Ordinance (Chapter 27, No. 12). In regard to the first submission it is to be observed that, despite the clear allegation in paragraph 2 of the Statement of Claim that the tenancy was assigned, there is not in the Defence any express denial of that allegation other than the general traverse in paragraph 5. Indeed the defendant's answer to the claim appears to be restricted to a denial, first, of any right in Emily Flatts to assign that part of the land of which she was not tenant, and, next, of the purchase of either of the two houses by the plaintiff. No evidence whatever was offered by the defendant at the trial, and it seems clear that both the issues of fact raised in her Defence were abandoned.

Counsel for the respondent has submitted that it is clear from the correspondence between the parties which preceded the trial, and from the evidence adduced for the plaintiff at the trial, that

the plaintiff was seeking a novation of the contract of tenancy, and that no assignment was either made or contemplated. It does not appear whether this point was taken at the trial, and the judgment makes no reference to it. With regard to the request for the landlord's consent in the correspondence, we think that this is consistent with the erroneous belief, to which we have already referred, that assignment required consent, and, if the defendant thought that no assignment had been made and that novation only was sought, it is strange that notice to quit should have been served upon Emily Flatts for "transferring the tenancy without consent" (see the last paragraph of Exhibit I.S. 4 and Exhibit W.A.1).

Counsel for the appellant has submitted that, since the allegation of assignment in paragraph 2 of the Statement of Claim has not been traversed, it must be taken as admitted. In reply to this submission reliance was placed on the general denial contained in paragraph 5 of the Defence. It seems clear that paragraph 3 of the Defence is intended to embody the defendant's answer to the allegation of fact in paragraph 2 of the Statement of Claim, and there is no mention of the allegation of assignment of the tenancy. In such circumstances we do not consider that paragraph 5 of the Defence can properly be regarded as traversing the allegation of assignment. If the defendant's advisers intended to raise the issues as to whether any such assignment as was alleged did in fact take place, and, if so, whether it was valid in law, the proper way to do this was, first to seek particulars of the assignment; next to say expressly in the Defence that it was not admitted; and further (if necessary) that the defendant would rely on the provisions of section 10 of the Conveyancing and Law of Property Ordinance (Chapter 27 No. 12). We are therefore satisfied that by reasonable intendment the alleged assignment must be taken to have been admitted, and we do not think that it was competent for the defendant, without amendment of the pleadings which was never sought, to raise these defences either at the trial or before us.

In regard to the submission that the assignment was invalid because it was not shown to have been made by deed, it is our view, as already indicated, that this defence should have been specially pleaded under Order XX rule 15. Alternatively it was submitted that the Court must itself, independently of the pleading, give effect to an express requirement of law for the valid assignment of a tenancy. In the view which we take as to the effect of the pleadings, there was no need for evidence of the mode of assignment, and therefore the questions whether a deed was necessary for its validity and, if so, whether the court should take notice of the requirement, do not fall to be determined in this appeal.

For these reasons the appeal must be allowed. The judgment of the court below is set aside and the appellant's claim for a declaration of tenancy is granted and the counter-claim is dismissed. Costs to the appellant here and in the Court below.

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1950

AND IN

WEST INDIAN COURT OF APPEAL

[1950].

EDITED BY

KENNETH S. STOBY. ESQ.,

Barrister-at-Law, Lincoln's Inn, Third Puisne Judge, British Guiana.

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1953.

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1950.

SIR NEWHAM ARTHUR WORLEY	—Chief Justice
FREDERICK MALCOLM BOLAND	—First Puisne Judge (from 7th April, 1950). Acted as Chief Justice from 3rd May—31st August, 1950.
ERNEST RUEUL LA TOURRETT WARD	—Second Puisne Judge (from 7th April). Acted as First Puisne Judge from January to April, 1950.
HAROLD JOHN HUGHES	—Third Puisne Judge (from 14th April).
SYDNEY LYONS VAN BATTENBURG STAFFORD	—Additional Judge (from 1st May). Acted Second Puisne Judge from 31st March, 1950 to 28th April, 1950.
KENNETH SIEVEWRIGHT STOBY	—Additional Judge (from 15th September, 1950 to 30th October, 1950).

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 (1950) L.R.B.G.

TABLE OF CASES REPORTED

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