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CASES

DETERMINED IN THE

Supreme Court of British Guiana.

In the matter of The Deeds Registry Ordinance, Chapter 177,
and
In the matter of The Transport by J. Jaikaran to C. P. Jaikaran, of lot 129 Regent Road, Bourda, Georgetown, and

The Transport by J. Jaikaran to E. S. Jaikaran of north half lot 2, Albouystown, Georgetown.

(In the Supreme Court, In Chambers (BOLAND J.)
August 9, 14, 21, 1950; January 15, 1951).

Deeds Registry Ordinance—Deeds Registry Fees Regulation 1933—*Transport—fees payable—value of property.*

The Acting Registrar declined to accept as payment of the fee prescribed by the regulation a sum calculated on the basis of the amount of the consideration specified in the transport on the ground that the regulation fixes the fee in accordance with the value of the property and not on the consideration declared on the transport.

Held: The Acting Registrar was fully justified in demanding to be satisfied by proper valuations, of the value of the property.

Dictum: The consideration expressed upon which one per cent is payable must be the true consideration and the Registrar is not precluded from demanding to be satisfied that the consideration expressed in the transport is true.

J. E. de Freitas for appellant.

C. A. Burton, J. A. Luckhoo with him for respondent.

Boland, J.: This matter has come before me in Chambers by way of an appeal against the refusal of the Acting Registrar, Mr. Parkes, to certify the passing of two transports by Joseph Jaikaran, one in favour of his daughter Carmelita P. Jaikaran, and the other in favour of another daughter, Elsie S. Jaikaran. The transport in favour of Carmelita relates to Lot 129, Regent Road, Bourda, Georgetown, and on the face of it purports to be a sale at the price of $3,900, while that in favour of Elsie relates to the north half of lot 2, Albouystown and purports to be a sale at the price of $6,000.00 The Acting Registrar, in each case, declined to accept as payment of the fee prescribed by the Deeds Registry Fees Regulation, 1933, a sum calculated on the basis of the amount of the consideration specified in the Transport, pointing out that the scale set out in the schedule to the Regulations fixes the fee in accordance with the *value* of the property itself and not accord-

ing to the consideration declared on the transport and that it was immaterial whether that consideration was actually paid or not.

The documents of title disclosed that Joseph Jaikaran had purchased these two properties in 1918 and 1921 respectively, each at the same price at which he was then purporting to sell to his daughters. This raised a suspicion in the mind of the Acting Registrar that these respective sums did not represent the true values of the properties and acting by virtue of the power given to him under section 10 (1) of the Deeds Registry Ordinance, chapter 177, as Registrar he demanded a valuation of each property in proof of the value; pending his being satisfied by such valuation, he refused to certify the transports.

It would appear that though, as the Acting Registrar pointed out, Item I in the Schedule of the Deeds Registry Fees Regulations 1933, furnishes a scale of fees based upon the *value* of the property, it has been the practice in the Registry always to regard the named consideration in a transport of sale as conclusive evidence of the value of the property for the purpose of the collection of the registrar's fee. Whilst this may be correct in most cases of sales because in normal circumstances a vendor would hardly be likely to dispose of his property at a figure less than what he considers to be its value, it is not necessarily always so. As regards the alleged prices in these two transports, it cannot be overlooked that in Georgetown the value of properties has increased tremendously beyond what it was in 1918 and 1921, and as these were transfers from a father to his unmarried daughters it was not unnatural that the Registrar should have suspected that the consideration mentioned in the transport did not represent the real value of the properties and that the revenue would stand to lose by receiving smaller sums for registrar's fees than what would be payable on the real value. It is imagined that the increase in fee would be comparatively small, having regard to the scale in the schedule, but this appeal has been brought it would appear, more for the purpose of challenging the Acting Registrar's ruling on the point than from a consideration of the sum of money involved.

Mr. de Freitas, for the appellant, put forward the contention that the Registrar is not empowered to refuse to certify a transport because of the sum tendered for payment of registrar's fee being in his view inadequate. It was, he urged, the Registrar's duty provided the transport is otherwise in order, to certify the transport and enforce payment of the full fee by an action in court. I could not agree with this submission in view of the provision in clause 3 of the Deeds Registry Fees Regulation 1933, which makes all fees payable in advance. But I was anxious not to delay the passing of transport while I was having a decision on the amount payable under my consideration and accordingly, pending my ruling, I gave directions to the Registrar to certify the transports on payment by the appellant in each case of a provisional sum based on the consideration stated together with a sum that would be payable on that basis if the consideration were three times the amount stated.

The Acting Registrar, in giving his reasons for his refusal to

accept the expressed consideration as a basis for the calculation of the registrar's fee, distinguishes the registrar's fee from the duty payable on a conveyance under the Tax Ordinance No. 43 of 1939. As regards this latter duty he points out that section 10 of Ordinance No. 43 of 1939 provides for "an *ad valorem* duty of one per cent on the *consideration paid* for such conveyance, transport or transfer" and accordingly he accepted in each case the payment by way of duty of one per cent., of the sum expressed in the transports as the consideration paid.

In my view, even for this tax the consideration expressed upon which one per cent., is payable must be the *true* consideration, and the Registrar is not precluded from demanding to be satisfied that the consideration expressed in the transport is true. It is conceded, however, that a consideration may be true although not representing the true value of the property as for instance where the transferor is willing, for a reason sufficient so far as he himself is concerned, to dispose of his property at a price less than its actual value.

Mr. de Freitas in the course of his submissions gave me a short history of the legislation in England with regard to the payment of duty on conveyances on sale. It would appear that in the reign of George III, conveyance duty was payable without any question on the consideration expressed, the revenue being protected from fraud by an enactment prohibiting any untrue consideration being set out in instruments of sale by the imposition of severe penalties for breaches of the law in this regard—*Attorney General v. Brown* 3 *Ex.* 662. This was altered by the Stamp Act of 1891 which, while requiring on the pain of incurring a penalty that all the facts and circumstances affecting the liability of an instrument to duty be fully set forth in the instrument itself, empowered the Commissioners, upon adjudication, to call for evidence to show that this direction had been complied with. Unless therefore, *ad valorem* duty is paid upon "the amount or value of the consideration for the sale, the instrument is insufficiently stamped, and not admissible in evidence notwithstanding that the stamp duty accords with the consideration expressed." (*Vide* Alpes' Law of Stamp Duties in Deeds and other instruments 11th Ed. at p. 131.).

It is to be noted that our Tax Ordinance in providing for the payment of duty, fixes the amount payable on the basis of the *consideration paid,* whilst the Stamp Act of 1891 provides for payment according as the *amount or value of the consideration for the sale* does not exceed certain sums. It is nevertheless clear that here in this colony the Registrar is entitled to be satisfied that the amount is the true consideration, just as the Commissioner of Inland Revenue in England.

As stated, the Deeds Registry Fees Regulations fix the fee payable in the Registry on the basis of a scale that is graded according to the *value* of the property not on the consideration so that while the consideration expressed in the instrument may be a guide as to value it is not conclusive. Evidence by affidavit was submitted seeking to establish that in each case the consideration *was paid.* Each daughter had an account in the Bank operated by the father on the authority of powers of attorney,

and there were tendered in evidence, written authorities to the father from each daughter authorising him to withdraw from the Bank the sums mentioned as consideration for the purpose of paying the purchase price for each property. In view of the circumstances it is open to question whether even for conveyance duty, this was the true consideration; be that as it may, so far as the registrar's fees are concerned, the Registrar was fully justified in demanding to be satisfied by proper valuations.

For the above reasons, the appeal against the registrar's refusal to certify the transports must be dismissed. Out of the amount in deposit, there shall be paid such sum as would be the balance due in each case for registrar's fees according to such valuation of the premises as is accepted by the Registrar. Failing such valuation, the deposit shall be forfeited in payment of the balance of registrar's fees.

REX *v.* CHING, MORRISON AND JACOBS

(In the Supreme Court, Criminal Jurisdiction (Ward J.) May 16, 17, 1951)

Criminal Law—receiving stolen property—disagreement of Jury—further proceedings—same indictment—section 236 *Criminal Law* (*Offences*) *Ordinance—proviso—no bar*.

At the trial of the three accused on charges of receiving property knowing them to have been stolen, the jury disagreed. The proviso to subsection (2) of section 236 of the Criminal Law (Offences) Ordinance chapter 17 reads: "Provided that no person, however tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence."

After the jury disagreed, the accused were remanded for trial at the next session. The question arose whether the proviso operated as a bar to further proceedings on the same indictment.

Held: The accused were not being prosecuted again. Their trial was on the original indictment and plea and the Court continues the trial before another jury and the process may continue until a verdict is passed.

R. v. NG-A-FOOK, April 25, 1951 not followed.

C. A. Burton for Crown.

C. Lloyd Luckhoo for Ching.

J. O. F. Haynes for Morrison.

B. O. Adams for Jacobs.

Ward J: In this case two questions have arisen which require decisions on the interpretation of sections of the Ordinances relating to Criminal Law Offences and Criminal Law

Procedure. The first question which I am asked to decide is whether the proviso to subsection (2) of section 236 of the Criminal Law (Offences) Ordinance Cap. 17 operates as a bar to further proceedings on the same indictment against the accused for the offence of receiving goods knowing them to have been stolen. The proviso reads as follows:— "Provided that no person, however tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence."

It is clear that the proviso must be read in relation to the preceding subsection. This provides that a person who receives a chattel which has been stolen may be indicted either as an accessory after the fact, or for a substantive felony. Section 236 (1) of the Criminal Law (Offences) Ordinance reproduces *ipsissima verba* section 91 of the Larceny Act 1361. Read in relation to this subsection the proviso is clearly intended to protect an accused person from being prosecuted a second time in relation to the said acts whether he was indicted as an accessory after the fact or for receiving. The proviso in my opinion was intended to remove any doubt as to whether a person acquitted of a charge of receiving could successfully plead autrefois acquit to a charge on the same facts on an indictment as an accessory after the fact. This conclusion is supported by the fact that the proviso does not appear in section 95 of the Larceny Act 1861 which corresponds to section 237 of the Criminal Law (Offences) Ordinance. A person accused of an offence under section 95 can only be indicted for the statutory misdemeanour of receiving thereby created; and the proviso would be irrelevant since there is no alternative indictment under the section. Why the proviso was attached to section 237 of the local Ordinance or what interpretation must be given to it in that context is not for me to determine. I would respectfully suggest that it has no meaning whatever and its insertion was due to an oversight on the part of the draftsman. But in relation to section 236 the proviso in my opinion was clearly intended to set at rest any doubt as to whether a person who has been tried on an indictment for receiving could be prosecuted a second time on an indictment as an accessory after the fact and vice versa.

A decision as to the meaning of the word "tried" in the proviso to subsection (2) of section 236 has recently been given by Hughes J. in the case of R. v. Bertie N.C. Ng-a-Fook (April 25, 1951). Although I am not bound by that decision I have naturally given careful consideration to its reasoning. But as 1 do not agree with the conclusion stated in the judgment I think it right to set out my own opinion. As it appears to me the important words in this provision are "tried" and "prosecuted a second time". A trial, as I understand the matter, imports the conclusion of a *lis,* and this is the opinion of the learned author of Stroud's Judicial Dictionary who defines Trial at p. 2097 as follows:— "A trial is the conclusion by a competent tribunal of questions in issue in legal proceedings, whether civil or criminal." There are judicial dicta which support this interpretation. In Reg. v. Newton 13 Q.B. 716 Lord Denham said: "The discharge of

a jury is neither an acquittal or a conviction — there is no judgment — nothing that would appear on the record". In Reg v. Charlesworth 31 L.J. (M.C.) 25 Cockburn C.J. said: "When we talk of a man being tried twice we mean a trial which proceeds to its legitimate and lawful conclusion by verdict, and when we speak of a man being twice put in jeopardy we mean put in jeopardy by the verdict of a jury, and he is not tried or put in jeopardy till the verdict is given". Again in Reg v. Winsor L.R. 1 Q.B. at p. 311 the same judge says: "It has been urged upon us that according to the law of England no man ought to be put in peril twice on the same charge. I entirely agree. But we must apply that great fundamental maxim of the criminal law according to its true meaning. It means that a man shall not be twice put in peril, after a verdict has been returned by a jury, this verdict being given on a good indictment, and one on which the prisoner could be legally convicted and sentenced. It does not, however, follow if from any particular circumstance a trial has proved abortive, that then the case shall not be again submitted to the consideration of a jury and determined as right and justice may require". So also in R. v. Richardson (1913) 29 T.L.R. 228 Avory J. delivering the judgment of the Court of Criminal Appeal said: "The discharge of the jury operated as if there had been no trial at all". I am fortified in this conclusion by a decision of the Indian Courts in the case of R. v. Nirmal Kantor Roy (1914) 1 L.R. 41 Calc. 1072, E. & E. Digest Vol. xiv p. 329 note (h). There the Court held that a prisoner against whom an indictment has been preferred and on which the jury has failed to agree is not being "tried again"; but his trial is on the original indictment and plea, and the court continues the trial before another jury, and the process may continue until a verdict is passed on all the counts.

The second important words are "prosecuted again". A prosecution has been defined by Pattison J. in Rawlins v. Jenkins 4 Q.B. 419 as "laying an information or bringing a charge." The Criminal Law (Procedure) Ordinance makes it clear that the only means of starting a prosecution which will end with an indictment at the Criminal Sessions of the Supreme Court of this Colony is by laying an information or complaint, and the Ordinance lays down in detail the various steps which must be taken in the course of hearing the information or complaint. I refer particularly to sections 51, 53, 55, 60, 61, 68 and 86. It appears to me that for a person to be prosecuted a second time there must be a new information laid which in due course would be followed by a preliminary trial and the committal of the accused for trial. In this case there is no fresh information or indictment; no plea is taken from the accused, and the proceedings are carried on the original indictment and plea. In no sense can it be said that the accused is being prosecuted a second time.

For these reasons I have reached the conclusion that the accused have not been tried within the meaning of the proviso to subsection (2) of section 236 of the Ordinance. A trial has been begun, which by the disagreement of the jury and their subse-

quent discharge, proved abortive. The present proceedings are a continuation of the trial with a different jury, and the accused are not being prosecuted a second time.

The second question to be decided is whether Section 103 (5) of the Criminal Law (Procedure) Ordinance Cap. 18 is mandatory.

Section 103 (5) provides that every special plea shall be in writing and shall be filed with the Registrar not less than twenty-four hours before the arraignment of the accused person. If this provision is interpreted as mandatory the result would be that an accused person, who, through ignorance or some other cause, failed to file a special plea of autrefois acquit or autrefois convict within the time stipulated might be in peril a second time on a charge in respect of acts or omissions for which he had already been acquitted or convicted. As the principle of the Common Law is that no person should be put in peril twice on the same charge for the same acts or omissions it would be strange if the principle were to be abrogated by a procedural requirement. It might well happen that in the course of a trial the fact emerges that an accused person has already been charged and convicted in respect of the same act in another competent court and after due trial. He may have failed to plead specially, but it can hardly be suggested that a Court, apprised of the fact of a previous acquittal or conviction in respect of the same acts, would allow the trial to proceed. The requirement in subsection (5) of section 103 of the Ordinance is, as I understand it, intended to secure that the Crown is warned beforehand of the special plea so as to be ready to adduce evidence, if necessary, to rebut the evidence of the accused of a previous acquittal or conviction. Further it is essential for the record of the Court that the plea should be put in writing, and for this reason, if the plea is made verbally, the Court will, according to an old authority, adjourn the case and allot counsel to the prisoner to put the plea in proper form for the record. This provision differs from the requirements laid down by statute for the perfecting of an appeal. A right of appeal is given by statute and the requirements of the statute conferring the right must be strictly complied with. The protection given by a plea of autrefois acquit or autrefois convict is an existing common law right embodying a principle of natural justice, and no procedural requirement can avail to take away the right. I therefore hold that the requirements of Section 103 (5) of the Criminal Law (Procedure) Ordinance are directory only and that failure to comply with them cannot debar an accused person from pleading autrefois acquit or autrefois convict to an indictment.

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Boland, C.J. (Ag.), Hughes, J.) June 1, 8, 1951).

Control of Prices—overcharge on more than one article—one complaint—Not bad for duplicity.

The appellant was convicted on a charge of selling one pound of plantains and one pound of eddoes for twelve cents a price exceeding the maximum selling price, fixed for these articles, contrary to paragraph 2 of the Control of Prices (Certain Local Produce) Order, 1946. On appeal it was contended that the complaint was bad for duplicity.

Held: The complaint was not bad for duplicity. Hugh v. Baptiste L.R.B.G. 1949 followed.

C. E. R. Debidin for appellant.

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

Judgment of the Court: The appellant was convicted, before the Magistrate of the Georgetown Judicial District, on a charge of selling one pound of plantains and one pound of eddoes for twelve cents, a price exceeding the maximum selling price fixed for those articles, contrary to paragraph 2 of the Control of Prices (Certain Local Produce) Order, 1946.

This appeal is brought against that conviction on the following grounds:

(a) that the decision was unreasonable and could not be supported having regard to the evidence;

(b) that the information was bad for duplicity.

Shortly, the facts of the case are that Randolph Durga, aged sixteen, was given a marked sixpenny piece, and certain instructions, by the respondent herein, a Police Constable. The evidence of Durga is that he went to the appellant's stall at Bourda Market, purchased from her one pound of plantains and one pound of eddoes, and handed her the sixpenny piece; she took the coin and told him that the pound of plantains was eight cents, the pound of eddoes five cents, and that the money was one cent short: he told her that he had no more money and she said "all right". Durga then reported to the respondent and they returned to the appellant who claimed that she had told Durga to wait for five cents change. In cross-examination —

(a) Durga stated that the appellant "turned out her pockets to the Police. She had coppers on her."

(b) the respondent stated that the appellant had, in a coffee tin, copper coins to an amount exceeding, five cents (the change to which Durga was entitled) as well as silver coins.

The appellant's evidence was that she sold the articles to Durga, received the sixpenny piece and told him to wait a minute, that she had five cents change for him. At the time of the sale, the appellant stated, she had only three cents in coppers and in fact sold some potatoes to another person in order to get the necessary change for Durga. She denied telling Durga that he owed her one cent. The witness called by the appellant corroborated her evidence.

In support of the first ground of appeal it has been urged that the evidence of the respondent is in conflict with that of Durga, particularly in regard to the place at which the appellant had the copper coins or change; in this connexion attention was directed to the fact that Durga made no reference to a coffee tin, that the appellant denied having one and that her witness stated that he saw none. It was submitted further, on behalf of the appellant, that the respondent had failed to impound the copper coins alleged to have been in the possession of the appellant and that had he done so the case for the prosecution would have been materially strengthened. This fact, though properly mentioned by counsel, is not one which can by itself, affect to any appreciable extent the guilt or otherwise of the appellant.

While it is the case that, in some respects, the evidence of the respondent, does not coincide with that of Durga, this Court considers that there is insufficient ground to hold, in this connexion. that the Magistrate, who was in a position to observe the demeanour of the witnesses, acted unreasonably in accepting the evidence of those two witnesses and in rejecting that of the appellant and her witness.

The other ground of appeal was that the information is bad for duplicity. On being called upon for a reply only on this ground of appeal, the learned Solicitor-General cited the case of Mrs. James Hugh v. Vernon Baptiste, Police Constable No. 5088 (1949, No. 140), a decision of this Court which was delivered on 29th June, 1949. In that case, as in this one, the appellant had been convicted before the Magistrate for selling two different price-controlled articles at a total price exceeding that prescribed in respect of each article. The sale was effected in one transaction. A ground of appeal was that the charge was bad for duplicity and that point is exhaustively dealt with in the judgment in that case. This Court sees no reason to differ from the reasoning or from the finding that the appellant was properly convicted, contained in that judgment and accordingly this appeal is dismissed. Cost to respondent.

KING *v.* BISSEMBER AND MCDAVID

(In the Supreme Court, Civil Jurisdiction (Boland C.J. Acting) January 16, 17, 18, 19, 23, 24; February, 2; June 21).

Immovable property—Trust—Consent judgement against Trustee —Fraud on cestui que trust—Knowledge of trust by judgement creditor—Execution on trust property—set aside.

K purchased property in the name of M with whom he was living as husband and wife. She executed a document in which she acknowledged being a trustee for the plaintiff in respect of one half of the property. Later, she entered into a collusive arrangement with B under which she signed a promissory note in B's favour. There was no consideration for the note. When B filed a writ for the amount of the promissory note she consented to judgement. B knew that a half share of the property in the name of M belonged to K, but he levied on the whole property to satisfy the judgement debt.

K opposed the sale at execution. M was joined as a defendant by order of a judge in Chambers.

Held: B could not levy on K's half share of the property. In these proceedings the judgement by B against M could not be set aside nor could the levy in respect of M's half share in the property as she was in *pari delicto* with B.

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

B. O. Adams for the first named defendant.

J. Carter for the second defendant.

Boland J: In this action, the plaintiff seeks a declaration that a certain judgment obtained in this Court on the 12th April, 1948, was part of a fraudulent conspiracy between the first-named defendant, William Archibald Bissember, and the second-named defendant Sylvia McDavid to defraud the plaintiff of his beneficial interest in half of a property known as Lot 178, Shell Road, Alexanderville, Kitty, in the Kitty and Alexanderville Village District, East Coast, Demerara. The plaintiff had on the 15th October, 1948, filed an opposition to the sale at execution of this property as had been advertised in pursuance of a writ of execution founded upon the said judgment. In his notice of opposition, the plaintiff claimed that Sylvia McDavid, the execution debtor, as Bissember the execution creditor, was at all material times well aware, held the property as trustee for herself and the plaintiff, and that although the promissory note dated 20th February, 1948, for the alleged non-payment of which the judgment had been obtained, purported to be for the sum of $500, no consideration had in fact passed, and that the judgment based on that promissory note was part of the conspiracy between Sylvia McDavid and Bissember to defraud the plaintiff of his half share in the property.

The writ in this action was filed against Bissember alone in enforcement of plaintiff's opposition to the sale at execution, but defendant Sylvia McDavid was subsequently, on plaintiff's application, joined as a co-defendant by an order made in chambers by Sir Newnham Worley, C.J. She duly entered appearance to the writ, but has filed no statement of defence. At the trial, her counsel appeared merely to state that, though an appearance had been entered on her behalf, he had since been instructed not to

oppose the plaintiff's claim that she was a trustee for plaintiff in respect of one half of the property, and on his application Counsel for Sylvia McDavid was granted leave not to take any further part at the trial. Sylvia McDavid was. however, called as a witness for the plaintiff and in testifying on his behalf, supported plaintiff's case as to her being trustee for herself and plaintiff and acknowledged that no consideration had passed for the promissory note made by her in Bissember's favour and that the judgment for $500 and costs had been obtained by Bissember in-collusion with her.

On the evidence before me I find that Sylvia McDavid is a trustee for herself and plaintiff in equal shares. Plaintiff and Sylvia McDavid had been living together in concubinage for a period of 14 years prior to October 1947. Each was married but for some time prior to their living together each had not been living with the marriage partner.

Plaintiff is a painter-contractor employed by the Public Works Department and he it was who supported the household comprising Sylvia McDavid, her daughter, Maggie, and himself out of his earnings. During the time they lived together, there was provision business carried on at one of the city markets. This business was in Sylvia McDavid's name and managed by her but the business was financed entirely by plaintiff and in truth and in fact was his own property. When that business at the market was closed, they started a small retail charcoal business, which Sylvia McDavid looked after. Out of the monies earned by him in his employment at the Public Works and from their business undertakings, plaintiff from time to time made deposits in the Post Office Savings Bank in the name of the child Maggie. He did this, he said, not by way of a gift to the child, but to avoid the temptation to make withdrawals which would not be so easy as it would have been if the deposits had been made into an account of his own. He had no creditors at the time when he opened this account in the name of the child and he refuted the suggestion in cross-examination that he anticipated the avoidance of claims of future creditors. Some time in 1945, as a result of some unpleasantness in their domestic relations, plaintiff determined to leave Sylvia McDavid, and unknown to the mother he got Maggie in September, 1945, to go with him to the Savings Bank and sign a withdrawal for $700.00 which sum he intended to take with him on his leaving Sylvia McDavid. But he changed his mind about separating and continued to live with her. Some time early in 1946, plaintiff entered into negotiations to purchase the property at Kitty for the sum of $2,440 and paid $100 down to the vendors as part of the said purchase price. Payment of the balance namely $2,340, was to be made on the passing of the transport; of this amount the sum of $1,000 was to be provided out of the savings which had from time to time been deposited in the account in Maggie's name—$340 from other cash plaintiff saved and the remaining $1,000 was to be raised by a mortgage of the premises. Plaintiff agreed with Sylvia McDavid to have the transport put in her name subject to her agreeing to hold the property as trustee for herself and the plaintiff in equal shares, and a written document prepared by Mr. H. B. Fraser, Solicitor, was executed by

Sylvia McDavid whereby she declared herself to be trustee of the property for herself and the plaintiff. As to this trust, Sylvia McDavid in her testimony at the trial corroborated the evidence given by plaintiff as well as by those of his witnesses who declared that they were present when she executed the document. An unsigned copy of this trust instrument was produced from the records of Mr. Fraser's office and admitted in evidence in the absence of the original whose destruction or disappearance was alleged to be part of the scheme into which Sylvia McDavid and Bissember entered whereby to deprive the plaintiff of his half share.

I am satisfied that Bissember had full knowledge of the trust at the date of the promissory note. This was made abundantly clear by the evidence detailing the course of the relations between Bissember and Sylvia McDavid. After much difficulty in getting vacant possession of Lot 178. Kitty for some time after its purchase, plaintiff and Sylvia McDavid eventually were able to move into it and resided there, but in October 1947 plaintiff left the home following upon disputes with Sylvia McDavid which included amongst other matters, a dispute as to sharing part of the money which had been raised subsequently on a second mortgage. He had already spent a considerable sum on improvements and repairs to the house. On leaving her, plaintiff suggested to Sylvia McDavid that the place should be sold and that the proceeds of sale should be divided between them equally, and with her approval, he inserted in one of the local news papers, a sale advertisement directing that offers to purchase should be made to her. It was about this period, that is late in October 1947, that Bissember for the first time made his appearance at Lot 178 Shell Road, Alexanderville, Kitty. Bissember was known to be a person doing business in the buying and selling of properties, and though this occupation may have given him the excuse at first of interesting himself in the affairs of Sylvia McDavid and the proposed sale of the property there is no doubt that despite the claim which he made in his evidence of his being a married man living happily with his wife he very soon insinuated himself into very intimate relations with this woman who had recently been left by the man with whom she had been living for many years.

I accepted Sylvia McDavid's evidence that she showed Bissember the trust paper which plaintiff had left behind in the house, and I am satisfied that Bissember suggested to her that she should repudiate the trust, and the document was accordingly destroyed. Bissember from then commenced to devise schemes by which plaintiff's share, even if capable of being established despite the destruction of the document, would be lost to him.

First he got her to attempt a mortgage to one Doodnauth Bhowani Persaud, which was duly advertised in the Official Gazette in November 1947 but opposition was entered by the plaintiff, on a claim to a beneficial interest in half of the property, for the enforcement of which, in accordance with rules of Court, plaintiff subsequently brought an action, No. 616 of 1947, against Sylvia McDavid. That action in due course came on for trial before Luckhoo J. who, in the course of the proceedings, ordered

the joining of the child Maggie McDavid as a party to the suit to be represented by the Public Trustee. Sylvia McDavid's defence in that action was a complete disavowal of the alleged trust. The property was purchased, she then alleged, with her own money supplemented by a gift of $440 made to her by plaintiff and if she did sign the document alleged to create the trust, she had done so without appreciating its purport and only because plaintiff had threatened to cause the purchase to fall through by not assisting her with the $440.00. She had been persuaded that the document was intended "only to protect him and his property from his creditors." The death of Luckhoo J. in June 1949 before he gave his decision caused a retrial before Ward J. who on 26th September, 1950, finally concluded the matter by recording a judgment by consent in favour of the plaintiff which embodied the terms of settlement arrived at between the parties.

In the settlement, which was filed in Court to be translated into the formal decree, Sylvia McDavid acknowledged the trust in favour of the plaintiff and declared that Bissember had had full knowledge of this trust, at the time when she signed the promissory note for $500 in his favour and that the cause of action upon which that judgment was based, likewise upon certain other judgments against her obtained during this period by Bissember was wholly fictitious. It was a further term of the settlement and embodied as an order in the judgment that the property should forthwith be conveyed and transported to the plaintiff as at a value of $6,000, out of which sum there was first to be deducted, the amount of the debt of the existing mortgagee unless the plaintiff was willing to take over the property subject to the mortgage; then after settlement with the mortgagee, he sum of $1,000 was ordered to be paid into the Court to be held by the Registrar for the child Maggie McDavid; Sylvia McDavid's moiety of the balance was ordered to be paid into Court by the plaintiff to be held by the Registrar to await the determination of the present action which was then pending.

It is instructive, as showing Bissember's determination to deprive plaintiff of his share in the property, to trace in chronological sequence, the steps taken to achieve this objective.

The attempt of Sylvia McDavid on instigation by Bissember to give a second mortgage to Persaud was, as stated above, at once countered by plaintiff's entry of opposition followed by the opposition action against Sylvia McDavid. No. 616 of 1947, the writ in which was served on the 13th December, 1947.

On the 17th January, 1948, Bissember filed an action No. 37 of 1948 against Sylvia McDavid claiming the sum of $800 on a promissory note dated 25th November, 1947, and payable on demand. Judgment was obtained in default of appearance on the 26th January, 1947, and a writ of execution was taken out on the next day. Bissember's solicitor in that action was Mr. H. C. B. Humphrys, who testified that he consented to stay the levy on the property on a receipt of a letter from Mr. Sharples on behalf of King the plaintiff in the present action whose action No. 616 of 1947 against McDavid seeking to establish the trust in his favour had already been filed. Mr. Humphrys could not remem-

ber whether he told his client precisely that there was a claim being made to half of Lot 178, Shell Road, Alexanderville, Kitty, which was levied upon, but he was sure that he did tell him that Mr. Sharples was representing someone who was claiming some interest in the property. On the 23rd September, 1948, Mr. Humphrys requested the marshal to re-advertise the levy.

Then there was the action of Bissember against McDavid, No. 211 of 1948, referred to in the entry of opposition leading to this present action which was for payment of a promissory note drawn by McDavid dated 20th February, 1948, for the sum of $500 and made payable on demand. The writ was filed on the 2nd April, 1948. At the date of the note, Bissember had already been told by Mr. Humphrys his solicitor, if not precisely of a claim being made by King on half of the property, yet that someone was claiming an interest in the property, and Bissember, although he denied this in his evidence, must have known of the stay of the levy, and that there had been discussions as to whether the property was of a value sufficient to pay off all parties. In such circumstances it is hardly credible that he would be making a further loan of $500 to Sylvia McDavid without receiving any payment of the existing judgment for $800 and costs. Curiously enough, it was on the 17th February, just three days before this alleged loan of $500 that Sylvia McDavid, who up till then had entered no appearance in the opposition action brought by the plaintiff, made application to Luckhoo J. and obtained an extension of fourteen days within which to enter appearance. She appeared before Jackson J. on 12th April and admitted indebtedness, whereupon judgment was given against her for $500 and costs. That very day the case of King v. Sylvia McDavid which was part heard was further adjourned.

That Bissember kept evincing a keen and constant interest in those proceedings of King v. Sylvia McDavid from its very commencement was established not only by the evidence of Sylvia McDavid, but even by admissions made by Bissember himself who stated that at one stage he sought to get Mr. Humphrys K.C. to intervene on his behalf.

In contradiction of Sylvia McDavid's testimony in the present action that she had got no money on the $500 note, Bissember stated in his evidence that he did give her $500. First he said positively that he gave her $250 in cash and two cheques, one for $100 and the other for $150 to pay her lawyers Mr. Carter and Mr. Dinally respectively; both cheques were made out, he said, in her favour or order — she was to endorse them and hand them to the lawyers. Asked to bring the cheque to Court at a next hearing, as he must have got them back from the Bank, Bissember came back to Court and said that he found from his cheque stumps that he had issued no cheques on that day and he varied his previous statement by saying that he gave her the full sum of $500 in cash; but Kenrick Murray, clerk to Mr. Carter, called in rebuttal by plaintiff, testified that Sylvia McDavid's first payment of fees to Mr. Carter was at a much later date, namely, in May 1948 and that payment was by a cheque drawn in her favour which she had to endorse. On the 18th September, 1948, Bissember took out a writ of execution on this judgment for $500

and costs and on the 22nd September, 1948, directed the marshal to levy on Lot 178, Shell Road, Kitty. This, as stated, led to the entry of opposition followed by the writ in the present action.

On 15th April, 1948, whilst these two judgments remained unsatisfied, Bissember claims that he lent Sylvia McDavid the sum of $1,000 on the security of a promissory note made payable on demand. To enforce payment of this he filed a writ against her on the 2nd June, 1948, (Proceedings No. 340 of 1948) and obtained judgment on the 14th June, 1948, in default of appearance. On September 16, request was made for the issue of a writ of execution, a renewal of which was requested on and issued 6th October 1950. Sylvia McDavid denies also that she received any money on the note.

A very significant piece of evidence was provided by certain figures on an envelope which plaintiff produced and tendered to the Court. He had found this on a table in the house when he returned there after the separation for the purpose of discussing the subject of the sale of the house with Sylvia McDavid. At that date Bissember had already intruded himself into her domestic life. I am satisfied that the figures on the envelope, which are in Bissember's handwriting, represent a calculation for the distribution of the proceeds of an intending sale of the property. Sylvia McDavid had told plaintiff that Bissember was offering for the property $5,300 — the same sum specified on the envelope from which deductions are made. The calculation shows that out of that sum of $5,300, an amount of $952 was to be allotted to plaintiff as his share after payment of all mortgage debts and charges, and the share of Sylvia McDavid was to be further divided into two halves — presumably one half was to go to Sylvia McDavid and the other half to Bissember. It would seem that at that stage Bissember had not yet determined to get the woman to disacknowledge the trust, but was seeking to get a benefit out of her half share. It was after this that plaintiff saw the proposed mortgage to Persaud advertised.

I am satisfied that it has been established that Sylvia McDavid readily fell in with the proposals Bissember made which, as she clearly appreciated, were designed to defraud the plaintiff of his interest in the property. She was induced to sign the notes for this purpose in the belief that he would, as he represented to her, repay her these amounts after the recovery of the judgments by him. He assured her that he had done that successfully before in aid of one Vandeyar. In his evidence Bissember denied that the note transactions were fictitious and that he had made any promise to Sylvia McDavid to repay her the amounts for which he obtained judgment. He strove to show to the Court that his relations with her were at no time of such a nature as would render her likely to be influenced by him to sign a note without receiving valuable consideration, but his evidence given under cross-examination clearly proved otherwise. He and Sylvia McDavid lived together from the end of October 1945, but when they ultimately fell out she ordered him to leave her house, and there ensued between them a dispute about a bed which had been purchased for Maggie's accommodation, but which Bissember had taken away. There was a report lodged by Sylvia

McDavid at the Police Station at Kitty concerning the dispute. Whilst living with the mother, he insisted that plaintiff, who had continued to give Maggie her school fees, should cease doing so and following upon a quarrel with Sylvia McDavid about this, Bissember forbade Maggie to go to plaintiff for the money and thence-forward Bissember was paying the school fees himself.

A further example of the dominating influence exercised over Sylvia McDavid by Bissember was furnished by the evidence relating to a letter which Mr. Humphrys of Cameron & Shepherd, the solicitor for Bissember, received purporting to come from Sylvia McDavid admitting her indebtedness to plaintiff in the sum of $800 under the promissory note of the 25th day of November, 1947. This letter was acknowledged by Sylvia McDavid in her evidence to be subscribed with her signature, but she had no recollection of her doing so. The peculiar manner of spelling of the word "difficulties" as "differculties" in the letter induced the Court to recall Sylvia McDavid and Bissember and each in turn was requested to spell the word. It was Bissember who spelt it "differculties" clearly indicating that he it was who was the author of this letter, which Sylvia McDavid had merely signed.

I was satisfied that Sylvia McDavid's change from the attitude she had taken at first when defending the former action brought by plaintiff against her is not to be attributed to her having now falling out with Bissember and again favouring the previous lover. Plaintiff is now married a second time and I accept Sylvia McDavid's evidence that her former relations with plaintiff have not been resumed. Her change, I am impressed, is inspired by true repentance for the wrong which she at the instigation of Bissember was endeavouring to perpetrate on a man who had been kind to her and her child.

Accordingly, by way of judgment the Court makes the following declarations:

(1) that the defendant Sylvia McDavid is a trustee for the plaintiff in respect of half of the property Lot 178 Shell Road, Alexanderville, Kitty, subject to the first and second mortgage now subsisting thereon in favour of Hand-in-Hand Mutual Fire Insurance Company Limited, and subject also to a charge in favour of Maggie McDavid for payment to her of the sum of $1,000;

(2) that at the date of the promissory note for $500 made by defendant Sylvia McDavid in favour of defendant William Archibald Bissember, the said defendant Bissember knew that the said Sylvia McDavid was a trustee for plaintiff as aforesaid;

(3) that the said promissory note for $500 and the action, the judgment, the execution and the levy based thereon in Proceedings No. 211 of 1948 all formed part of a fraudulent conspiracy between the said William Archibald Bissember and Sylvia McDavid to defraud plaintiff of his said beneficial interest in half of the property;

(4) that the opposition dated 10th October, 1948, and filed the same day to the sale at execution of that property

> as belonging to the judgment debtor Sylvia McDavid is just legal and well founded: And the Court orders an injunction restraining the defendants, their servants and/or their agents with proceeding with the said sale at execution as advertised, without declaring that the interest to be sold is only the one half share of Sylvia McDavid in the property described therein.

The plaintiff, by an amendment granted in the course of the hearing, has also claimed an order that the above judgment between Bissember and Sylvia McDavid should be set aside. I have had great difficulty in determining whether such an order, made against the entire judgment, protecting as it would also the beneficial half-interest of Sylvia McDavid from the execution thereunder, would be proper in this action, which is a suit brought by the plaintiff to protect his own beneficial interest from a levy which is the outcome of the fraud between Bissember and Sylvia McDavid.

At the close of the case on an invitation from the Court. counsel for Sylvia McDavid who, as stated, at the commencement of the trial withdrew from further appearance after declaring his client's non-resistance to the plaintiff's claim, addressed me on the form that the order should take if the case were decided in favour of the plaintiff. Mr. Carter contended that in the event of a decision in favour of the plaintiff the Court should set aside the judgment in its entirety, thus supporting the views of Mr. Stafford, K.C., counsel for plaintiff, who on this point speaking merely as amicus curiae, had urged that the order to set aside should rescind the fraudulent judgment in its entirety, although such an order would be according relief to Sylvia McDavid from a consequence of her own fraudulent act. The Court's attention was directed to the dictum of Sir William de Grey, afterwards Lord Walsingham, Chief Justice of the Court of Common Pleas, in his opinion given in the Duchess of Kingston's case, 11th Edition, 2 Smith Leading Cases 731, after consultation with all the Judges: "Fraud", the learned Chief Justice says at p. 734 "is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical and temporal." The opinion was given on questions submitted to the judges by Parliament concerning the effect of a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage. Was that sentence conclusive as establishing that there was no marriage and precluded the Crown from tendering evidence on an indictment for polygamy in order to show that the sentence of the Spiritual Court had been obtained by fraud or collusion and that there was in fact a good marriage? The unanimous opinion of the judges was that the Spiritual Court's order was not conclusive to stop proof of marriage in the criminal Courts. I fail to see that this dictum of Chief Justice de Grey has any application to a suit like the instant case. A judgment of the Court in a matrimonial suit declaring that there was no marriage or dissolving or refusing to dissolve the marriage tie is one which makes a pronouncement

affecting the status of the parties. Dependent on the nature of the judgment each party either has or does not have the married status with its attendant mutual obligations of a marriage partner. In such suits the court as representing the State is directly concerned in the issue, and is vigilant to see that there is no fraud or collusion between the parties to obtain an order in repudiation of marriage. If there is fraud or collusion between the parties in getting a declaration of no marriage, it is a fraud practised directly on the Court and. through the Court, on the State itself, and the State as a party affected by the fraud should be able to have the entire order set aside. Consequently it would seem right in principle that in a criminal court in a prosecution for bigamy, where proof of marriage is essential as an element of the offence, the prosecution should be competent to show that the decree of jactitation had been obtained by collusion or fraud and was accordingly entirely worthless.

Similarly, the Court in its Probate jurisdiction is directly concerned with the proper proof of wills. Directions for the devolution of his property on death given by a person must be in writing and in the manner prescribed by law as to execution and attestation. The Court has to see that these requirements of the law are strictly complied with before it gives its authority to the devolution which has been directed. If a fraud has been practised on the Court, and as a result either Probate of a will, or Letters of Administration following on a fraudulent allegation of intestacy, have been granted by the Court, the grant of Probate or Letters of Administration will be revoked as against everybody who would get an interest thereunder no matter whether he be a person who is not a party to the proceedings nor is privy to the fraud. Like the judgments in matrimonial Courts which decree jactitation of marriage, divorce, or nullity of marriage, these judgments of the probate jurisdiction are in the nature of judgments *in rem* and not judgments *in personam.* A rescission of the decree cannot be limited in scope to affect only some people. It avails against the whole world. Birch v. Birch 86 L.T. (N.S.) 364. Not so, however, a rescission of a judgment for a money debt.

Further in support of the submission that in setting aside a collusive judgment the order cannot be restricted to the judgment only as it would prejudicially affect strangers to the suit, the considered judgment (not yet reported) delivered in this Court by Worley C.J. on 31st March, 1950, in Ernest Marks v. John Ernest Butts, Mervyn Outridge Butts, Lloyd Vernon Butts and Ernest Perry (Proceedings No. 366 of 1943) was cited. I have carefully read that decision which seems principally to have turned upon the determination of the question of the competence of the plaintiff to get an order of injunction restraining a sale at execution despite his failure to proceed for relief in an action in enforcement of an entry of opposition as prescribed by the Rules of Court. After the abandonment of the opposition proceedings, the plaintiff Marks had brought an action to restrain a sale in execution of a judgment which he alleged had been fraudulently obtained so as to deprive him of his equitable interest in the property. The Court found that the judgment was obtained

through the fraud and collusion of the defendants with intent to defraud Marks, who was not a party in the action and that he was entitled to the order of injunction. On the question of setting aside the judgment I find that nowhere in the decision of the learned Chief Justice is it stated that if the Court is to set aside the judgment it must set it aside so as to render it entirely inoperative even as between the parties to the suit who acted in fraudulent collusion. On the contrary, the learned Chief Justice says on page 11 of the typed judgment in the record "But, apart from these considerations, the judgment obtained by Perry is *void as a judgment against the estate of Harriet Susannah Butts and cannot stand.*" Again later on page 42 he says "I have already expressed my view that the judgment is void *at least as against the estate of Harriet 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 concluding his decision, the learned Chief Justice finally says: "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." Whether or not. in acceptance of this invitation to them, counsel made any submissions as to the form of the order following upon which directions were given by the Chief Justice that the formal order should be drawn up so that the collusive judgment should be deemed void against the whole world does not appear from the record as I see therein no entry of the judgment.

It appears to me from the evidence adduced before the Court in this instant case that Sylvia McDavid was in *pari delicto* with Bissember in the fraudulent machinations against the plaintiff which in part comprised that fraudulent judgment and execution obtained in Proceedings No. 211 of 1948. If she herself were plaintiff in an action against Bissember in which she sought to set aside that judgment; she would be confronted by a defence plea by Bissember of estoppel *by record* to which in reply she could not successfully seek to "*confess and avoid*" by the admission of her own fraud and collusion with Bissember against a third person. Her half share in the property would hardly escape liability to be taken in execution in enforcement of Bissember's judgment. I fail to see that she can be in a better position in an action brought by that third person, the plaintiff herein, who was not party to the fraudulent action nor privy to the fraud practised on the Court and whose sole object in bringing this action is to protect his own interest from the operation of the fraudulent judgment. Sylvia McDavid in this case testified for the plaintiff and openly avowed the fraud, but she may not have done so. Had she as co-defendant resisted the plaintiff's claim and persisted in the fraud, would she be entitled nevertheless to get the benefit of an order setting aside the judgment? I am certain that that would be preposterous.

It is true that in the Bankruptcy jurisdiction it is permissible for a debtor to resist a petition for a receiving order by showing that the judgment debt upon which the petition is based was fraudulently obtained by the Petitioner creditor in collusion with him. *Ex parte* Lennox In re Lennox (1886) 16 Q.B.D. 315 C.A. This at first might seem to support the contention that such a

collusive judgment is void even against the judgment debtor. But the reason for this right accorded in bankruptcy proceedings to the debtor is that the Bankruptcy Court in protecting creditors is concerned to see that only provable debts are to be taken into consideration when the division of the realized assets of the debtor falls to be made amongst creditors rateably.

Accordingly in addition to the declarations and injunction specified above, I make an order setting aside the judgment and execution but only in so far as it affects the half share of the property which I have declared above to be the beneficial interest of the plaintiff. As to the other half share belonging to Sylvia McDavid I make no order neither by way of injunction restraining the levy nor otherwise. Sylvia McDavid can take such steps against the execution of the judgment in favour of Bissember in reference to that half share as she may be advised. Perhaps she may be able to obtain relief if she can succeed in establishing that though in *delicto* she was not in *pari delicto* with Bissember. As to this, I wish to be guarded against seeming to suggest that she would be successful in avoiding the execution by putting forward such a plea. No claim to relief from the execution was advanced by her in these proceedings.

The plaintiff is entitled to costs against both defendants Bissember and McDavid jointly and severally.

Solicitors: H. A. Bruton for the plaintiff.
A. Vanier for the first defendant.
W. D. Dinally for the second defendant.

MAJEED v. BEERAM

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Boland C.J. Ward J.) June 29; July 10, 1951).

Motor Vehicles Insurance (Third Party Risks) *Ordinance* 1937—*uninsured vehicle—disqualification—special reasons.*

The appellant was the owner of a motor car licensed as a private car and was insured against third party risks when using the car for private purposes but not if the car was used for the carriage or delivery of goods in connection with any trade or business. He used his car in breach of the terms of the insurance policy and was convicted of using a motor car when there was not a policy in force in respect of the user of the said vehicle.

He was fined $25 and was disqualified from holding or obtaining a driver's licence for 12 months.

On appeal against that portion of the sentence imposing disqualification.

Held: The fact that the appellant did not understand his policy or was misled by its terms is not a special reason precluding disqualification. (Knowles v. Rennison (1947) K.B. 488 applied).

E. V. Luckhoo for appellant.

A. C. Brazao, Solicitor General for respondent.

Judgment of the Court: In this appeal the appellant has abandoned his appeal against the conviction and confines himself to the ground of appeal on which it is submitted that the sentence imposed on him by the Magistrate was unduly severe "because in all the circumstances of the case the learned Magistrate should not have disqualified him from holding or obtaining a driver's licence for 12 months".

The charge against the appellant was that on the 13th September 1950 at Water Street,Georgetown he used motor car No. P. 7973 when there was not a policy in force in respect to the user of the said vehicle in breach of section 3 (1) of the Motor Vehicles Insurance (Third Party Risks) Ordinance 1937. On conviction appellant was ordered to pay a fine of $25.00 in default one month's imprisonment with hard labour and he was disqualified from holding or obtaining a driver's licence for 12 months. Section 3 (2) of the Ordinance provides that for an offence under section 3 (1) a person is liable to a fine not exceeding two hundred and fifty dollars or to imprisonment for a term not exceeding three months or to both such fine and imprisonment, and *shall* (*unless the Court thinks fit to order otherwise and without prejudice to the Court to order a longer period of disqualification*) *be disqualified from holding or obtaining a driver's certificate under section* 8 *of the Motor Vehicles Ordinance* 1932, *for a period of* 12 *months from the date of conviction.*

As to the circumstances of the case there is nothing noted in the proceedings of the Magistrate's Court apart from what is alleged by the learned Magistrate himself in the Memorandum of Reasons for Decisions furnished by him for the information of this Court. The Memorandum of Reasons for Decision is dated 15th December, 1950 nearly three months after the date of the sentence which was on the 27th September, 1950. The record itself only shows that at the hearing on 27th September, 1950, the defendant who was represented by Mr. J. A. Veerasawmy pleaded guilty and was fined and the order for disqualification made as stated above. No doubt in order to enable the Magistrate to assess punishment the prosecution must have given the relevant facts and circumstances relating to the commission of the offence, but this is not noted. Whatever appears in his reasons written nearly three months after the date of the sentence must represent the learned Magistrate s recollection of what was told him at the time. Here we would observe that this omission to record what the prosecution advances as material for assessment of punishment is unsatisfactory particularly in a case for an offence like the instant case where the Magistrate is given by the ordinance not only a discretion within wide limits as to the amount of the fine and period of imprisonment, but is also directed to make an order of disqualification unless he thinks otherwise.

The facts, according as they are stated in the Magistrate's reasons were as follows. "The appellant owns motor car P 7973 in respect of which he takes out a licence as a private car and pays the appropriate licensing fee as for a private car. The appellant lives at Fyrish Village, Corentyne, Berbice, and carries on a store

in connection with which he buys and sells goods. On Wednesday the 13th September, 1950 at about 3 p.m. a Police Constable saw car P. 7973 parked in Water Street, Georgetown, and a man was seen carrying a bolt of cloth from Fogarty's Store which he placed in the car. The constable looked and observed it was packed with different kinds of goods. The appellant told the constable he was the driver and owner of the car and the goods in the car belonged to him and he had bought them to sell in his store in Berbice, and was transporting them to Berbice in the car. The appellant was informed by the Police that he was using the car as a goods vehicle and that the insurance policy in respect of the user of the car does not cover him in respect of the carriage or delivery of goods in connection with any trade or business. The appellant begged for a chance but was taken to Brickdam where he was arrested and charged. In a statement to the Police the appellant admitted that he had goods to the value of $546.24 in the car.

The Magistrate adds that "on a previous occasion the appellant was warned by the police, when found carrying goods under similar circumstances" but counsel for the appellant said that no previous warning had ever been given to the appellant by the Police, nor was that stated to the Magistrate. Counsel for the Respondent was unable to say whether the learned Magistrate's recollection of what was stated in court was accurate on this point. The Magistrate went on to refer to the Certificate of Insurance that was produced before him and which we also were privileged to see. Clause 6 of this certificate reads—"Use for private purposes which means use for "social, domestic and pleasure purposes"and "use in connection with the policy holder's business or profession."

"The Policy does not cover for hiring, racing, pace making or speed con-
"tests or trials, or for the carriage or delivering of goods or samples in connec-
"tion with any trade or business or for tuition or use of any description in con-
"nection with the motor trade or for carrying passengers for hire or reward."

We are of opinion that if a person found guilty of this offence wishes to avoid an order of disqualification the burden falls on him to show such facts to the Magistrate as would justify the Magistrate in thinking it fit not to order the disqualification of a driver's licence as he is directed by the ordinance. It does not appear that appellant made any special representation to the Magistrate for the exercise of a discretion by the Magistrate not to make the order for disqualification beyond referring to the wording of the insurance certificate.

Here before us Counsel for the appellant urges in support of his appeal for the removal, of the order for disqualification the following reasons—

(1) The absence of mens rea.
(2) The hardship to the appellant who has a small business for which it is necessary for purposes other than the transport of goods to have a motor vehicle in use. The

appellant would find it hard to hire a chauffeur to drive the car during his period of disqualification.

(3) The difficulty of construing the language of the insurance policy. A similarly worded clause in an insurance policy was the subject of the decision in Grey v. Blackmore (1933) 50 T.L.R. 23. In that case it was submitted by eminent counsel that the policy was ambiguous and misleading. The Court it is true held otherwise, but Counsel for appellant stressed in mitigation of sentence the wrong but not unreasonable interpretation given to his policy by the appellant.

First we would observe that the question whether the facts furnish special reasons of the exercise of a discretion by the Magistrate not to make the order for disqualification is one of law, which is the subject of review on appeal. Accordingly what is a special reason is not to be decided by the Magistrate in his absolute discretion. This point was settled early by the Courts of Scotland and the decisions in Scotland have been confirmed in England. "We are in "general agreement" says Lord Goddard C.J. in Knowles-v-Rennison (1947) K.B. 488 at p. 494, "with decisions given in Scotland that the question "whether, on facts found by the court, it is open to them to hold that special "reasons exist, is one of law." It is clear too that previous good character, or many years of driving without complaint is not a special reason. The reason must be one that is special in relation to the act which constituted the offence—not some reason that would be general as being applicable to many persons (vide Whittall v. Kirkby (1946) 2 All E. Reports at p. 555).

It is no special reason that the offender did not understand his policy nor was misled by its terms. The object of the provision in the ordinance in ordering disqualification is the protection of the public on the roads—that is the paramount consideration to which he hardship to be suffered by the offender in being disqualified is subordinate. Lord Goddard C.J. in delivering the judgment of the Divisional Court in Knowles v. Rennison (supra) says at p. 494—

"The Act requires every person who uses a motor vehicle, or causes or "permits it to be used on a road, to be insured against third party risks. The "obvious duty therefore of the owner is to see that he is insured and to "make himself acquainted with the contents of his policy. He is not "obliged to have a motor vehicle, but if he does, he must see that he has a "policy as the law requires. If he does not under stand his policy he can "seek guidance and instruction, but if he neither informs himself of its pro-"visions nor gets advice as to what it covers, we are unable to see that he "has any reasonable ground for believing that the policy covers something "which it does not. Belief, however honest, cannot in our opinion be re-"garded as a special reason, unless it is based on reasonable grounds."

In conformity with these decisions we hold that no special

reason is disclosed why the order for disqualification made by the Magistrate should not have been made. Accordingly we dismiss the appeal and confirm both the conviction and the sentence imposed including the order disqualifying the appellant from holding or obtaining a driver's licence for twelve months. We award costs to the Respondent.

BOODHOO v. FOO YING

(In the Full Court on appeal from the Magistrate's Court for the Georgetown Judicial District (Boland C.J., acting and Hughes J) June 1, 15; July 18, 1951)

Rent Restriction Ordinance—possession—nuisance—principles applicable—reasonableness—breach of condition of tenancy—subsequent receipt of rent—waiver—res judicata.

A landlord applied for an order for possession against his tenant on grounds that:—

(1) The tenant had in breach of a condition of his sub-tenancy been using the premises as a cake-shop instead of a barber shop; and

(2) that the tenant was storing furniture and other things on the premises which constituted a nuisance about which the landlord had received a complaint from his superior landlord.

The Magistrate ordered the tenant to deliver up possession of the premises and grounded his decision on the finding that the landlord reasonably required possession of the premises for the purpose of extension of his own business and that it was reasonable to make the order on that ground. He also found that the user of the barber shop as a goods stall was a nuisance which prevented the landlord getting his own premises registered as an eating house. He further held that the tenant was guilty of using a cake-shop as a barber shop in breach of the condition of tenancy. The tenant appealed.

Held: The Magistrate misdirected himself as to what, under Rent Restriction Legislation, constitutes a nuisance.

In the circumstances of this case, it was not reasonable to make the order.

Assuming there was a breach of a restrictive condition in the tenancy entitling the landlord to determine the tenancy, the landlord waived his right to determine the tenancy on that ground by his subsequent conduct in receiving rents and his attitude generally.

Dismissal by a Magistrate of an application for possession is not necessarily a bar to the entertainment of a subsequent application on the same type of ground recognised in the Rent Restriction Ordinances as a basis for an order for possession but if such fresh proceedings are instituted on the notice to quit on which the first proceedings are brought res *judicata* may be pleaded successfully.

W. J. Gilchrist for the appellant

F. R. Jacob for the respondent.

Judgment of the Court: In his written plaint lodged at the Magistrate's Court on the 10th January, 1950, respondent alleged that appellant was the monthly tenant of respondent of certain premises to wit a barber shop at 13A, Water Street, Georgetown;

that respondent, who was the tenant of the entire ground flat at 13A, Water Street, had sublet a portion thereof to appellant; that notice had been served on appellant on the 29th June, 1949, requiring appellant to deliver possession thereof to respondent on the 1st August, 1949; that appellant was still in possession and that respondent was entitled to possession on the grounds that:

(1) appellant had in breach of a condition of his sub-tenancy been using the premises as a cake shop instead of a barber shop; and

(2) that appellant was storing furniture and other things on the premises which constituted a nuisance about which respondent had received a complaint from the superior landlord.

The Magistrate after hearing the evidence adduced by both sides, made an order on 6th March, 1950, ordering appellant to deliver possession by the 1st July, 1950. Against this Order appellant appeals.

At the hearing before the Magistrate, the evidence disclosed that respondent is a tenant of the entire bottom flat at Lot 13A, Water Street. It would appear that this bottom flat, as counsel on both sides at the hearing of the appeal before us agreed, has a frontage on the eastern side of Water Street and is divided more or less into two halves—a northern half and a southern half. The northern half comprises three rooms—that is a front room giving on Water Street, and a smaller room at the back of this room. These two rooms are the premises rented to appellant. Behind these two rooms there is in the northern half, a room occupied by respondent for his business of the manufacture of noodles, a commodity which is offered for sale at the Bourda Market and by itinerant vendors about the streets of Georgetown. The southern half, except for a small portion at the back, is occupied as a combined cake shop and cook shop run by a man called Hussain who a few years ago had purchased that business from the respondent, but a small back portion of this southern half was reserved for respondent's own use.

In his memorandum for his reasons for decision, the learned Magistrate would seem to have grounded respondent's right to the order for possession on respondent's reasonable requirement of the premises for the purpose of the extension of his own business and that it was reasonable to make the order on that ground. Also that appellant's user of the premises of the barber shop for a food stall was a nuisance which prevented respondent from getting his premises registered as an eating house, as he had proposed, for the purposes of his business; further, the Magistrate held that the appellant was guilty of using as a cake shop the premises demised to her as a barber shop in breach of a condition of her tenancy.

Appellant in his notice of grounds of appeal has advanced as his first ground, the plea that the matter is *res judicata.* The evidence showed that respondent had previously made an application for the ejectment of appellant and on the 8th March, 1948, Mr. Burton, Rent Assessor and Magistrate, had dismissed that application. A certified copy of the record and of the evi-

dence taken in those proceedings (No. 249 of 1948) disclosed that a plaint was filed by respondent on 15th January, 1948, claiming possession from appellant of the same premises after the expiry of a full month's notice to quit. The ground for wanting possession was therein stated to be the requirement by respondent of the premises for carrying on a cake shop there.

We cannot agree with the submission that this previous dismissal of respondent's application is to be regarded as *res judicata* so as to taint every subsequent application on the same ground even if based on a fresh notice to quit. It would certainly be *res judicata* in relation to a subsequent application based on the *same notice;* but a landlord cannot, we hold, be stopped from advancing a ground for an order for possession because he had advanced the same ground in a previous application which was dismissed. Such a dismissal would only establish that the ground was deemed not available to him at the time of the dismissal. It is conceded, however, that a court would always take into consideration the dismissal of a previous application when determining the question of the *bona fides* of the landlord in again seeking possession on the same ground. However, in this application the dismissal of which is the subject of the appeal before us, respondent not only renewed his ground that he requires the premises for his own business, but also puts forward the additional ground of nuisance by the tenant and also the breach of a condition of the tenancy. The plea of *res judicata* therefore, is clearly not maintainable. Moreover it must be pointed out that as regards the alleged breach of a condition of the tenancy in using the barber shop premises as a cake shop, the use of the premises as a cake shop alleged by respondent to be unauthorised was by both sides declared to have only commenced in February or March 1949 after the dismissal by Mr. Burton of respondent's previous application which, as stated before, was grounded solely upon the requirement of the premises for the accommodation of respondent's own business.

On the question of nuisance, we are of opinion that the learned magistrate misdirected himself as to what, under Rent Restriction legislation, is in law a nuisance as would justify an order of ejection against a tenant. In his *memorandum of reasons for decision* he refers to the evidence of Sanitary Inspector Good who testifies "that defendant now carries on a food stall in the barber shop, living room and passage way which is unfit for the preparation of food" and later on he writes "I also find that defendant's user of the business constitutes a nuisance and annoyance to the plaintiff. I believed Sanitary Inspector Good's evidence that he told defendant she would have to cease carrying on the food stall or cooking in the passage way. I did not believe defendant's evidence that she obtained the permission of Dr. Barrow or Sanitary Inspector Good that she could cook where she is cooking". The Rent Restriction Ordinance (1941) section 7 (1) (C). as amended by Ordinance 13 of 1947, which extended control to include premises used mainly for business purposes, makes it permissible for an order for possession to be made against a tenant "if the tenant or any person residing or lodging with him or being his sub-tenant, has been guilty of conduct which is a nuisance or

annoyance to adjoining proprietors or to other tenants or to the landlord or has used the premises or allowed them to be used for an immoral or illegal purpose, or the condition of the premises has, in the opinion of the court deteriorated or become insanitary owing to acts of waste or the neglect or default of the tenant or any such person".

Megarry in his work on the Rent Acts cites on page 99 (4th-Edition) the decision of Mac Iver v. Struthers (1924) S.L.T. (Sh. Ct.) 15 (which report is not available in our library) as a case where it was held that "permitting premises to become dirty and malodorous, if this neither affects adjoining occupiers nor causes a deterioration of the premises" is not a nuisance under the Act. In Timmis v. Pearson (1934) L.J. N.C.C.R. 115, also cited by Megarry, it was held that an act was not a nuisance under the Act merely because it is made a nuisance for the purpose of some other statute. That was a case where the tenant was guilty of overcrowding the premises in breach of another statute.

The passage referred to in which appellant cocked is a passage which lies between 13A, Water Street and the urinal of a rum-shop owned by the superior landlord from whom respondent is renting. It gives access from Water Street to the yard at the back and both respondent and appellant, as co-occupiers of 13A, Water Street, are entitled to the use of this common passage way. Mr. Good, the sanitary inspector, complained on sanitary grounds about the cooking of food so close to a urinal and directed appellant to cease doing so. Whether or not appellant did obtain permission to cook there from Dr. Barrow, the Medical Officer of Health for Georgetown, is in our view immaterial for the purposes of this case. A nuisance under the Public Health law is not necessarily a nuisance which would furnish a foundation for an ejectment order under the Rent Restriction law unless it is one which reasonably interferes with the peace and quiet or the normal comfort which adjoining occupiers are entitled to enjoy, or, if adjoining premises are used for business, it is calculated reasonably to disturb normal business activities. It would, of course, be a ground for ejectment if it causes a deterioration of the premises themselves.

Although appellant by cooking there may conceivably have exposed herself to prosecution for a nuisance under the Public Health Ordinance, we do not see that the mere act of cooking in the passage way or keeping a food stall on the premises would come within the category of nuisance under the Rent Restriction Ordinance as indicated above so as to justify an order of ejectment. It is to be noted that the learned magistrate makes mention of the cooking in the passage as a nuisance on sanitary grounds only and not because of the curtailment of the free passage thereby, although respondent did produce a letter dated 27th February, 1949, received by him from Messrs. Kings, his landlord's solicitors, in which reference was made to the fact of the sub-tenant's "storing, on the premises of furniture etc. which

does not allow ingress to and egress from the premises and could cause serious damage to the premises in case of fire, etc." No evidence was given about any curtailment of the right of egress and ingress beyond the allegation contained in this letter. In the absence of a specific finding by the Magistrate as to the nature and degree of the obstruction resulting from the use of the passage way by the appellant, we cannot ourselves, on the evidence appearing in the record, declare that there was such continuous curtailment of the right of egress and ingress and of such a character as to amount to a nuisance justifying ejectment. No doubt because of the likelihood of obstruction in the passage way by leaving the cake shop and food stall there, appellant had some time before removed them into the barber shop itself. Mr. Good stated in his evidence that the keeping of food for sale stored in the barber shop would prevent an eating house licence being granted to either appellant or respondent.

Respondent has been carrying on his business of manufacturing noodles for some time at the back of the premises and this business, according to Mr. Good, has been increasing. Mr. Good had informed him that an application that year for the registration of the premises as an eating house would not be granted. It is difficult to see how the cooking and storing of food in her part of the premises could prevent respondent from obtaining an eating house licence for his part of the premises. Refusal of a grant of the licence would, one would imagine, be because of the un-suitability of the premises in respect of which the application is made.

We now propose to refer to the claim by respondent that he reasonably requires the demised premises for the purposes of his own business. The learned Magistrate held that respondent had established this reasonable requirement for his own business purposes and this was one of the grounds entitling him to the order of possession. We will assume that the Magistrate was right in his findings of reasonable requirement by appellant for his business. But while it is true that Section 7 (1) (e) (iii) of the Ordinance gives to the landlord the right to an order for possession of business premises for which he can show a reasonable requirement for his own business or for trade purposes, that is subject to the Magistrate being satisfied that it is reasonable in ail the circumstances to grant him possession (section 7 (1) (m) of the Ordinance).

The Magistrate in considering whether the making of the order would be reasonable under section 7 (1) (m) has to weigh all the relevant circumstances in the particular case. He is to exercise his discretion but it must be on judicial grounds. If it is shown that the Magistrate has given regard to the essential factors that should merit consideration, and has given a judicial pronouncement on the reasonableness or otherwise of making the order, his decision will not be disturbed on appeal. In the instant case which is a claim for possession of business premises for the landlord's own business, what is it that has been put forward

by the Magistrate as reasonable for the making of the order for possession?

In his reasons for decision he says:

> "In my opinion the plaintiff's application is reasonable and it becomes "more so because of the continued insanitary use the defendant was mak- "ing of the premises which precludes either of the parties from having the "use of the premises as licensed premises".

In commenting on the ground of nuisance, we have already dealt with the point of the alleged insanitary use of the premises by the appellant, holding that the alleged nuisance is not cognizable on the question of an order for possession under rent restriction legislation.

The learned Magistrate continuing to give his grounds for holding an order would be reasonable says: "The defendant's tenancy was for a barber shop which she is "now using as a cook and cake shop. This is a breach of covenant". With all respect to the learned Magistrate, this is not what is intended by section 7 (1) (m) of the Ordinance. The alleged use of the barber shop as a cake shop, if in breach of the condition of the tenancy is itself a ground for the order which is however subject to the over-riding condition that the Magistrate must find in addition that it is reasonable to make the order.

It is obvious from the foregoing that the learned Magistrate has confused a substantive ground for a possession order with the other additional general factors contemplated by section 7 (1) (m) to be taken into consideration in *determining the reasonableness* of the order. This Court therefore will itself analyse the evidence in the record and make its own decision in regard to reasonableness.

In this case the availability of alternative accommodation for the tenant though a point not to be entirely ignored is not a necessary condition of an order as it is where the demised premises are a dwelling house and the landlord requires the place not for himself but for the occupation as a dwelling house for any member of his family or someone in his actual whole time employment (vide section 7 (1) (e) (ii) and the proviso thereunder), nor is this a case where, though not a dwelling house, it is a business place which is required for a dwelling for the landlord's family or some person in his employment, in which case the Magistrate has to weigh the relative hardships to the parties by a grant or refusal of the order, including the availability of alternative accommodation.

We will say at once that in our view it would be unreasonable in this case to make the order, although respondent may reasonably require the premises for his present business or for extending the same. It is admitted that he once had the front portion on the southern side as a cake shop and had sold that including the good-will some years ago to Hussain, and confined himself to his

present portion at the back of the premises. At that time appellant's portion of premises was a barber shop, and she is now using it also as a cake shop and food stall, having transferred her site of this kind of trade from the passage way to the barber shop as a result of objections of the superior landlord and the Sanitary Inspector, which, it is suspected, were instigated by respondent himself. His object in seeking to eject her is to start a similar business of a cake shop himself and to acquire by her removal anything in the way of goodwill that her business enjoys. He will also be enabled to set up a rival business to Hussain to whom he had sold the good-will of his former business, but Hussain perhaps can, if it is available to him, and if he so chooses, adequately protect himself.

We deal later in this judgment with the subject of the claim that there has been a breach of a condition of the tenancy by using the place as a cake shop and we refer to the question of relief from forfeiture which in certain circumstances is available to the tenant, but we wish to stress here that though we see no reason to differ from the Magistrate's findings that the respondent reasonably requires the place for his business, we hold for the reasons given above, that the respondent is not reasonably entitled to the order on this ground because in all the circumstances and particularly because of what is stated above, we find that it would be unreasonable to make the order.

We now turn our attention to the ground that in using the premises as a cake shop appellant was guilty of a breach of a condition of the tenancy. The authorities furnished by many decided cases make it clear that, though a place is rented for a particular purpose, the tenant is not restricted from using it for any other purpose unless the restriction not to use the place otherwise is expressed at the time of the letting in clear and unequivocal language. But despite such an expressed condition against other user, if the landlord or his agent has become aware of the breach of the condition by wrongful user and continues to accept rent from the tenant without taking any step to terminate the tenancy, he will be taken to have waived his right of re-entry because of the breach of the condition. In the case of a continuing breach acceptance of rent would be a waiver of the breach up to the date of the receipt of rent but not subsequently. However, a distinction would appear to be drawn by the decided cases according to whether the acceptance of the rent after knowledge of the breach is during a period when the tenant holds under a contractual tenancy or has become a statutory tenant under the rent restriction statutes. In the latter case acceptance of rent after knowledge of the breach does not amount to automatic waiver of the breach as happens when the tenant holds under a contructual tenancy. In the case of a contractual tenancy acceptance of rent by the landlord with knowledge of the breach of the condition amounts to a waiver, though the acceptance may be accompanied by a declaration by the landlord that his receipt of rent is not to prejudice his right to forfeiture because of the breach. But when the rent is accepted from the statutory tenant, it is necessary to ascertain whether, in accepting rent from the

tenant, it was in fact the intention of the landlord to waive the breach and create a new tenancy with terms different from the old agreement.

In Oak Property Co. Ltd. v. Chapman (1947) 116 L.J. K.B. 1327, Evershed L.J. says at p. 1333:

> "By the common law, which tended to construe forfeiture provisions as ef-
> "fective to render leases voidable and not void, a landlord was bound, as
> "soon as he was aware of a non-continuing breach of covenant by the ten-
> "ant entitling the landlord to avoid the lease, to elect at once for or against
> "avoidance and to notify the tenant if he elected for the former. On this
> "principle acceptance of any rent accrued due after the landlord's knowl-
> "edge of this tenant's breach was regarded necessarily as inconsistent with
> "an election to avoid the lease and consistent only with its affirmance. The
> "acceptance of the rent being, in the circumstances an unequivocal act,
> "waiver of the breach followed, according to Parker J. in Matthews v.
> "Smallwood 79 L.J. Ch. at p. 329 as a matter of law, and so unequivocal
> "was the matter of law that the landlord was held disentitled to get the best
> "of two worlds by attempts to qualify the acceptance by stating that he ac-
> "cepted the rent without prejudice to the right of forfeiture."

In Wolfe v. Hogan (1949) 1 All E.R. 570, Denning L.J. says at p. 575, referring to the common law doctrine as to waiver for forfeiture:

> "A breach of covenant not to use premises in a particular way is a continu-
> "ing breach. Any acceptance of rent by the landlord after knowledge only
> "waives the continuance of the breaches up to the time of the acceptance
> "of rent. It does not waive the continuance of the breach thereafter, and
> "notwithstanding his previous acceptance of rent the landlord can still pro-
> "ceed for forfeiture on that account. Indeed, in the case of a continuing
> "breach the acceptance of rent after knowledge is only a bar to a claim for
> "forfeiture, if it goes on for so long or is accepted in such circumstances
> "that it can be inferred that the landlord has not merely waived the breach,
> "but has also affirmatively consented to the tenant continuing to use the
> "premises as he has done."

Turning now to the evidence, appellant testified that the place was first rented to her husband who carried on a barber shop there. After her husband's death she took over and paid the rent. She made no special agreement with respondent. On the other hand respondent swore that his agreement with the husband was for a "barber shop only". When she started the cake shop he told her "he did not like it." That was all the evidence as to the agreement of tenancy. It is of interest to ascertain what was the finding of the Magistrate in relation to this agreement. In his reasons he says: "*The defendant's tenancy was for a barber shop* which she is now using as a cake and cook shop. *This is a breach of the agreement.*"

It is not clear what the learned Magistrate means by the above. Does he accept the respondent's evidence that the tenancy agreement was for a "barber shop only?" If those were

the words used certainly setting up a cake shop there would be a breach of a condition, but not so if no words importing restriction of every other user were used, in which case a finding of breach of a condition of the agreement would be wrong in law.

Appellant's counsel submitted that at any rate there was a waiver of any such breach of condition by the landlord's subsequent receipt of rents. This was not raised as a defence in the Magistrate's Court, nor was it stated in the grounds of appeal as originally filed, but leave to amend the grounds of appeal was at the hearing before us allowed by the Court so that counsel might include waiver by receipt of rent as part of his case on appeal. Also for this purpose on counsel's application at the hearing before us some receipts for rent were tendered and admitted as fresh evidence with the consent of appellant's counsel, after leave of the Court was obtained to tender these receipts in evidence. The evidence showed as stated before that in February or March 1949 the appellant removed her cake shop business and food stall from the passage way into the barber shop. Respondent says he told her he "did not like it".

After this expression of his views concerning the use of the demised premises as a cake shop, respondent continued to receive rent each month with the knowledge that there was the continued user of the premises in this manner. It is true that on the receipts he continued to describe the rent money as being received for the rent of a "barber shop", but that fact even if intended to make it a qualified acceptance of rent was not sufficient to avoid the inference, which follows as a rule of law according to Parker J.'s decision in Matthews v. Smallwood that he had elected not to disaffirm the tenancy. If the cake shop in the premises started not in March 1949 as appellant in her evidence stated but in February 1949, as respondent's reputed wife, Carmen Cato, testified before the Magistrate, that was before the 8th March, 1949, the date of the hearing of the previous application made before Mr. Burton. That previous application, it is true, was based on a notice to quit dated 15th January, but the landlord was entitled to advance at the hearing, any ground for ejectment which had arisen since the notice. His omission to advance this ground of a breach of the condition of tenancy would be another reason for the inference that he regarded the tenant as not being under that restriction or at any rate that he had elected not to disaffirm the tenancy on that ground.

On the 5th April, 1949, after the dismissal by Mr. Burton. Mr. F. I. Dias, Solicitor, filed another plaint in the Magistrate's Court, Georgetown, on behalf of respondent claiming possession of the premises from appellant. The claim was based on a notice to quit dated 28th February, 1949, in which the ground for the notice is stated to be the requirement of the premises for the landlord's own business. Neither in that notice nor in the plaint is any reference to a breach of a condition of the tenancy. That case was fixed to be heard on the 10th April, 1949, but was withdrawn. If the premises were being used, without the landlord's approval, by appellant

in breach of a condition of the tenancy, was not the landlord's attitude such as would justify the inference that he was electing not to disaffirm it? Moreover, on the 10th June, 1949, he receives the monthly rent for the month of May, 1949, and gives the receipt in the customary form, but on the 29th June, 1949, he serves another month's notice to quit and for the first time in writing, he declares that the appellant had committed a breach of a condition of the tenancy by carrying on a cake shop on the premises instead of a barber shop.

As we stated before, we are not certain that, accepting the evidence of respondent as against that of appellant, the learned Magistrate found that respondent had made it an expressed condition that the premises were to be used for a barber shop only.

But even if there was a breach of such a restrictive condition in the tenancy entitling the landlord to determine the tenancy, we hold that he waived the right to determine the tenancy on that ground by his subsequent conduct in receiving rents and his attitude otherwise, which the tenant was entitled to construe, despite the landlord's expression of disfavour at first, as indicating his intention not to rescind the tenancy on that ground. But, as we have said, the Magistrate may have been guilty of an error in law, by holding that there was to be imported into the agreement a restriction in the use of the demised premises although no such restriction had been expressed.

In the result, we hold the order for possession was unjustified on any of the grounds given by the learned Magistrate in his reasons and after a review of all the evidence including the receipts admitted in evidence at the hearing before us we see no ground as justifying an order for possession against appellant and we accordingly allow the appeal, dismissing the order for possession.

As regards costs, the appellant's substantive ground of appeal—waiver by the landlord—was never put before the Magistrate. Even on appeal he did not include this on his grounds of appeal, but had to get leave to amend his grounds of appeal in order to be entitled to be heard on this point. It was even necessary to obtain leave to submit fresh evidence by tendering the receipts for rent which form the basis of the claim of waiver. Had the Magistrate been favoured with that plea and the evidence in support, he might have given a decision in appellant's favour thus avoiding an appeal by her. In the circumstances, the Court will not grant the appellant her costs. Each side will bear its own costs.

WILLIAMS v. CAMERON

(In the Full Court, on appeal from the Magistrate Court for the Georgetown Judicial District (Boland C.J. (Ag.) and Stoby J. (Ag.) July 12; September 14, 1951).

Rent Restriction Ordinance—possession—sub-letting by tenant without landlord's consent—statutory tenant—acquiescence—reasonable requirement—conduct of landlord.

During the year 1946 the respondent purchased a property of which the appellant's husband was a tenant of the lower flat. On that ground that he wished to extend his own business, the respondent applied to the Magistrate for possession on four occasions but each time his application was refused.

The appellant's husband died in 1948 and she remained in possession as a statutory tenant and sub-let a portion of the premises without the respondent's consent. Her husband had also been in the habit of subletting. After the death of the husband, the respondent made three attempts to eject the appellant on the ground that he wished to extend his own business. Each attempt was unsuccessful. A fourth application was granted on the ground that she had sub-let without his consent and because he reasonably required the premises for his own use and it was reasonable to make the order. On appeal,

Held: Although the acceptance of rent subsequent to the sub-letting was not an acquiescence in it since the appellant was a statutory tenant, as his repeated applications for possession were not based on that ground, it would be implied that he was not objecting to it.

From the landlord's prior conduct, it was manifest that the real motive of the landlord was not the legitimate extension of his business but the dispossession of the tenant to obtain vacant possession and the Magistrate was not justified in holding that the landlord reasonably required the premises for his own use.

Appellant in person.

C. V. Wight for the respondent.

Judgment of the Court: This is an appeal from the decision of the learned Magistrate and Rent Assessor of the Georgetown Judicial District ordering the appellant to deliver up possession of business premises to the respondent.

During the year 1946, the respondent purchased premises at 37, Camp Street. Georgetown. He also owns the building next to it where on the ground floor he carries on a business and he lives upstairs. At the time when respondent acquired the property at 37, Camp Street, the appellant's husband was the tenant of the lower flat; he was then carrying on a laundry business in a portion of the rented premises and was sub-letting the other part to persons who were engaged in varying kinds of business.

The business of the respondent at his property next to 37, Camp Street is that of a grocer and general merchant and, alleging a desire to extend the sphere of his commercial activities by establishing a restaurant and probably a furniture shop at 37, Camp Street, he had previously endeavoured to determine the tenancy of the appellant's husband by serving him with a notice to quit; and upon the latter's failure to vacate, proceedings were taken before the Magistrate and Rent Assessor but without success. On three subsequent occasions efforts were similarly made

to obtain an order for possession from a Magistrate but each proved fruitless.

The appellant's husband died in 1948 and thereupon the respondent renewed his efforts to obtain possession. Three attempts to eject appellant by Court proceedings were unavailing, but on the fourth occasion, his persistence was rewarded and this appeal is the result.

It was argued in the court below and in this court that the landlord (respondent) was entitled to possession on two grounds:

(a) that the tenant (appellant) had sub-let the premises without his consent in writing, contrary to section 18 of Ordinance 13 of 1947 and had thereby committed a breach of an express obligation of the tenancy, and

(b) the premises were reasonably required by the landlord for use by himself for trade purposes.

The evidence is conclusive that the appellant did sub-let without having obtained the consent in writing of the respondent but it was urged on her behalf in the court below that the respondent had acquiesced in the sub-letting by accepting rent after knowledge that the tenant was sub-letting.

In order to determine whether any question of acquiescence arises, it is necessary first to decide whether the appellant at the time of the receipt of rent by the landlord with knowledge of the sub-letting by the tenant was or was not a statutory tenant, because in the case of a statutory tenancy, receipt of rent from the tenant is not to be deemed a waiver of the right to possession following upon a breach of the tenancy. Ordinance 13 of 1947 enlarged the application of the Principal Ordinance No. 33 of 1941 by bringing under control all public or commercial buildings whether let, furnished or unfurnished, and section 11 amending section 10 of the Principal Ordinance enacts that:

> "a tenant who by virtue of the provisions of this Ordinance retains posses-
> "sion of *any premises* to which this Ordinance applies shall, so long as he
> "does so, observe and be entitled to the benefit of all the terms and condi-
> "tions of the original contract of tenancy so far as they are consistent with
> "the provisions of the Ordinance and shall only be entitled to give up pos-
> "session of the premises on giving the notice which would have been re-
> "quired under the original contract of tenancy."

It is clear from the reference to "any premises" in section 18 that the protection afforded by the Rent Restriction Ordinance 1941 to a tenant of a dwelling house who remains in possession after the contractual tenancy has been determined is, since Ordinance No. 13 of 1947 came into force, also afforded to a tenant of business premises. In this respect the law of this colony differs from the law of England where the rights and privileges given to statutory tenants have no application to business premises for the simple reason that only dwelling houses and not business premises are within the Acts—vide Smith L.J. in Hoskins v. Lewis 1931

2 K.B. p. 13. Section 13 of the Increase Rent and Mortgage Interest (Restrictions) Act 1920 did bring business premises in England under control until the 24th June, 1921, but that provision was not renewed and was repealed by the Statute Law Revision Act 1927, S. 1 and Schedule.

In accordance with the law enunciated above, it is clear that both appellant's husband and herself who held over after the expiry of a valid notice to quit become from that time a statutory tenant. It is true that the acceptance of rent from the husband by the respondent after notice, though with knowledge of a breach of the condition of the tenancy would not operate to create a new contractual tenancy, but as his repeated proceedings for possession were not based on that ground it would be implied that he was not objecting to the husband's sub-letting. After the husband's death respondent continued to receive the rents without disapproving of the sub-letting. Was she not entitled to assume that the landlord, who must have known about the subletting, was making no objection to her continuing to sublet? His continuing to receive rent from her, his omission to advance that as a ground for an order for possession in each proceeding prior to the one which is the subject of this appeal combine to make it unreasonable in the circumstances to order possession against the appellant on a claim for possession by her landlord based on the ground of the breach of a condition of the tenancy. To us, it is manifest that respondent's complaint was not about sub-letting —what he was urging was that he required possession for the extension of his business.

We now turn to this main ground on which the respondent based his application before the Magistrate and Rent Assessor, namely, that the premises were reasonably required for use him for trade. The Magistrate and Rent Assessor found that the premises were reasonably required because the respondent purchased the building with the intention of using it for himself and had shown a desire from the date of the purchase to extend his own business.

Purchasing a house or business premises in order to occupy it as a dwelling house or carry on a trade is indeed a legitimate and praiseworthy object especially at a time, when, due to a scarcity of housing accommodation the best security of tenure is ownership and not dependence on the protection afforded to the tenant by the Rent Restriction Ordinance. But the intention to occupy the premises and the desire to extend one's business must be genuine, and if from the landlord's prior conduct or from other circumstances it is manifest that the real motive for extending his business is merely to furnish a good ground for an order to dispossess the tenant which he thinks otherwise would not be obtainable, then the requirement would obviously not be reasonable.

As stated the evidence discloses that the respondent is at present carrying on a general business in the building next to the one in which he desires to extend his business. He is also the owner of this other building. On purchasing Lot 37, Camp

Street in 1946, it would appear that he did plan to have these two adjoining premises converted into one building. He says that his purpose at the time was to open a restaurant in the portion belonging to Lot 37. But an application made to the Town Council for permission to effect the necessary connection between the two buildings was refused, and appellant was forced to abandon his scheme. There are no details of the exact nature of his general business, the volume of trade, his profits, the need for a restaurant in the locality and correlated facts which could induce a court to find that his intention to open a restaurant at Lot 37 despite his being unable to carry it on under the same roof as his present general business is genuine. On the other hand there is evidence that he buys and sells house properties and that in 1948 after dispossessing the tenants of a house ostensibly for the purposes of effecting repairs, he sold it instead.

The learned Magistrate, it is clear, did not take into consideration this feature of the respondent's claim for possession as disclosed by the evidence and we are of opinion that in view of the evidence having established that the real motive of the landlord is not the legitimate extension of his business but the dispossession of the tenant, so as to get vacant possession, the Magistrate was not justified in holding that the landlord reasonably required the premises for his own use.

In view of this finding it is unnecessary for us to consider whether, had there been reasonable requirement, it would have been reasonable to make the order but we may observe that we consider as not genuine the offer made by respondent to allow the appellant to remain in occupation of half the premises if she would give up possession of the other half so as to allow him the use of the other half. True the appellant agreed to this at first, but subsequently refused. The respondent knew that it would be impossible for the appellant to carry on her laundry in half of the premises and he was sure that sooner or later he would achieve his real purpose which was to get vacant possession of the whole place.

Accordingly in our view the order for possession was wrong and we allow the appeal As appellant was not represented by counsel or solicitor at the hearing on appeal, we award her no costs but leave is granted to her to uplift the sum deposited in Court to abide the costs of appeal.

Appeal allowed.

ROSE v. HANOMAN

(In the Supreme Court of British Guiana, Civil Jurisdiction (Boland C.J.) May 8, 9, 10, 11, 16, 17, 18, 22, 23, 25, 29, 30, 31; June 4, 5, 6, 11, 12, 13, 14, 18, 19, 20, 21, 25 and 26, September 18, 1951).

Immovable property—transport—devolution of title—praedial servitude—not annotated on transport of dominant tenement but on servient tenement—Roman Dutch Law—how right to servitude properly constituted—how extinguished—prescriptive user—Civil Law of British Guiana Ordinance Chapter 7*—Deeds Registry Ordinance Chapter* 177*—Effect of in relation to servitudes by prescription—acts and conduct of owner of dominant tenement as affecting servitude—non-user—does not extinguish.*

Plantation Susannah is an area of land situate on the east sea coast of Berbice. From an early date it was divided into an eastern half and a western half; this latter part is subdivided into two.

The plaintiff is the owner by transport since 1888 of the west half of the western half of Susannah and since 1924 of a small piece on the east half of the western half. The defendant is the owner of the eastern half but at the date of trial had not obtained his transport from the previous owners Messrs. Booker Bros.

On the 3rd June, 1862, the then owner of Plantation Susannah transported the eastern half of it to B. On B's transport there is annotated the words "Subject to the condition that each of the proprietors of the eastern and western halves of said plantation shall have the right of grazing cattle over the whole plantation." This annotation appears on every transport for the eastern half including the transport of Messrs. Booker Bros., who sold to the defendant.

No corresponding annotation appears on any of the transports held by the plaintiff except that he is given in the 1888 transport a right to depasture cattle over the eastern half of the western half.

The plaintiff claims that by virtue of the annotation of the servitude on the eastern half referred to above, he was in the habit of depasturing his cattle on the eastern half. The defendant soon after his purchase of the eastern half impounded plaintiff's cattle and in consequence thereof the plaintiff brought this action claiming *inter alia* damages for the wrongful impounding of his cattle and a declaration that he holds a servitude to depasture his cattle on defendant's eastern half. At the trial in support of his right to the servitude the plaintiff submitted:

(1) evidence of the registration of the servitude in every transport for the eastern half since 1862.

(2) Evidence of prescriptive user.

The defendant contended that the plaintiff possesses no servitude as claimed because

(1) the plaintiff's transport has no right to such servitude annotated on it.

(2) If any servitude existed it was already extinguished by the owner of the dominant tenement.

(3) The right to servitude, if any, was abandoned by the acts of the plaintiff.

As to prescriptive user the defendant challenged the plaintiff's facts and relied in any event on extinguishment by purchase at execution sale and the Deeds Registry Ordinance Chapter 177.

Held: The annotation on B's transport for the eastern half in 1862 created a praedial servitude for cattle kept at Susannah. This servitude is immovable property and as such was capable of transfer by the proprietor of the western half only by transport, but the mere passing of transport of the dominant tenement by the owner does not pass to a transferee any praedial servitude to which the transferor may be entitled by reason of his ownership of the dominant tenement unless contemporaneously with the transport of the dominant tenement he also

expressly transports the right of real servitude enjoyed by the land. Steele v. Thompson (1860) 13 Moore. Privy Council Cases p. 280, applied.

Assuming the plaintiff had established prescriptive user, it could not have in the absence of actual notice affected Bookers on whose transport there was no registration of a servitude by prescription and consequently could not affect the defendant.

The plaintiff has no right of servitude for grazing cattle on the eastern half of Susannah either by grant or by prescriptive user.

Sir Eustace Woolford K.C. with B. O. Adams for the plaintiff. H. C. Humphrys K.C. and S. L. van B. Stafford K.C. with S. D. S. Hardyal for the defendant.

Boland C.J. (*Acting*)*:* This action has arisen out of the seizing and impounding by the defendant and his agents of cattle belonging to the plaintiff which, it is alleged, took place on certain dates at the end of August and during the month of September 1947. In justification, defendant claims that the cattle were found illegally trespassing on his lands. The plaintiff and the defendant are each proprietors of a separate portion of what is described as Plantation Susannah, otherwise known as Lot Number 15 which is situate on the east sea coast of the County of Berbice.

Plantation Susannah, as will be seen when a description later is given of the manner in which portions of it were sold from the entire plantation, was from an early date divided into an eastern half and a western half. While the whole of the eastern half was from time to time transferred from owner to owner without any sub-division and is still so held, the remaining western half was itself first sub-divided into two halves, that is, into a west half of the western half and an east half of the western half Subsequently, this east half of the western half was from time to time sub-divided into many small sub-divisions, each of which was held separately by purchasers. Accordingly it will be found convenient in this judgment to refer to Plantation Susannah as comprising three portions, namely, the eastern half, the west half of the western half, and the "multiple proprietors' " portion of the western half. Also, there is the Public Road running from east to west which intersects the entire plantation Susannah and thus divides it into a northern area whose northern limit is the Atlantic Ocean and a southern area whose southern limit is the Grand Canal. Whether or not in its very early history there was some sort or cultivation carried on at Susannah which caused it to be called a plantation, no trace of which however remains, it is a fact that Plantation Susannah like all the lands on the Berbice east sea coast, commencing from a period going right back almost to the middle of the last century and continuing right up to the present day, has mainly been occupied as lands for rearing cattle. True, a few dwelling houses came to be built alongside the Public Road but these were occupied by persons engaged in the cattle industry in Susannah. Later, in the area south of the Public Road, there arose rice cultivations which year after year endeavoured to struggle through the vicissitudes attendant upon scarcity of water which is so essential for rice growing.

On the 25th June, 1947, the defendant acquired from Messrs. Bookers Sugar Estates Limited the eastern half of Plantation Susannah. He has not yet obtained formal transport, but by letters which passed between plaintiff's counsel and defendant's counsel, it was agreed that no objection would be taken in this action against the assertion of any right in the defendant solely on the ground that he is not yet the owner by transport, and accordingly, for the purposes of this case the defendant is regarded as if transport of these lands had already been duly passed to him at the date of the impounding of the cattle.

Plaintiff on the dates of the impounding of his cattle, was the owner by transport of two other portions of Plantation Susannah, one piece being the west half of the western half of the said plantation—and the other a piece falling within the "multiple proprietors' " east half of the western half. This latter piece which adjoins plaintiff's west half of the western half is three roods wide from east to west and has the same depth as that of the entire plantation—that is to say, it is bounded on the north by the Atlantic Ocean and on the south by the Grand Canal Dam; and it is intersected by the Public Road referred to above.

As regards the west half of the western half, the plaintiff acquired this in the year 1888 and holds a transport for same from the assignee of the creditors of Charles Edwin Hooton an insolvent. The Plaintiff's three roods wide piece in the "multiple proprietors' " part of the western half he acquired by transport in 1924 from one of the "multiple proprietors". It may be also mentioned here that while these proceedings were pending plaintiff has transferred this smaller piece of land to his son David Rose. This was done, not with any fraudulent design to avoid execution in the event of judgment against him, but to give David Rose, who owns cattle on this piece of land, the right of the servitude to graze his cattle every where in Susannah which his father claims in this action to be the right of every proprietor of the Plantation.

The defendant as stated above, does not deny that the plaintiff's cattle were impounded by him. He claims that these animals were illegally trespassing on his eastern half. What this court is called upon to decide is whether, as plaintiff claims, those particular cattle which were seized and impounded were entitled to free pasturage on the eastern half of Susannah by virtue of being cattle belonging to plaintiff who is a proprietor of Susannah; for it is clear that if plaintiff as a proprietor of the plantation did at the time possess in law a right to the pasturage of these cattle on the eastern half, then the seizing and impounding by defendant would indeed be a trespass against the plaintiff and defendant would be liable to him in damages. Further, in such a case, plaintiff would also, as he claims, be entitled to an order for an injunction in restraint of any threatened or further intended violation by defendant of this right of pasturage belonging to the plaintiff. On the other hand if plaintiff fails to establish his right to have these particular cattle go on to defendant's land, the defendant, as he has claimed in his counterclaim, would be

entitled to damages against the plaintiff for the trespass by his cattle and also to the remedy by injunction, if plaintiff is likely to let his cattle continue to trespass on the defendant's eastern half. As both sides are at issue on the question whether plaintiff has a right of depasturing his cattle on the defendant's east half of Susannah, and as the plaintiff has specifically in his pleadings asked the Court by way of judgment, to issue a declaration as to his rights in this regard, the Court has given consideration to the question whether it is within the court's power in this case to make the declaration and also whether it is expedient in the circumstances for the Court to do so.

To summarise what is submitted for the court's adjudication by each party, the plaintiff's case is that he holds a servitude to depasture his cattle on defendant's eastern half and that his right is established by:

(1) Evidence of the registration of this servitude on every transport relating to the eastern half commencing from the time when the first transport in respect of the eastern half was passed—that is to say from the time when first the owner of the whole of Susannah sold out the eastern half right down to the transport held by Bookers who is the last holder by transport before the sale to the defendant; and/or

(2) Evidence of prescriptive user.

As against this, the defendant's case is that the plaintiff possesses no servitude as claimed because:

(1) The plaintiff himself holds no transport which purports to pass the right of any such servitude to him—and it is accordingly contended that plaintiff not being as admitted an original party to the creation of the servitude, he can acquire no right to a servitude, as such right to servitude was not legally constituted and transferred to him by transport in the same manner as he acquired ownership of his lands. As a corollary to this the Defence further contends that the annotations relating to the burden of servitude on the transports in respect of the east half, the servient tenement, are by themselves, insufficient to give to plaintiff the right of a servitude as holder of a dominant tenement.

(2) The servitude if indeed legally created originally, was extinguished by the original owner of the dominant tenement who transferred the dominant tenement without including a transfer of this right of servitude, the servitude was also extinguished when there was specifically a grant by transport of, not the full servitude, but only a limited servitude.

(3) The right to servitude, if existing at time of plaintiff's acquisition of his land, was extinguished by abandonment because of certain acts of plaintiff himself or by his permitting conditions to exist inconsistent with the exercise of the right to servitude.

And as to the claim by prescriptive user:

(4) The plaintiff did not in fact have user uninterruptedly and as of right for the period prescribed by law; but assuming that plaintiff from the time of his purchase was enjoying continuously this servitude right up to the time of defendant's purchase he cannot, though the time may be a sufficient prescriptive period, assert his claim to a prescriptive title without proceeding by Petition for a declaration of title in the manner provided by Ordinance.

(5) Assuming but not admitting that there was an uninterrupted prescriptive period of user of the servitude by defendant and his predecessors in title, such right of prescriptive user was extinguished by sales at execution of the eastern half—the servient tenement—prior to defendant's purchase.

(6) Defendant is protected by Ordinance against any defeasance of his title except such as was registered on Bookers' transport at the time of his purchase, and no servitude by prescription is registered on Bookers' transport from whom defendant purchased.

I shall proceed to consider first, plaintiff's claim to the servitude as based by him on what is recorded on instruments of transport. It will be necessary to go right back to the time when the servitude came into existence. The evidence shows that the right to graze cattle on a part of Susannah not owned by the grantee was first granted to a part owner of Susannah by a man called Britton who on 3rd June, 1862, acquired Plantation Susannah by transport No. 5154 of 1862. On the day of his purchase he transported the eastern half thereof to one D. Burns It is very probable that Susannah was purchased by Britton in pursuance of an agreement between him and Burns whereby Britton immediately on purchase was to transport the eastern half to Burns. Be that as it may, on Burns' transport of the eastern half, No. 5153 of 1862 there is annotated the words:

> "subject to the condition that each of the proprietors of eastern and west-
> "ern halves of said plantation shall have the right of grazing cattle over the
> "whole plantation."

In determining what rights and obligations flowed from the use of the above words thus incorporated in the transport to Burns of the eastern half, one has to view the position in the light of the rules of Roman Dutch law which was the legal system that at that date defined and governed all rights and obligations whatever relating to immovable property in British Guiana.

It is clear that this annotation on Burns' transport evidenced an agreement between Burns and his vendor Britton that Burns' land, the eastern half, was to have the burden of depasturing cattle belonging to other proprietors of Susannah. I shall leave aside for the moment the consideration of the question as to how far this annotation on Burns' transport affected Britton's western half in respect of the burden of depasturing there cattle belonging

to other proprietors of Susannah, that is to say, whether this annotation was sufficient to give Burns the right to the servitude over Britton's western half. It is proposed now to confine attention to the subject relating to the burden purported to be imposed on Burns' eastern half by the agreement. Here was effected something, in derogation of the full right of ownership by Burns in his eastern half. Is the agreement to be construed as intending to reserve to Britton personally this right of pasturage over Burns' eastern half, or was it a right intended to be exercisable not only by Britton but also by every subsequent proprietor of the western half? To me it seems clear from the words used that the agreement meant to confer mutual rights and obligations in respect of pasturage not on Britton and Burns alone, but on the respective proprietors of those two newly divided halves of Susannah. In those days when conveyancers were more meticulous and precise in language than is the practice nowadays, it would seem by the words used to have been intended that the enjoyments and burdens under the agreement were not to be restricted to Burns and Britton but were to be applicable to such persons as might have ownership of the lands; otherwise the names of Britton and Burns would have been mentioned specifically instead of the mere reference to "proprietors". Besides Britton who created the servitude must have contemplated at the time the possibility of either party selling his portion of land either in whole or in part, which he did do later as the record of the devolution of his western half as described later will show.

In my view there was created and then came into existence, properly constituted by this agreement as evidenced by the annotation on Burns' transport, what is known in Roman Dutch Law as a real or praedial servitude capable to belong and available to be transferred to all persons who might happen to be a proprietor of the western half entitling such proprietors to depasture their cattle on the eastern half. A real or praedial servitude is to be distinguished from a personal servitude by the fact that the essence of the former is that it is a right attached to immovable property while the latter is attached to a person irrespective of his ownership of land. The holder of a personal servitude has a right over the property, movable or immovable, of another—a jus in re aliena which however cannot extend beyond his own life. A mere agreement evidenced by formal registration on the title of the servient tenement was in Roman Dutch law sufficient to create a servitude between the parties to the agreement provided the land encumbered with the burden, the servient tenement, was, as it is in this instance, contiguous with the land to enjoy the privilege—the dominant tenement. In other words, to create the servitude there was in Roman Dutch law no necessity for an annotation of the agreement to be made on the transport then held by the dominant tenement. An annotation on the servient tenement evidenced that there was symbolic or quasi delivery of the servitude by the owner of the servient tenement. Professor Lee in his treatise "An Introduction to Roman Dutch Law"—3rd Edition at p. 175, in enumerating the ways in which praedial servitudes are acquired gives as his first

instance "Agreement followed by acquiescence by the owner of the servient land". Nevertheless, annotation or registration against the title of the servient tenement or praedium serviens is not a useless formality. It is in Roman Dutch Law not without its usefulness because although a bare agreement without registration is sufficient to bind the immediate parties to the agreement, registration against the title of the praedium serviens gives notice to an intending transferee of the praedium serviens that there is this burden of servitude on the land. Unless such transferee has actual notice he would not without such registration be affected by the servitude, a rule which after all is but fair and just and which is in accord with one of the basic principles of English equity jurisprudence. But more with respect to this later.

Having determined that the servitude which under the agreement between Burns and Britton was a real or praedial servitude and not a personal servitude, I now propose to consider the question as to what cattle belonging to a proprietor was by the agreement entitled to be depastured on the servient tenement. The case for the defence is that the impounding in respect of which the plaintiff brings his action—that is the impounding in August and September 1947 as specified in his Statement of Claim was of cattle not from plaintiff's Susannah lands but from Plantation Bohemia which is a plantation also belonging to Plaintiff adjoining Susannah on the east—that is immediately to the east of defendant's eastern half of Susannah.

Plaintiff denies that the cattle impounded on those dates belonged to his Bohemia Plantation insisting that they came from his Susannah lands, but it would seem from plaintiff's evidence under cross-examination and from the submissions of his counsel that although denying that the cattle came from Bohemia, it is never-the-less claimed that the plaintiff as a proprietor of Susannah is entitled to enjoy this right of servitude in respect of any cattle he may own no matter that they were not kept by him at Susannah. He claimed the right to bring his cattle to graze on defendant's eastern half from any place however remote from Susannah.

Later in this judgment, the Court has given its findings on the above issue of fact. The Court has found for the reasons given below that the cattle came from Bohemia; it is none the less necessary for the purpose of declaring the rights of the parties in relation to depasturage of their cattle in each other's portions of Susannah to construe this agreement of servitude between Britton and Burns so as to determine if it included the right of pasturage for each other's cattle whether such cattle belonged to Susannah or not.

There is no evidence as to whether either Burns or Britton had at that time cattle anywhere else or that either contemplated having cattle at any place other than at Susannah so as to wish to include grazing rights for any cattle likely to be brought to Susannah for the benefits of the servitude. To the court, it would seem preposterous to have such an agreement without any provision for some limitation of the area from which such cattle could come and the number which might be so brought. But quite

apart from this, the very essence of a praedial servitude is its attachment to contiguous land and not to a person. It would therefore be repugnant to the essential nature of a real servitude if there were introduced an element of user of the servient tenement by the owner of the dominant tenement which did not flow directly from his occupation of the dominant tenement. I have not the slightest hesitation in construing the agreement of servitude to mean that the cattle, which the owner of the dominant tenement would be entitled to graze on the servient tenement would be only those cattle that would be usually kept on the dominant tenement by its owner and not other cattle from elsewhere, albeit his awn, brought ad hoc, or allowed by him to enter on the servient tenement.

In his submissions on the law during the course of his address for the Defence, Mr. Stafford sought to contend that the phrase "right of grazing" without any modifying words has in Roman Dutch law a special signification when used in reference to a real servitude. He submitted that the phrase gives to the owner of the dominant tenement the right to graze on the servient tenement only such *cattle as he may have in use for the purposes of the dominant tenement* and no other cattle. Any pasturage on the servient tenement beyond what is sufficient for the needs of the cattle kept for the use of the dominant tenement is, Mr. Stafford contended, unaffected by the servitude. It would include cattle kept for ploughing agricultural lands or for draft purposes in connection with the occupation of the dominant tenement. But, he submitted, cattle kept for breeding purposes or as the stock-in-trade of a cattle dealer owning the dominant tenement would not come within the right to be depastured on the servient tenement by virtue of the phase "right to grazing" without modifying words importing that such cattle are to be included. Counsel cited Nathan's Common Law of South Africa, a treatise based on Voet's Commentaries on the Pandects, which in Vol. I, page 488 para. 721 (1904 edition) states in reference to rural servitudes "Under the jus pascendi, the right to pasture cattle on another man's land, *only cattle used for the purpose of the dominant tenement are included*." I cannot agree with this contention. Perhaps if Britton and Burns at the time of the agreement for mutual servitudes were each occupying cultivated lands or contemplated carrying on thereon some industry which might require the use of cattle, it could be said that the right of pasturage on the servient tenement was intended to be limited to such cattle. But whatever may have been the nature of the occupation of Susannah before Britton and Burns became owners, the evidence of witnesses who testified on this point is that Susannah has been known within the memory of living persons as land always used exclusively for cattle rearing, and that apart from the rice cultivations which commenced to be pursued in the southern portion only until many years after both Burns and Britton had gone out of occupation. Susannah had remained in the main cattle rearing lands. In view of the circumstances in which Britton and Burns entered into the agreement of servitude, I hold that as between Burns and Britton, the cattle which could have been depastured under the

servitude created by the agreement were all cattle maintained on the dominant tenement.

So far I have been dealing with the real servitude over the eastern half created by the agreement between Britton and Burns and have defined the rights and obligations of these two parties to the agreement in their respective capacities of owner of the dominant tenement and the owner of the servient tenement. As a result of the agreement Burns, it was pointed out, had his full ownership of the eastern half curtailed by this real servitude of pasturage reserved by Britton in favour of the western half.

I shall pass on now to consider how far this right of servitude over the eastern half can be held by transferees of the western half, and also the burdens and obligations of the eastern half, when held by transferees of that half. In course of time, the ownership of both the western half and the eastern half passed from Britton and Burns respectively to other persons, and it is necessary to consider if and by what means the real servitudes also passed to the transferees.

Britton in the year 1876 transferred by transport the east half of his western half to a man called Thomas Howard, retaining for himself the west half of the western half which in course of time after intermediate ownerships got transferred to the plaintiff. I shall trace the devolution of the west half of the western half from owner to owner down to the acquisition by the plaintiff, which was in the year 1883, and shall consider whether the real servitude over Burns' eastern half which Britton as a proprietor of Susannah—that is a proprietor of the western half—enjoyed by virtue of this agreement, did descend to each transferee of that western half including the plaintiff in whom became vested a portion only of the western half, namely, the west half of the western half.

The following gives an abstract of the title of the plaintiff to his west half of the western half —

(1) *3rd June,* 1862—Transport No. 5154 of 1862, Britton becomes owner of entire Plantation Susannah.

(2) *3rd June,* 1862—Britton remains owner of western half only having transported on this day by Transport 5153 of 1862 the eastern half of Susannah to Burns—contemporaneous agreement between Britton and Burns as to mutual real servitudes in respect of grazing cattle evidenced by writing incorporated on Burns' transport of eastern half in the following terms —"*subject to the condition* "*that each of the proprietors of the eastern and western halves of* "*said plantation shall have the right of grazing cattle over the* "*whole plantation*".

(3) 16th *September,* 1876—Britton remains owner only of west half of the western half of Susannah having on this day transferred to Thomas Howard the east half of the western half (Transport No. 64 of 1876) "*with the right of free pasturage to Thomas Howard*

"*over the whole of the said Plantation, and subject to a right of* "*pasturage over the said eastern half of the western half of the* "*said plantation to the said Paris Britton, his heirs, executors,* "*administrators and assigns.*"

(4) *27th December,* 1878—Death of Britton.

(5) *6th January,* 1879—Deposit of will of Britton with due proof of execution. Will directs sale of Susannah lands and after payment of legacies and debts to hold residue to Britton's wife.

(6) *8th July,* 1887—Letters of decree in favour of Charles Edwin Hooton in pursuance of sale at execution on 27th April, 1886. Property is described as "western half of the "western half of "plantation called Susannah *with right of free pasturage to Tho-* "*mas Howard over the whole of the said Plantation and subject* "*to the right of pasturage over the said eastern half of the west-* "*ern half of the said plantation to Britton, his heirs, executors,* "*administrators and assigns.*"

(7) *22nd March,* 1888.—Transport No. 26 of 1888 from Thomas Dagliesh assignee of the creditors of Charles Edwin Hooton, an insolvent, to Archibald Rose (the plaintiff)—Property—the western half of the western half of Plantation Susannah "*with right of* "*free pasturage to Thomas Howard over the whole of the said* "*plantation and subject to the right of pasturage over the eastern* "*half of the western half of the said* plantation to Paris Britton, his "heirs, executors, *administrators and assigns.*"

Now, as regards the plaintiff's parcel of land, three roods wide in the east half of the western half—"the multiple proprietors' " portion—this came down to plaintiff through intermediate transfers and finally by transport No. 122 of 1924 dated 21st June, 1924, made in pursuance of a sale in execution proceedings dated 14th February, 1924, and granted to the plaintiff Archibald Rose by James Henry Nathoo, Marshal of the Supreme Court, the property therein described being a piece of land three roods wide as shown on a certain plan. It is described as bounded on the west by the property of A. Rose—that is the west half of the western half. It is to be noted that no right of servitude nor any burden of servitude is mentioned in this particular transport.

In considering whether the real or praedial servitude to graze cattle on the eastern half of Susannah created by Britton for the enjoyment of the proprietors of Susannah passed to the transferees of the western half, it is necessary to see whether there is any form for a transfer of a praedial or real servitude prescribed by Roman Dutch law, which as already stated governed at this time all rights and obligations pertaining to immovable property in British Guiana. Roman Dutch law, it seems clear, regarded a servitude over another person's land as a part of the latter's immovable property actually extracted from his full right over

same. This extracted part is itself immovable property and therefore was considered subject to all the rules relating to the transfer of immovable property. Though a mere agreement for a praedial servitude is enforceable by either party to the agreement as was stated before, once it does exist and is fully constituted in law and registered on a transport, it can be transferred only in the manner prescribed for the transfer of immovable property. A right to a praedial or real servitude is, as stated, one which is vested in a person by reason of his ownership of land in contiguity with the land bearing the burden. It would seem that by the doctrine of Roman Dutch law the owner of the right to the real praedial servitude has two distinct pieces of immovable property. He has:

(a) the immovable property—the land which enjoys the servitude, that is the dominant tenement; and

(b) the immovable property which is the praedial or real servitude over the contiguous land—an extraction, which is itself immovable property, from the full right of ownership on the contiguous servient tenement.

In the year 1858, this Court constituted by Arrindel C.J., and Beete and Alexander JJ. in its judgment in Steele v. Thompson, which on appeal was confirmed by the Privy Council (vide Steele v. Thompson (1860) 13 Moore Privy Council Cases p. 280 at p. 287) stated:

> "A servitude on land (bona immobilia) partakes of the nature of the prop-
> "erty, and is classed or considered as immovable property,"

and pronouncing the judgment of the Privy Council, Lord Kingsdown said:

> "It is admitted that the servitude in question is of the character of immov-
> "able property and like other immovable property can only be passed ac-
> "cording to the Roman Dutch law, which prevails in the colony, by a pro-
> "ceeding in the presence of some judge of the place in which the property
> "is situate"

In British Guiana the method of transfer of immovables takes the form of the procedure by transport which receives authentication in a court proceeding, formerly before a Judge, but now before the Registrar of the Supreme Court. Of course, there is the exception which applies to all immovables that it may pass on death of the owner through his proved will or by inheritance under an intestacy without requiring the bringing of any special proceeding before a judge to obtain judicial recognition of the transfer, but devolution of the property of a deceased person is controlled by the Court in its grant of probate of a will, or a grant of letters of administration on intestacy. Therefore, the passing of transport of the dominant tenement by the owner does not pass to a transferee any real or praedial servitude to which the transferor may be entitled by reason of his ownership of the dominant tenement unless contemporaneously with the transport of the dominant tenement he also expressly transports

the rights of real servitude enjoyed by the land. He may effect the transfer of the servitude by incorporating such transfer of the right to servitude in the transport of the land itself, as is the more usual manner, but he may none the less effectively transfer the right to servitude by a collateral document of transport made contemporaneously with that relating to the land. This was decided by the Privy Council in Steele v. Thompson (supra), a decision on appeal coming from the colony of British Guiana. In that case the servitude was in respect of the use of a canal, the bed of which belonged to the owner of land through which the canal flowed. In agreeing to sell the adjoining land which he also owned, the vendor in his articles of agreement which was duly recorded in the Colonial Secretary's Office, agreed with the purchaser that the canal shall be for the joint use and benefit of the proprietors of both pieces of land with liberty to each proprietor to modify the course of the canal at his own expense provided the run of water therein was not thereby impeded. In pursuance of the agreement of sale, transport in favour of the purchaser was subsequently duly passed transferring the land to him "agreeably to contract of sale and purchase recorded in the Colonial Secretary's Office." At a later date the purchaser had his land transferred by execution sale and letters of decree to a person who subsequently sold it to the appellant and duly passed transport in favour of the appellant; and also the original owner of the two adjoining lands subsequently transferred to the respondent the piece of land which he had retained. Neither in the transport of the dominant tenement nor in that of the servient tenement was there any reference to the servitude. An obstruction of the canal by the respondent led to an action by the appellant in which was raised the question whether the right to the servitude in respect of using this canal was vested in the appellant. The Supreme Court of British Guiana before which this action was brought, held that it was not so vested. In its judgment confirming the decision of the Supreme Court of British Guiana, the Privy Council discusses the question whether the servitude though the subject of the agreement was fully constituted despite not being expressly incorporated in the transport—first, whether the words in the transport "agreeably to contract of sale and purchase recorded in the Colonial Secretary's Office" was sufficient evidence of the intention of the parties to have the servitude agreement included as part of the transport. If those words were not sufficient to import such an intention, then as a servitude which is immovable property had to be constituted by transport duly approved in a judicial proceeding. there was no such servitude created. It was held that ho such intention of servitude could be imported in the transport of the land which had been duly approved in judicial proceedings. The judgment next went on to pronounce that even if the Court were to hold that the parties intended that the transport should be considered as impliedly containing this servitude stipulated for the servitude was none the less not properly constituted because of its not being in compliance with the law of the colony which

provides that a transport of immovable property shall only be made before a judicial authority. The Court accepted that a servitude over a piece of land is in Roman Dutch law a piece of immovable property belonging to the owner of the servient tenement and granted by him to the owner of the dominant tenement. Hence the necessity for transport expressly transferring the servitude.

The case of Steele v. Thompson came before the Court as a matter in dispute not between persons who originally had entered into the agreement for servitude, but between their respective assignees of the lands. The appellant was a transferee of the land which he claimed to be a dominant tenement in relation to a servient tenement of which respondent was the transferee. If the decision is to be construed as holding that parties to a contract for servitude between themselves would not be bound by the contract because the servitude was not effectuated by transport, the decision would seem to be inconsistent with the opinions of the text book writers on Roman Dutch law, who have declared that in Roman Dutch law, there can be such an enforceable binding agreement between owners of contiguous lands. By virtue of the contract, the original owner of the dominant tenement would certainly have a jus in personam as against the original owner of the servient tenement, which would be enforceable in a court of law. But it is submitted that a transferee of the dominant tenement would have no right of servitude unless that immovable property—the servitude—was constituted by transport and duly passed to him in a document of transport which received authentication in a judicial proceeding in the pre-scribed manner. It seems to me that the decision of the Privy Council would have been different had the parties to the suit been the original parties to the agreement. In my opinion the decision is an authority only as it relates to a claim to the right of servitude put forward by a transferee of an alleged dominant tenement. Such a claimant has to establish that the right of servitude was properly constituted and passed on to him by transport in formal judicial proceedings. Without this pre-requisite, he would have no right to servitude.

As shown in the foregoing abstract of plaintiff's title to his west half of the western half, the transport No. 236 of 1888 gives him expressly only "the right of free pasturage to Thomas Howard over the whole of the said plantation" and makes the conveyance "subject to the right of pasturage over the eastern half of the western half of the said plantation to Paris Britton his heirs, executors, administrators and assigns." What right do the above words give to the plaintiff? The words "with right of free pasturage to Thomas Howard over the whole of the said plantation" must be construed as purporting to give plaintiff not a *right* but to make the purchased land *subject* to a right alleged to be in Thomas Howard, for it is obvious that no right to a servitude in Howard who was at no time an owner of the west half of the western half could be assigned to plaintiff by virtue of his ownership of the west half of the western half. At this stage,

the question which is being solved is not one which relates to the burdens on plaintiff's lands, but the right which he would have by virtue of his transport, but it may be here observed that this right which was given to Howard in his transport of the east half of the western half (No 64 of 1876) was a right only of *personal* servitude which was exercisable by Howard so long as he was the owner of the east half of the western half, and which was extinguished by Howard's death, presumably very many years ago. The words "subject to a right of pasturage over the said east half of the western half of the said plantation to the said Paris Britton, his heirs, executors, administrators and assigns" purport to give plaintiff a servitude not on the eastern half of the plantation, but that which was enjoyed by Britton only over the east half of the western half. It is clear therefore that plaintiff had not had transferred to him by transport the right of servitude which he claims over the eastern half of Plantation Susannah now is the ownership of the defendant.

As against this, both counsel for plaintiff in their submissions pointed to the annotation of the burden of a servitude of grazing cattle which admittedly appears on every transport of the eastern half from Burns' transport right down to the last transport which is that in favour of Bookers. It was contended that this annotation of the servitude on the transport of Bookers and Bookers' predecessors is sufficient to give to plaintiff the right to the servitude over the eastern half despite the fact that no such right of servitude is included in his own transport. It was difficult to appreciate the construction which plaintiff's counsel sought to give to the decision of Steele v. Thompson, or the effort made to distinguish the ratio decidendi in that case from the principle which would be applicable to the instant case. But plaintiff's counsel cited the judgment of Verity C.J. in Peer Bacchus v. Narine Hookumchand and Christmas Hookumchand (1943) L.R.B.G. 245.

> "Under the system of conveyancing practised in this colony, Verity C.J. "says at p. 248, the person entitled to the benefit of a servitude does not "rest his claim upon any right secured to him by his own transport or "document of title, which is, as a rule, silent on this point. His right rests "on the reservation contained in the title of the person over whose property "it is to be exercised. It is possible, therefore, for such a servitude to be ex- "tinguished by omission from the transport by which the property over "which it is exercised is transferred to some third party. This was held to "be so in D'Aguiar v. Phillips (L. J. 11th January, 1904; G.J. 29th March, "1904.)"

There is no reference in the judgment in Peer Bacchus v. Narine Hookumchand and Christmas Hookumchand to any evidence having been put before the Court in support of the finding that there was such a practice in conveyancing in this colony which certainly would have been at variance with the principles enunciated by the Privy Council in Steele v. Thompson (supra). But it can readily be appreciated that in investigating the title of a

claim to the right of servitude exercisable by the owner of one piece of land over neighbouring lands, a conveyancer would specially direct scrutiny of the transport of the alleged servient tenement to see whether there is registered thereon the burden of the servitude, because there is an abundance of authority in Roman Dutch law that an owner of land is not affected by a claim of servitude over his land unless that servitude is registered on his transport or it can be shown otherwise that he had actual notice of such a servitude at the time of his acquisition of the servient tenement. In South Africa so much importance was attached to the registration on the transport of the servient tenement that in the Transvaal a statute was passed (No. 3 of 1886) which declared that no servitude should hold good against third parties if not properly indicated in the deed of transfer. The learned Chief Justice would seem, I say this with every respect, to have misconstrued the decision in D'Aguiar v. Phillips. The judgment in that case did in effect declare, as Verity C.J. stated, that:

> "The owner of the servitude can only secure his rights by vigilance and by "opposition to any transport when he may observe that from the adver- "tisement thereof his servitude is in danger of being omitted."

but that case cannot be an authority that an annotation of the servitude on the servient tenement, which may perhaps not have been at the instance of the transferor of a dominant tenement but at that of some predecessor of title of his, dispenses with the need for the transferor taking care, if he wishes to give to the transferee the transferor's full rights, to make a proper transport not only of the land itself but of the other immovable property associated with ownership of the land—namely the right of servitude over the servient tenement. His transfer of each immovable—that of the servitude as well as that of the land itself must, as prescribed by Roman Dutch law, be effected by transport. A right of praedial servitude over another's land is, it is true, dependent for its existence on its being linked with the land which enjoys the servitude—the dominant tenement. But the right of ownership of the land itself can exist without concurrent existence of the right of servitude over the neighbouring, land and therefore the owner of the servitude can, if he chooses, extinguish this right of servitude while still retaining the land, or he can pass on ownership of the land without passing therewith the right to servitude on his neighbour's land. If he omits to pass the servitude to the transferee of the land in the manner which the law prescribed—that is by formal transport, then the right to servitude becomes extinguished because that right cannot exist dissociated from ownership of the land. To hold that an annotation of the servitude on the transport of the servient tenement would be sufficient to give title to the servitude to the transferee of the dominant tenement would be to make it possible for a servitude to exist and to pass from owner to owner of the dominant tenement irrespective of the intention of the owner of the dominant tenement. It would mean that the owner of land would hold the right of servitude associated with the land

in trust for every subsequent owner of the land and be incapable of abandoning or destroying this right, a thing he could do with a house on the land or any other property belonging to him. D'Aguiar v. Phillips was a case where the alleged servient tenement was the subject of a sale at execution for non-payment of taxes which was duly confirmed subsequently by letters of decree in which no reference was made to the alleged servitude. It was held that the purchaser had taken the lands unencumbered by the servitude. Lucie-Smith J. found that neither the purchaser at the execution sale nor the plaintiff who took transfer from him was guilty of fraud. It would seem that the question of actual notice was deemed not to arise as this was a purchase at what is called parate execution. The purchaser's title at such sale would only be affected by encumbrances declared on the advertised conditions of sale. The owner of the alleged dominant tenement should have seen that his claim to servitude was recognised in the advertised conditions of sale. His failure to have this done gave the purchaser a title unencumbered by the servitude and this was so whether the owner of the dominant tenement was claiming that he acquired his right to servitude by legal transport or by prescription. In D'Aguiar v. Phillips, the claim to servitude was one based on prescriptive user.

Reference must now be made to the case of Judd v. Fourie, to which both sides alluded in support of their respective submissions. Judd v. Fourie was a case decided in the year 1882 in the Eastern District's Court of the Cape of Good Hope and the case is reported by Buchanan J. one of the Judges of the Court in 2 Eastern District's Court Cases at p. 41.

The facts as disclosed in the evidence in that case were that H and J owners respectively of adjoining farms entered into a mutual agreement in writing in consideration of which J sold a portion of his farm to H and granted to H and the proprietors of the said portion of land the servitude of grazing cattle over the portion which J retained for himself—and H sold to J a portion of his own farm and granted in favour of the land so sold, the servitude of water leading over his retained lands. The transaction was partly an exchange and partly a purchase. Mutual transports of the lands so sold were duly passed, but no reference was made in either transport to the servitudes through an omission by the common agent who had brought about the transaction. The defendant subsequently bought H's retained property. Before he purchased, he got full information from the agent that there was this servitude of water-leading imposed upon the lands he wished to purchase. The agent actually read to the defendant from the written agreement the exact terms of the servitude of water-leading which at that time was being openly enjoyed by the dominant tenement. Defendant purchased from H after written conditions of sale were signed which contained these words:

> "The above property is sold subject to all such regulations and servi-
> "tudes as may be found attached thereto, especially

"the right at all times to graze upon the farm (mentioning the farm which "H had sold to J.)"

In these conditions of sale, there was no special reference to the right of servitude of water-leading over the lands sold to defendant. In the transport passed in favour of the defendant there was no mention of either the right of servitude to grazing cattle on the adjoining land, or the burden imposed on his own land with respect to water-leading. Some time after this, the plaintiff with full knowledge of the agreements purchased J's property. The defendant had misled the plaintiff into believing that the water-leading servitude was in fact registered on the defendant's transport and, believing him, plaintiff had the servitude for grazing cattle on plaintiff's land duly registered on plaintiff's transport. Disputes between the plaintiff and the defendant arose afterwards. The plaintiff claimed damages from the defendant for preventing him from using the water, while the defendant counter-claimed against the plaintiff alleging that plaintiff had by putting up a fence obstructed him in the enjoyment of his right of servitude to grazing his cattle on plaintiff's land. In the Eastern District's Court to which the case was removed for argument and decision, the Court comprising Sir J. D. Parry, Judge, President, with Shippard and Buchanan, JJ gave judgment in favour of the plaintiff declaring that he was entitled to a servitude on the defendant's land in terms of the original conditions of sale and directed that the said servitude be duly registered at his own costs. The counter-claim was dismissed.

Though the learned judges agreed on what the result of the case should be as embodied in the joint order, they were not in agreement as to the consequences in law of the omission to have the servitude on the transports in reference to which each judge in his separate judgment expressed his view very fully. They differed as to the rights possessed by parties to an agreement relating to a servitude which was not registered on the transport but on the special facts of the case they took the unanimous view that as the defendant had had actual notice of the servitude and as his conduct had amounted to a fraud on the plaintiff, or at least the registration of the servitude on the servient tenement had been omitted by a mistake induced by the defendant, the plaintiff was entitled to the relief which was granted. The Court would seem also to have agreed as to the correctness of the Privy Council's decision in Steele v. Thompson. Because of the divergence of the views held by the Judges relating to servitudes which were not registered on transports, counsel on each side in the instant case was enabled to cite judicial dicta in Judd v. Fourie in support of his submission. It may be said at once that there is no element of fraud in the instant case, nor can it be contended that the defendant had actual notice of the servitude as was established against the defendant in Judd v. Fourie. Buchanan J. as appears from his judgment, realised that *the plaintiff had not established that he had acquired the right to the servitude of water-leading as he omitted to show that he* had this right given to him on his transport. *But Buchanan J.*

said "This defence was not relied upon in argument, nor is it specifically raised in the pleadings." The learned Judge was at pains to show that the plaintiff considered that he did buy this right, which he was aware was in the conditions of sale between H and J, and that he was using the water furrow from the time of purchase up to the time of obstruction. It seems clear that plaintiff's transferor intended that the right of servitude was to pass to the plaintiff. The learned Judge says further in his judgment:

> "If my view be sound, the plaintiff as owner of the land, could have en-
> "forced the agreement against H had H remained the owner of the servient
> "tenement, equally as well as his predecessor J could have done."

From the foregoing it would appear to me that Buchanan J. appreciated the necessity in Roman Dutch law that a transfer by transport of the right to servitude shall accompany the transfer by transport of the dominant tenement, but that if the point had been taken by the defendant in the case before him, the Court would, because of the special facts, have nevertheless, been justified in awarding, to the plaintiff the right to servitude just as if he had had it formally transferred to him by transport. In other words Roman Dutch law would have given effect to a principle analogous to that in English equity jurisprudence namely that "that is regarded as done which ought to have been done." Had the plaintiff proceeded against J for the rectification of his transport to include this right of servitude J could not have resisted rectification. Shippard J declaring that Roman Dutch law made a formal transport necessary for the constitution of a servitude said at p. 61:

> "It is in my opinion sufficiently established that, apart from prescription,
> "registration is by the law of this colony an ingredient absolutely essential
> "to the validity of a real incorporeal right or praedial servitude, in order to
> "bind a singular or particular successor, such as a purchaser for value like
> "the defendant"

and referring to the purchase by the plaintiff of the dominant tenement Shippard J. said at p. 73:

> "It seems to me to have been practically admitted, or at least not denied,
> "by the defendant that the plaintiff bought a right to the servitude claimed,
> "as far as such right could be bought."

The President of the Court Sir J. D. Parry, while agreeing that the defendant could not be heard to assert his want of good faith, which would be the case if, after the express notice proved, he could deprive the plaintiff of a right of servitude previously bought from his vendor, observed at p. 77 in reference to the point whether the plaintiff had effectively bought this right of servitude:

> "The difficulty I had, arose from the fact that the plaintiff neither alleged
> "nor proved distinctly that he bought this right of servitude of which it was
> "alleged the defendant had notice. The summons merely alleged that the
> "plaintiff obtained transfer which is perfectly consistent with

"the purchase of the farm minus the right of servitude. A servitude is a jus "in re, and would be bought with the land to which it is attached, but the "right to a servitude does not necessarily attach to the land. It is true that "the defendant did not rely upon this defect, and during argument it was "assumed that J had sold to the plaintiff this right he now claims, and the "difficulty might have been surmounted by the fact that the defendant in "his evidence admitted that plaintiff had acquired a right, and that he had "promised to bring in his title to show that it had been registered. That was "an admission which plaintiff might perhaps have availed himself of, even "without the amendment made in the pleadings. The Court, however, has "made that amendment to remove any possible difficulty that might exist. "The allegation now added to the summons has been proved by the defen- "dant himself."

It is noteworthy that the Court in its judgment abstained from awarding damages to the plaintiff, holding that plaintiff was not entitled to a remedy in law but to the remedy of rectification in accordance with the doctrines of equity administered by English Courts which is concerned merely to effect a readjustment of the relations of the parties in keeping with what is fair and conscionable. Accordingly, though the Court refrained from making an award of damages, it directed that the defendant should have his transport rectified so as to include the burden of the servitude. Plaintiff was no doubt left to take the proper steps to have his own transport adjusted so as to include the right to servitude over the servient tenement—presumably the Court could not make that order as affecting the plaintiff's transport without having as a party before it plaintiff's vendor or his heirs. Therefore, it seems to me on a careful analysis of the judgments in the case of Judd v. Fourie that the decision is an authority that where a plaintiff claims by reason of his ownership of land that he has a right of servitude over an adjoining piece of land, if the plaintiff is not the person in whose favour such a real or praedial servitude was originally given, it is essential for him to prove apart from prescriptive user:

(1) That there was an agreement for the servitude between the owner of the servient tenement and some predecessor in title of his own land—the dominant tenement.

(2) That that agreement was duly registered in a formal transport—otherwise only the parties thereto can be affected by servitude;

(3) That he has acquired not only the dominant tenement, but the right to servitude over the servient tenement by virtue of a formal transport transferring to him the servitude also unless he acquired the land and servitude by inheritance. (In Judd v. Fourie, it was not contended that he had not purchased the servitude from the transferor and the defendant at any rate because of his admissions was estopped from contesting it); and

(4) that the servitude is duly registered on the servient tenement, or, if not so registered, that the owner of the servient tenement had full notice of the servitude at the time he acquired the servient tenement and had purchased the servient tenement with full appreciation that the land was burdened with the servitude so as to render it unjust to the owner of the dominant tenement not to have the servitude registered on the transport of the servient tenement.

In the instant case, it is clear from the evidence that though there is the registration in Bookers' transport of the servitude imposed on the eastern half of Susannah in favour of the Proprietors of Susannah, plaintiff who has no mention on his own transport of this right of servitude is not in a position to claim as Judd was able to do against the defendant Fourie that he had expressly arranged to purchase from his vendor not only the land but the right to the servitude of grazing his cattle over the whole of Plantation Susannah entitling him to get rectification of his transport so as to include this right of servitude which had been omitted per incuriam or fraud. Besides, assuming that he were able to establish that it was intended by him and his vendor that he was to have this right of servitude as Judd in his case was able to show, nevertheless, plaintiff would not be granted the remedy of rectification because of having slept on his rights, since 1888 in respect of his west half of the western half and since 1924 in respect of his land in the "multiple proprietors' " east half of the western half; and his transfer to his son of this latter piece of land would moreover disentitle him absolutely to the rectification of his transport with respect to that piece of land. But apart from the bar because of his laches, plaintiff in order to get rectification would have to show that the transferor at the time of the transfer to plaintiff had himself the right to this servitude over the eastern half which he could transfer. For obviously *nemo dat quod non habet.* This leads me to a consideration of the question whether the right to servitude, if indeed originally constituted in law, had not been extinguished before the acquisition of the land by the plaintiff as contended in the summary of the defence submissions set out earlier in this judgment.

How did Britton dispose of this right of servitude which as owner of the western half he had over the eastern half? Britton in 1876 passed transport of the east half of that western half to Thomas Howard. In my view, on this division of his western half Britton could also divide the right of servitude associated with it so as to give to each divided portion the right to depasture its cattle in the eastern half of Susannah provided it was contiguous with it. In transferring to Thomas Howard the east half of the western half, Britton was fully competent expressly to transfer to Thomas Howard, but limited to the east half of the western half, the real or praedial servitude which he was enjoying by virtue of his ownership of the entire western half of Susannah. But he gave Howard in Howard's transport, not the

right to a praedial or real servitude, but something, less than it—he gave to Thomas Howard only a personal servitude of pasturage for his cattle over the whole of Susannah to be enjoyed by Howard personally so long as Howard was the owner of the east half of the western half. By this grant to Howard of a personal servitude only there was in respect of the east half of the western half a right of personal servitude in substitution for the full real or praedial servitude over the eastern half of Susannah which Britton had had. I may here state that the personal servitude given to Howard terminating at his death or transfer of the land completely disposes of the claim that plaintiff has made in this action in regard to the right of servitude over defendant's eastern half by virtue of plaintiff's ownership of his three roods piece in the "multiple proprietors' " eastern half of the western half of which Howard was a predecessor in title. Mr. Humphrys indeed went beyond this in his submissions and sought to convince the Court that the whole of the right of praedial servitude held by Britton—not only that in relation to its enjoyment by the east half of the western half—was completely extinguished. I cannot agree with this submission: certainly the right of servitude was extinguished in relation to its enjoyment by the ownership of the east half of the western half but not in relation to the ownership of the west half of the western half. That right of servitude Britton still retained when he retained the west half of the western half. "A servitude "may be abandoned as to one portion of a farm, and retained as to the remain- "der. Where a dominant tenement is divided among several owners, one of "them may abandon his right so far as his share is concerned, and the servitude "will still continue for the benefit of the remaining divided shares in the prop- "erty held by the other joint owners (see Myburgh v. Van de Byl 1 S.C. 360), "for as many servitudes are regarded as existing as there are divided portions "of the dominant tenement." (Nathan's Common Law of South Africa Vol. 1, p. 49). True, the west half of the western half is not contiguous with the servient tenement—the eastern half—and as contiguity with the servient tenement is an essential element for the enjoyment of a rural praedial servitude by a dominant tenement, Britton in relation to his ownership of the west half of the western half would have lost this right of servitude over the eastern half if in the transport to Howard he did not take care to reserve to the west half of the western half a right of grazing its cattle on the east half of the western half. That servitude was registered on Howard's transport in the words:

> "Subject to the right of pasturage over the said eastern half of the western "half of the said plantation to the said Paris Britton his heirs executors and "assigns."

That servitude over the east half of the western half gave to the west half of the western half the contiguity with the eastern half—the servient tenement—which is necessary for the enjoyment of the right of praedial servitude, for Britton's cattle on his west of the western half could while depasturing over Howard's east of the western half in exercise of the right of pasturage expressly given by transport go over to the eastern half without

committing, trespass on the east half of the western half. Nor can I agree with Mr. Humphrys' contention, as I understood it, that because Britton chose specially in express terms in Howard's transport to give himself, his heirs, executors, administrators and assigns, the right of servitude of grazing cattle on Howard's east half of the western half, Britton had thereby abandoned or caused to be extinguished the more comprehensive right of grazing his cattle on other parts of Susannah. This registration on Howard's transport could not affect Britton's rights over the east half, which, as I have stated, was duly constituted and registered on Burns' transport.

Continuing to trace the devolution of Britton's right to pasturage over Susannah, it is seen that on Britton's death, Britton's wife inherited by his will the west half of the western half with its rights to servitude. The devolution of the rights to servitude on the death of the owner of the dominant tenement need not, it is admitted, be effected by transport. But Britton's wife suffered the loss of the west half of the western half by a sale at execution, and the letters of decree issued by the Court in favour of Hooton makes specific reference only to the right of servitude over the east half of the west half and to no other right of servitude. It was also made subject to the burden imposed on the land by virtue of the personal right of servitude held by Howard. In my opinion, because of the absence of any mention of this servitude, the right which Britton had to pasturage over the whole of Susannah was thereby extinguished and did not pass to Hooton, nor did the subsequent transfer to plaintiff by the assignee of Hooton's creditors in 1888 mention this right to servitude for depasturing cattle over Susannah generally which would, it seems, confirm that there had already been an extinguishment of Britton's old right to the servitude of pasturage over the eastern half of Susannah.

I propose now to turn attention to plaintiff's alternative claim to the servitude for depasturing cattle on the eastern half which is based on prescriptive user, and, while reviewing the evidence in support of prescription, I shall also direct attention to the evidence of acts or omissions by plaintiff which counsel for defence has claimed point to the extinguishment of the right of servitude in plaintiff whether such servitude was held by him by virtue of transport or by virtue of prescriptive user.

In Roman Dutch law as in English law, to found a title by prescription, there must be user as of right *nec vi nec clam nec precario.* What is the length of the period of user of a servitude upon which a claim to a title by prescription can be based? The Civil Law of British Guiana Ordinance, (Chapter 7 of the Laws of British Guiana 1930), which became operative as from the 1st January, 1917, was enacted to introduce into this Colony the Common Law of England as the Common Law of the colony, but care was taken by a proviso to section 3 to exclude the English Common Law of real property, thus leaving Roman Dutch law still governing all rights in respect of realty in the absence of statutory enactment. By section 2 (3), existing rights established under Roman Dutch law, whether in respect of movable

or immovable property, are expressly preserved. But section 4 (1) which makes provision for a title to immovable property by prescription enacts:

> "Title to immovable property including immovable property of the Crown "or colony, or to any easement, profit a prendre, servitude or any other "right connected therewith, may be acquired by sole and undisturbed pos- "session for thirty years, of which not less than three years shall be after "the date aforesaid (that is the 1st January, 1917), if that possession is es- "tablished to the satisfaction of the Supreme Court which may issue a dec- "laration of title in regard to the property or right upon application in the "manner by any Ordinance or Rules of Court."

The manner in which an application must be made is by petition as prescribed by Rules of the Supreme Court (Declaration of Title) 1923, which also makes provision for the publication of a notice of the petition and service on interested parties.

As stated above, the Ordinance in section 2 (3) preserved existing, rights to property already established under Roman Dutch law. Therefore if plaintiff is able to show that on the 1st January, 1917, under Roman Dutch law he had already acquired and had established a title by prescription to a servitude of grazing his cattle on the eastern half of Susannah, this Court would be bound to give recognition to his right of prescription and his right to the servitude would from the date of its establishment have been a *right in rem* against everybody including the defendant. But if on the other hand the plaintiff fails to show that he had on the 1st January, 1917, already acquired an established prescriptive title under Roman Dutch law, then his right to the servitude by prescription would be subject to his complying with the requirements for a prescriptive title ordained by section 4 (2) of Chapter 7.

I wish to make it clear that a person who has had user as of right for the prescriptive period but has failed to get his title thereto established in keeping with the Ordinance is not debarred by the Civil law of British Guiana, Ch. 7. from setting up his prescriptive right in defence to a claim because he has not had his title declared in the manner provided by Rules of Cour. (*Lalbahadursingh v. Daniel McPherson* (1939) B.G.L.R. 80). But though thus unrestricted in his defence to a claim, he cannot himself put forward a claim founded on a title to prescription which has not been the subject of a decree by the Court in pursuance of a petition presented to the Court *vide* judgment by Worley C.J. in *Adams and Christmas v. Raghubir—No.* 441 *of* 1946 Demerara—delivered on April 16, 1951. The position is analogous with the bar to action provided by the Statute of Limitation. A defendant is able to resist a claim to possession of land although he may be barred by the statute from getting an order for possession.

In this case, plaintiff alternatively, is putting forward his claim to damages and/or an injunction against the defendant founded upon a title by prescription to a servitude of grazing his cattle on defendant's lands. To be able to avail himself of

this title to servitude in support of his claim he must show first that he had got a declaration of title from the Court, not in these proceedings but in proceedings commenced by a petition as prescribed by Rules of Court. True, there is the counter-claim, but I am of the opinion that the issues in the claim and counterclaim, are so linked together, that, as the proceedings were initiated by plaintiff, the defence is entitled to submit that when the plaintiff fails in his claim, the plaintiff is liable for the trespass which he has been unable to justify in law.

As regards his claim to a prescriptive title under Roman Dutch law, it is obvious that plaintiff cannot, in support of prescription, advance user by him personally for a period beginning from the date of his acquisition of the west half of the western half of Susannah, for he bought in 1888 and from that date to 1st January, 1917, it would not be more than 29 years. The prescriptive period, under Roman Dutch law is one third of a hundred years (vide Lee's Introduction to Roman Dutch law 3rd Edition 176); apparently, it does not matter whether the user of such servitude has been continuous or intermittent (Nathan's Common Law of South Africa, Vol. 1, p. 452, para. 692 citing Voet's Commentaries Book VIII, Title 4, section 6). Therefore, to found a title to the servitude by prescription it would be necessary for plaintiff to include user by predecessors in title so as to show user of the servitude for an aggregate period of thirty-three and one-third years. Assuming that the evidence does show such a user of servitude by plaintiff and his predecessors in title, nevertheless, the question then would arise whether the servitude was so established as to bind the defendant. I am of opinion that by virtue of section 21 of the Deeds Registry Ordinance, Ch. 177, anyone since 1st January, 1921, who wishes to affect an alleged servient tenement with the burden of a servitude by prescription under Roman Dutch law, must take steps to register the servitude by prescription on the transport of the servient tenement before the owner of the servient tenement acquired the land or he must show that the owner of the servient tenement acquired the servient tenement with actual notice of the servitude having already been established by prescription.

Section 21 of Ch. 177 provides:

> "From and after the first day of January, one thousand, nine hundred and "twenty-one, every transport of immovable property, other than a judicial "sale transport, shall vest in the transferee the full and absolute title to the "immovable property as to the rights and interest therein described on that "transport subject to:
>
> "(a) statutory claims:
>
> "(b) registered encumbrances;
>
> "(c) registered interests, registered before the date of the last adver- "tisement of the transport in the Gazette;
>
> "(d) registered leases before the date of the last advertisement of the "transport in the Gazette;
>
> "provided that any transport, whether passed before or after the first day of "January, nineteen hundred and twenty-one,

"obtained by fraud shall be liable in the hands of all parties or privies to "the fraud to be declared void by the Court in any action brought within "twelve months after discovery of the fraud, or from the first day of Octo- "ber nineteen hundred and twenty-five, whichever is the more recent."

I cannot agree with the contention of Mr. Adams, one of the counsel for the plaintiff, that this section was never intended to over-ride the provisions of the Civil Law of British Guiana Ordinance, Ch. 7 which he points out, was at pains expressly to preserve existing rights acquired under Roman Dutch law. What the section did do was not to deprive a person of his right of servitude acquired by prescription under Roman Dutch law, but it directed that he must have such servitude registered on the transport of the servient tenement if he wishes to affect a purchaser of the servient tenement with the burden of the servitude. This protection afforded by the Ordinance to the owner of an alleged servient tenement is in keeping with Roman Dutch law itself, as enunciated in many decided cases including Judd v. Fourie, although in that case the Court decided in favour of a servitude which had not been registered on the servient tenement because of a mistake by the owner of the dominant tenement induced by the owner of the servient tenement himself and which amounted practically to a fraud on the dominant tenement.

On Bookers' transport, there is in fact noted the servitude in favour of the proprietors of Susannah. Admittedly, that annotation referred to the servitude that came into existence on the agreement between Britton and Burns, and has no reference to a servitude acquired by prescription. That servitude though recorded on all the transports relating to the eastern half of Susannah, had already been extinguished at the time of Bookers' purchase for the reasons already given above.

It is said that the recognition of a right by prescription is based on the fiction of a lost grant, but it is indisputable law that when the enjoyment of a right is by virtue of an express grant, the grantee is limited by the grant and does not acquire a prescriptive right by exercising it for the period of prescription. "The common law doctrine is that all prescription presupposes a grant. But if the grant is proved and its terms are known, prescription has no place" per Lord Lindley in Gardner v. Hodgson's Kingston Brewery Co. (1903) A.C. 229. I hold therefore that the annotation on Bookers' transport is not to be taken as a registration of the servitude claimed to be acquired by. prescription under Roman Dutch law and accordingly I hold that even if plaintiff can establish prescriptive user for thirty-three and one-third years through the combined user of the servitude by his predecessors in title and himself in the absence of actual notice it would not affect Messrs. Bookers, on whose transport there was no registration of a servitude by prescription. Under Roman Dutch law the manner of getting, recognition of an easement by prescription as against lands about to be transferred was by lodging an opposition, when on proof of facts by affidavit in support of prescriptive user, the easement would be directed to

be registered on the transport of the transferee of the land. This was never done as affecting the eastern half of Susannah by plaintiff or any of his predecessors in title of the western half of Susannah, and therefore no transferee of the eastern half was affected by any servitude by prescription.

As regards actual notice, I cannot agree with Mr. Adams' contention that the existing annotation on Bookers' transport, if not capable of being regarded as registration of the servitude by prescription, yet would nevertheless affect Bookers with actual notice of the servitude by prescription. As has already been pointed out, the right to servitude by prescription is entirely different from and independent of the servitude arising from the grant of servitude in pursuance of the agreement between Britton and Burns. Moreover, an unregistered right of servitude by prescription is completely wiped out if the servient tenement is sold at an execution sale. I have earlier in this judgment referred to the sale at execution of the dominant tenement, pointing out that the right to servitude over a servient tenement is extinguished unless it is embodied on the letters of decree or on the transport passed by the Marshal of the Court in pursuance of the advertised sale which mentions the right to servitude as being included. But in the case of a servient tenement a judicial sale by transport vests in the transferee a full and absolute title subject only to certain registered interests.

Section 2 of the Deeds Registry (Sales in Execution) Ordinance, 1936, which Ordinance (No. 4 of 1936) was passed to amend the Deeds Registry Ordinance, Ch. 177, provides:

> (c) Where the sale of the property is for the purpose of enforcing the payment of a judgment debt of a judgment creditor other than the holder of a statutory claim or a registered encumbrance, the property shall be sold subject to all statutory claims, registered encumbrances, registered interests and registered leases.

And section (3):

> A judicial sale transport passed after the commencement of this Ordinance (which was on the 27th May, 1936) shall vest in the transferee the full and absolute title to the immovable property or the rights and interests therein *subject only* to such statutory claims registered interest and registered leases as have not been extinguished by the sale in execution.

The evidence of the title to defendant's eastern half giving the successive transfers by transport reveals that in the year 1902, Mary Anna da Silva became owner of the eastern half of Susannah by virtue of a transport No. 167 of 1902 dated the 6th September, 1902. On that transport there was registered the right given to each of the proprietors of eastern and western halves of Susannah of grazing cattle over the whole plantation, which, as I stated, was a feature of every transport of the eastern half from the time of Burns downwards. In 1936, in pursuance of an order of the Supreme Court, there was an execution and a judicial sale of this eastern half followed by transport by the Marshal (No. 336 of 1936 dated 21st August, 1936) in favour of

the purchaser, Hugini Vasco da Silva, Mary Agnes Soares, Valerie Lourdes da Silva and Simeon Theobald da Silva, their heirs, executors, administrators and assigns. On this transport, the only registered interest to which the transfer is made subject is that same right given to the proprietors of the east and west halves of grazing cattle over the whole plantation Susannah. It is clear that by virtue of Ordinance No. 4 of 1936, the purchasers at the execution sale took the eastern half free from any unregistered servitude based on user for the prescriptive period. If plaintiff did have such a claim to servitude by prescription, either in Roman Dutch law by user for a quarter of a century before 1st January, 1917, or by user for 30 years in accordance with section 4 of Ch. 7, he lost it in 1936 when the servient tenement was sold at execution, and from 1936 to the present date he will not have had user for the statutory prescriptive period of thirty years even assuming that all the time cattle from the western half was grazing on the eastern half as of right, *nec vi, nec clam, nec precario.*

Quite apart from the indefeasibility by statute of the defendant's title in respect of any claim to an unregistered servitude by prescription over the eastern half of Susannah, I am not satisfied on the evidence that there was as of right for the period of prescription, the grazing of cattle belonging to plaintiff and his predecessors in title. Plaintiff, who is 87 years, testified that he knew Susannah and its proprietors from his earliest boyhood days long before he became a purchaser in 1888. He used to see cattle belonging to all owners grazing undisturbed on every part of Susannah. He himself before purchasing Susannah was the owner of a portion of lot 11 Corentyne which is immediately to the west of Hermitage, the plantation that adjoins Susannah on the west; and his cattle from No. 11 used to go across Hermitage into. Susannah. He subsequently bought and now owns the eastern half of Hermitage which bounds with his own west of the western half of Susannah. From the evidence given in this case, it would appear that generally the owners of lands along the Corentyne Coast had no objection to the cattle of neighbouring lands coming on their lands for grazing purposes, but no inference is to be drawn from the fact that there was no objection raised that the right of grazing on each other's lands was exercised as of right which is an essential element of acquisition by prescription. This is illustrated by the fact, as admitted by plaintiff in his evidence, that Hanoman, the father of the defendant, who had owned part of No. 11 was often impounding plaintiff's cattle which strayed from Hermitage into No. 11, and this caused plaintiff to fence off Hermitage from No. 11 soon after he bought Hermitage. Also plaintiff in his evidence, while denying that he had impounded any Susannah cattle grazing on his portion of Susannah declared that he was impounding cattle straying on his adjoining plantations Bohemia and Hermitage,

No doubt, it was to give to each other something more than a mere licence but a precise and definite right to graze cattle on each other's portion of Susannah that Britton and Burns agreed upon the real servitude that was registered on Burns' transport,

This, as I have stressed, gave to each and their successors only, such right as would be in keeping with the rules of Roman Dutch law pertaining to the constitution and transference of a praedial servitude; the exercise of this right by grant, I repeat, could not furnish any foundation for a title by prescription to the servitude. Mr. Faulkner, Deputy Manager of Plantation Rose Hall, belonging to Messrs. Bookers, and Mr. McTurk of the same firm, the latter to whom had immediate and direct control over the eastern half of Susannah during the ownership of Bookers, both testified that Bookers did not impound, while grazing over their lands, any cattle of the proprietors, and these cattle were allowed to graze freely all over the place outside of the period of the rice crop. McTurk stated that he understood that there was a right of grazing in the proprietors. No doubt, it was because of the registration on Bookers' transport that it came to be understood that there was that right existing. But as I have pointed out, that right though continuing to be noted on the transports of the servient tenement, had in fact and in law, long been extinguished. George Klass who is 66 years old and who knew Susannah for seven years from the age of 18, said that he used to see cattle grazing all over Susannah; whose cattle and whether they were there in circumstances justifying an inference that they were not there by special permission, he was unable to say. The evidence of Goberdarsingh and Bhoopsingh each of whom at some time was interested in the proprietors' portion of the east half of the western half, does not in my view carry the case for the plaintiff any further, because even assuming that their cattle did roam undisturbed over the eastern half, it does not establish that it was being done as of right, such as could crystallize after long user into a prescriptive title. The same must be said of the evidence of Simeon da Silva, when he spoke of cattle grazing on the eastern half. Da Silva's mother acquired the eastern half of Susannah and also subsequently owned part of the proprietor's portion of the east half of the western half. If cattle were grazing over her eastern half, any claim by the owner of the cattle based upon user for the prescriptive period was wiped out when her lands were sold at execution.

I now pass on to consider whether apart from extinguishment by operation of law prior to plaintiff's acquisition of his lands at Susannah, plaintiff's own acts and conduct effected an extinguishment of any right of servitude which plaintiff may have possessed over the eastern half of Susannah. The authorities are clear that while mere non-user of a servitude will not extinguish the right to servitude, any acts of the owner of the servient tenement which are inconsistent with the existence of the servitude over his lands would, if not disallowed by the owner of the dominant tenement, serve to extinguish the servitude, and there would thereby be extinguishment of the servitude none the less though the owner of the dominant tenement with no intention to abandon his right to servitude gave his consent to the condition making the exercise of the right to servitude impossible. The southern portion of Susannah, though grazing lands like the rest of the plantation, came to be used in course of time for rice cultivation. The evidence is not clear when rice was first planted

there. Ribeiro, the immediate predecessor in title to the eastern half before the da Silvas, it was stated, was the first to commence rice planting on the southern portion of the eastern half. If that were so, rice planting on the south portion of the eastern half seems afterwards to have been given up altogether until da Silva and plaintiff later on entered into an agreement whereby da Silva was allowed to plant rice and a temporary fence was set up to keep cattle out during crop time. Some years after this, the other proprietors, including plaintiff himself, planted rice on their southern portions under similar mutual agreements, but because of lack of water, no rice was sowed by some proprietors in some years. According to the evidence for plaintiff, it was agreed that all cattle would be kept on the northern portion of Susannah each year during the rice crop, and would be set free to graze again on the southern portion after the crop. It is plaintiff's case that it was only in keeping with this old arrangement between the proprietors of Susannah that Bookers, although not planting rice themselves, were enabled to rent as rice lands their southern portion of Susannah to some of their labourers employed at Rose Hall; Bookers supplied water to their tenants as well as to plaintiff and other proprietors and the withdrawal of this water supply by Bookers, which Bookers said was required for their own Rose Hall purposes, led to a dispute between plaintiff and Bookers when plaintiff uttered a threat that he would prevent Bookers from planting rice. Whether that threat signified an intention to cancel the agreement under which it was claimed rice was permitted to be planted to the exclusion of cattle, or whether plaintiff intended by his threat that he would remove his fence separating his cattle grazing lands at Bohemia from Bookers' eastern half of Susannah and thus permit his cattle there to enter upon the rice fields on Booker's southern area is not clear, but Bookers sold the lands soon after to defendant who proceeded at once to impound cattle coming into his rice lands. The contention of the Defence is that this agreement by plaintiff to keep his cattle off the eastern half every year during the rice crop amounted to an abandonment of the right of servitude for grazing cattle over the southern portion of the east half, if any such right existed. It is admitted by the Defence that that curtailment of the servitude over a certain portion of the servient tenement would not extinguish the servitude over the whole of the eastern half, but it is contended that the agreement would in effect extinguish the servitude over the southern portion.

As stated before, a right to servitude though not divisible can be abandoned so far as a distinct portion of the servient tenement is concerned. But I cannot agree with the submissions of the Defence on this point. Mere non-user, it is agreed, does not extinguish a servitude unless it is non-user lasting for a prescriptive period. And I hold that in this case the agreement for non-user of the servitude for a certain period each year is not to be deemed to have effected an extinction of the right to servitude on the southern area of the eastern half assuming of course, that the right to servitude did exist in law at the time of the agreement.

Much time was taken up in this case with the hearing of

evidence relating to fences which were alleged to have been put up by plaintiff to separate his lands from the rest of Susannah. Whether these fences were put up by plaintiff or not does not seem to merit the importance given by both sides to the subject. Plaintiff's main object of putting up fences which separated his lands from other lands was, it is reasonable to conclude, to prevent other proprietors' cattle from coming on his own lands. Plaintiff insisted that a fence erected on the northern area was to enable him to drive his wild cattle into a kraal or paddock for the purpose of branding them or for assemblage prior to despatching them to Georgetown for sale. Be that as it may. the fact that plaintiff might have been preventing others from exercising a right of grazing cattle on his lands, does not mean that he himself thereby was abandoning the right to allow his own cattle to go on a servient tenement. Besides, I am not satisfied that any fence put up by plaintiff completely shut out plaintiff's cattle from going on the eastern half. No doubt their freedom to go and graze there was to some extent restricted, but there was the road also along which they could stray or be driven into the eastern half for grazing purposes. However, the setting up of fences by plaintiff, it is conceded, is a matter not to be altogether ignored on the question of abandonment. In this case plaintiff sets up in support of his own right that there were reciprocal rights to servitude possessed by all proprietors of Susannah and therefore the fact that he himself was fencing in his own lands may also be an indication that he entertained no belief in the existence of such a right. Still for the reason given above, I would not be inclined to hold that assuming the servitude existed, it must be deemed to have been abandoned by plaintiff simply because of his acts of erecting fences, putting up trespass notices against straying cattle and even actually impounding cattle of other proprietors coming on his portion of Susannah.

For the reasons given above, I find that plaintiff at the time of the admitted seizing and impounding of the cattle possessed no right of servitude for grazing cattle on the defendant's eastern half of Susannah. Neither by virtue of a grant to his predecessors in ownership of the land nor by virtue of prescription was plaintiff entitled to any such right. I have already stated that I hold the servitude which Britton enjoyed by grant was in respect of the cattle he maintained at Susannah and not any cattle which he might own but maintained elsewhere. If I am wrong in the view I have taken that Britton's rights of servitude were extinguished before plaintiff acquired his Susannah lands and if that servitude did pass down to plaintiff—if plaintiff did in law acquire Britton's rights, then it would be necessary to determine whether the cattle impounded by the defendant in August and September 1947, belonged to Susannah as alleged by plaintiff or came from Bohemia as alleged by the defence.

If those cattle were from Bohemia then I hold that plaintiff is not entitled to any right of servitude with respect to these, and his claim for damages and the injunction must fail. The defendant in these circumstances would be entitled to judgment on his counterclaim for the trespass of these cattle. All plaintiff's cattle,

whether from Susannah, Bohemia or elsewhere carried, it is admitted, the same brand. Accordingly the records on the Police Pound Books giving the brand of the animals brought to the pound furnish no help on the question whether the animals came from Bohemia or Susannah. But in determining what cattle were then impounded, the Court is entitled to take note of the circumstances existing, at the time of defendant's purchase and particularly the relations between Bookers and plaintiff immediately preceding defendant's purchase. In Bookers' time, it is admitted, the fence separating Bohemia from the eastern half belonged to plaintiff. That fence it would appear was not in the best state of repair, and the relations between plaintiff and the management of Rose Hall were so friendly and cordial that outside of the rice crop, Bookers did not object to plaintiff lowering the wire of his fence to allow cattle from Bohemia to go and graze on the rice fields. When Bookers withdrew their supply of water, plaintiff threatened to prevent Bookers from planting rice, and the management of Bookers would appear to have appreciated that plaintiff would allow his Bohemia cattle to get through this fence, and they immediately sent a man to repair the fence to which plaintiff refused to consent. Bookers, it would seem, had no fear of cattle coming from other parts of Susannah in view of the punt trench on their western boundary and the other fences to the west that would to a very great extent prevent the cattle of plaintiff and of other proprietors from entering on their eastern half. But Bookers without placating plaintiff as to the supply of water sold to defendant their eastern half. Whether defendant knew the trouble between Bookers and plaintiff is not clear but in my opinion that is immaterial. This was a threat to prevent the planting of rice on Bookers' eastern half and by the threat it was understood that the Bohemia cattle would be allowed to go through the fence. No notice of this dispute could affect defendant so as to impose a burden on him to allow Bohemia cattle to graze on his land. As I have already held, plaintiff's Bohemia cattle could never have had the right to graze there by virtue of the registration on Bookers' transport, and as regards the claim by prescription, no evidence has been advanced by plaintiff in support of a right to the servitude by prescription in relation to his *Bohemia cattle*. Evidence was given by both plaintiff and defendant as to a conversation between them on an occasion soon after defendant's purchase. Each has denied what the other alleges. The plaintiff said that on a Sunday the defendant came to him and made certain suggestions to him by which they should agree to deprive the multiple small proprietors of the servitude of grazing, whereupon plaintiff showed defendant a copy of a transport with the servitude endorsed on it. Defendant denies this.

In my view, even accepting plaintiff's evidence on this, it is not conclusive as affecting defendant with notice of a subsisting servitude good and valid in law. On the other hand defendant testifies that he met plaintiff on the road and plaintiff issued a threat to take down his fence between Bohemia and Susannah and drive his cattle into defendant's rice lands. Having regard to what had transpired between plaintiff and Bookers, the utter-

ance of this threat by plaintiff does not seem very improbable, and seeing the plaintiff in the box, I am satisfied from his demeanour that he is quite capable of saying what defendant alleged. Whether or not the cattle were deliberately driven into the eastern half of Susannah as threatened, the defendant is unable to say but he saw them coming from the direction of Bohemia. I am satisfied that the cattle seized and impounded on the dates in August and September 1947, alleged in the Statement of Claim came from Bohemia. It is true that the fence separating the southern area of Bohemia from the eastern half was not pulled down right away, but plaintiff very soon removed the wire separating, the northern portion of Bohemia from the northern portion of the eastern half of Susannah. His reason for doing this is not clear.

I may mention that I prefer not to attach too much weight to the testimony given by Edwin Clarence who at one time lived at plaintiff's house because of his paramour being the sister of the woman with whom Rose was living. He is no longer living at plaintiff's house nor is he now working with him following disagreements which would seem to have left Edwin Clarence so embittered that he might be induced to say anything to the prejudice of plaintiff's case. Clarence spoke of plaintiff's cattle going from Bohemia to the defendant's rice lands. But on one night defendant said he saw cattle on his lands and immediately sent for the police. Corporal Gronogen arrived about 2.00 a.m. in time to see plaintiff, the Corporal states, chasing cattle across the bridge at Bohemia into his lands on the northern side. Plaintiff denied that, he was out there at midnight. If that evidence is true, then the evidence of the Corporal is significant. Plaintiff may have heard that the police were being sent for, and, on the corporal's arrival, was striving to get his animals away before the police came up. Why should the police corporal have conspired with defendant to invent this story, it is difficult to see. On the evidence I am satisfied that the animals referred to as impounded in August and September, 1947 came from Bohemia.

The plaintiff by his several amendments to the Statement of claim made during the course of the trial alleged in addition the seizing and impounding of his cattle in 1948 and 1949 subsequent to the date of his writ which was in December 1947. In allowing the amendments I made it clear that plaintiff was not entitled to advance any additional claim based on fresh causes of action rising since writ, but these alleged seizures of cattle were only relevant on the question whether defendant was persisting in further violation of the rights of servitude.

Assuming that the impounding in August and September, 1947 was in violation of plaintiff's right of servitude, the evidence of these alleged subsequent acts of seizing of plaintiff's cattle was material in determining whether the plaintiff should be granted the injunction he claimed. But apart from that, both plaintiff and defendant in their pleadings asked the Court for a declaration relating to the rights of servitude for grazing cattle over the eastern half, and although the Court has found the acts of seizing cattle in August and September 1947, which is

the cause of action in these proceedings, were in respect of Bohemia cattle which as I hold were never at any time in law included in the right of servitude, yet for the purpose of the declaration asked for by both sides, it became necessary to admit evidence of these subsequent acts, some of which admittedly were the seizing of animals that came from plaintiff's Susannah lands. For the reasons I have stated in this judgment, plaintiff has no right of servitude for grazing cattle oh the eastern half of Susannah and accordingly he is not entitled to the declaration he asks the Court to make. In the result I give judgment for the defendant on the claim. On the other hand, the defendant is entitled to judgment on the counter-claim. For the acts of trespass by plaintiff's cattle, the defendant is entitled to damages, which, because no special damage is proved, I fix at $200.00; and by way of further judgment in favour of the defendant on the counter-claim, the Court makes the declaration that neither by virtue of transport, nor by virtue of prescription, is the plaintiff entitled to the servitude of grazing his cattle on the eastern half of Susannah, and an injunction is issued against the plaintiff, his servants and agents to restrain them from causing or permitting cattle to graze on the eastern half of Susannah. There will be costs in favour of the defendant both on the claim and counterclaim. I certify fit for two counsel.

Judgment for the defendant on the claim and counterclaim.

Solicitors:
W. D. Dinally for plaintiff.
J. E. deFreitas for defendant.

FINEY AND RAJCOOMAR
v.
PHOENIX

(In the Full Court, on appeal from the Magistrate's Court for the Courantyne Judicial District (Boland C.J. (Acting), Stoby J. (Acting)) July 19, September 21, 1951)

Unlawful possession of spirits—husband and wife—joint possession.

The appellants were convicted of being in the unlawful possession of spirits, to wit, bush rum.

The first appellant was the wife of the second appellant and lived in a house with a sister and eight children.

The police executed a search warrant in the absence of the husband and found a quantity of bush rum in the kitchen and a number of empty bottles smelling of spirits in the bedroom and in a locked room downstairs.

On appeal.

Held: There was evidence to justify the Magistrate's finding that both husband and wife were in unlawful possession of spirits.

A. R. Sawh for the appellants

A. C. Brazao Solicitor General for the respondent

Judgment of the Court:

The appellants were convicted by the Magistrate for the Courantyne Judicial District for being in the unlawful possession

of spirits to wit, bush rum contrary to section 93, sub-section 1 of the Spirits Ordinance, Chapter 110, as re-enacted by section 2, sub-section 1 of Ordinance 22 of 1931.

It was established at the trial that the appellants who arc married according to Hindu customary law live together in premises situated at Miss Phoebe, Courantyne, Berbice. On the 19th September, 1950, the Police armed with a search warrant, went to the appellants' home. On their approach, the female appellant who was sitting on the front step hurried into the kitchen. The male appellant was not at home. Six bottles containing liquid were found in a quake or basket in the kitchen. On analysis the liquid was found to be bush rum. In one of the bedrooms, two empty demijohns and five empty Winchester bottles were found, all smelling of spirits. In a locked room downstairs ten empty bottles smelling of spirits were discovered.

The main ground of appeal was that there was no sufficient evidence of possession to satisfy a conviction against either appellant in view of the fact that the kitchen in which the bush rum was found was accessible to any member of the public and that husband and wife had been absent from the house during the day.

Before an accused person can be convicted of being in the unlawful possession of bush rum found in his house, there must be evidence which satisfies the Magistrate beyond reasonable doubt that the person or persons charged knew that the substance was in the house and knew that it was bush rum. In either case the guilty knowledge may be proved directly or circumstantially. There is the presumption that if the evidence establishes possession by the appellants of what is proved to be bush rum, there was knowledge by them that it was bush rum unless they established otherwise. Whenever goods are found in a householder's premises it has to be decided as a question of fact whether those goods were on the premises with the knowledge and consent of the husband or wife or other members of the household or all of them. It is a question of fact which has to be decided with special reference to the circumstances of each case.

In the instant case the learned Magistrate accepted the evidence for the prosecution that the wife, the appellant Finey, ran towards the kitchen when she saw the police approaching. As against her it is to be noted that it was in the kitchen that the bush rum was found. Upon the rum being found she said that her husband was in the habit of making bush rum but had ceased to do so. Apart from her conduct at the time of the search, the fact that an empty demijohn and a number of empty bottles smelling or spirits were found in the bedroom and in a locked room downstairs was significant. Finey claimed joint ownership with her husband of those bottles but asserted they were used for bottling oil and ginger beer.

On these facts the Magistrate was entitled to conclude, as he did, that the appellant Finey was in possession physically and mentally of the bush rum found in the kitchen. It is incon-

ceivable that the wife of a householder whose normal domestic duties would entail supervision of the kitchen would fail to observe a quake containing six bottles in the kitchen. And when her conduct at the time of the search is taken into account together with the surrounding circumstances already mentioned, there was in the opinion of this court enough evidence to justify the Magistrate's findings with respect to the appellant Finey.

With regard to the husband, the appellant Rajcoomar, it was argued that since he was not at home when the search was made the evidence could not support the conviction against him.

It is a fallacy to assume that mere absence from the house when stolen property or bush rum are found in one's premises automatically destroys the case for the prosecution. Such absence is indeed an important factor which the Magistrate when assessing the evidence must take into account.

The appellant Rajcoomer did not give evidence at the trial but in a statement made to the police after he was arrested and cautioned he said that he left his house between 5.00 and 6.00 p.m. at which time his wife was at home.

The police must have arrived at his house about 8.00 p.m. and it is clear from the evidence that at all material times, that is to say from 5.00 to 8.00 p.m., the sister of the first-named appellant and the eight children of the appellants were there at home while the first-named appellant on her own story was there up to 7.00 p.m. It was not suggested that any member of the household brought the rum into the house and it is obvious that any stranger who attempted to place these bottles of bush rum in the house could not have escaped detection.

Counsel for the appellant relied on the cases of Graham v. Dickson Appellate Jurisdiction 12.6.07 and Reg. v. Higginbottom 1912 C.A.R. 79.

In Graham v. Dickson the appellant Graham lived in a house with a reputed wife. On their house being searched the reputed wife went into the kitchen and threw away a bottle containing bush rum. The Magistrate in convicting the appellant found that he was the sole occupant of the house. The appeal was allowed on the ground that he was not the sole occupant of the house and that as there was another inmate of the house and no suspicious circumstances attributable to the appellant the evidence was insufficient to prove possession in him.

A decision of a single judge in the old appellate jurisdiction of the Supreme Court is not binding on the Full Court but this Court can find nothing in the decision to support the contention advanced on behalf of the second-named appellant. In Graham's case there was one bottle of bush rum which the wife threw away: in the instant case there was a quake with six bottles coupled with the suspicious circumstances of a number of bottles all smelling of spirits.

In Reg. v. David Higginbottom 1912 C.A.R. 79 a burglary was committed in May 1911. In August 1912 in a house in which

the appellant and his brother lived a quantity of property stolen in May 1911 was found in a box belonging to appellant's brother but the key was in appellant's possession. Property belonging to both brothers was found in the box. There were separate trials and the appellant and his brother were convicted. The appellant's appeal was allowed on the ground that the trial judge did not adequately direct the jury on the law as to possession and the necessity for finding that the appellant was in possession. The box in the house did not belong to him and as his brother's goods were in the box it could reasonably be assumed that when he saw other articles in the box he presumed they belonged to his brother. But if as can reasonably be inferred from the evidence in this case the bush rum was in the premises prior to the time when the second-named appellant left on a visit to his bereaved neighbour, the inference drawn by the Magistrate that he too was in possession of the rum, was not unreasonable. The other factors already referred to coupled with his attempt falsely to convince the Court that he did not know that a quake with six bottles was in the kitchen support the presumption that he had knowledge of the contents of the bottles to be bush rum.

In the result the appeal of both appellants is dismissed with costs.

Appeal dismissed with costs.

In the matter of E. B. S. a person of unsound mind,
and
In the matter of the Civil Law of British Guiana Ordinance
Chapter 7.

Application on the part of Mary Hopkinson.

(In the Supreme Court, In Chambers (Ward J) March 27; April 3, 1950; September 3, 22, 1951).

Unsound mind—application for guardianship dismissed—costs against applicant.

An application for guardianship of a person of unsound mind was dismissed. Costs were awarded against the applicant because the trial judge was satisfied that the main aim and object of the applicant was not the protection of the person alleged to be of unsound mind, but to annoy and harass her husband.

A. T. Singh for the applicant

Sir E. Woolford for the husband of the person of unsound mind.

Ward, J.: This is an application by Mary Hopkinson asking to be appointed guardian or committee of Evalina Boodhoo Singh, a person of unsound mind, or alternatively that the Public Trustee of British Guiana be appointed a committee of the said lunatic. The application was opposed by the husband of the lunatic, and on hearing evidence and counsel for the applicant and the husband I dismissed the application, reserving the question of costs.

It has been urged by Mr. Singh for the applicant that she should not be ordered to pay the costs of and incidental to the application because the application was made bona fide for the benefit of the lunatic and her estate. Costs in applications relating to a person of unsound mind are in the discretion of the Court and the principles on which this discretion is to be exercised have been stated in the cases of In re Windham 4 D. F and J. 53 and In re Cathcart (1892) 1 Ch. 549 and (1893) 1 Ch. 466. The principle is stated by Lord Halsbury at p. 472 as follows: "It seems to me that if the demand for inquiry is really prompted by a desire to protect the person and property of the alleged lunatic, and is presented on reasonable grounds and in a reasonable manner, the expense of such a proceeding ought not to fall upon the person so invoking the aid of the law to protect those in need of protection." In the same speech Lord Halsbury approved the statement of Lindley L.J. reported in (1892) 1 Ch. at p. 560: "The relation in which the petitioner stands to the alleged lunatic, and the petitioner's objects and conduct are the last matters to which I will refer. It is plain that these matters, although not relevant to the inquiry into the state of mind of the alleged lunatic, are very important in considering the question of costs. An unsuccessful inquiry, promoted by a stranger for purposes of his own, ought to be regarded very differently from an unsuccessful inquiry promoted, perhaps most reluctantly, by a husband or wife or some kind of relative or intimate friend acting bona fide in the interest of the alleged lunatic and for the protection of himself and his property."

In this application I was satisfied that the main aim and object of the applicant was, not the protection of the person alleged to be of unsound mind, but to annoy and harass her husband. Sir E. Woolford contended that it was necessary for the husband to intervene in this matter for the protection of his wife and her property from the attempt of the applicant to get legal control of the person and property of his wife. In addition serious allegations were made against the husband. If I had been satisfied that the applicant had made her application bona fide for the protection and property of her niece I should not allow any costs against her; but as in my view the object of the proceedings was to harass the husband I am of opinion that costs should be awarded against her which I fix in the sum of thirty-five dollars.

Costs awarded against applicant.

JHAMAN v. ANROOP
and
Paul Jhaman an infant by his next friend and father
BENNIE JHAMAN v. ANROOP.

(In the Supreme Court, Civil Jurisdiction (Stoby J. (ag.)
June 18, 22, 25, 29; September 28, 1951)

Malicious prosecution—owner by transport—stranger in possession for over 30 years—claim to land—knowledge by owner—prosecution—absence of reasonable and probable cause.

The plaintiff Bennie Jhaman and his family were occupiers of land at Soesdyke for upwards of thirty years. About 1933 the defendant purchased an interest in the land so occupied and was authorised to act on behalf of the persons claiming to be owners by transport. In 1938 he occupied a portion of the land and from then until action brought was aware that the plaintiff was also asserting a claim to the land founded on uninterrupted possession. In 1947 the plaintiffs at the instigation and by the authority of the defendant were arrested and charged with larceny of wood taken from the land. The charges were dismissed. The plaintiffs claimed damages for malicious prosecution and false imprisonment.

Held: Assuming that the plaintiffs claim to the land was unjustifiable, the defendant was nevertheless aware that it was being honestly made and could not honestly believe in the plaintiffs' guilt. There was therefore an absence of reasonable and probable cause.

John Carter for plaintiffs.

C. E. R. Debidin for defendant,

Stoby, J. (Ag.): The plaintiff Bennie Jhaman is the father of Paul Jhaman and at the time when the incidents arose which resulted in these two actions for assault, false imprisonment, and malicious prosecution being brought against the defendant, were the occupiers of land at Soesdyke. The area of land occupied and. the nature of the occupation were the subject of a considerable amount of evidence but the view I take of the law is such that it will be unnecessary for me to make any finding regarding the ownership of the land.

On the 11th July, 1885, there was transported to one Ramdhun:

> "a piece of land part of the northern portion of Plantation Soesdyke in the "river Demerara in the county of Demerara and Colony of British Guiana, "said northern portion of said plantation Soesdyke, having a facade of two "hundred Rhynland roods by a mean depth of seven hundred and fifty "Rhynland roods as laid down and defined on a. diagram of said northern "portion of said plantation made by John Peter Prass, Sworn Land Sur-"veyor, dated 19th July, 1884, and deposited in the Registrar's Office of "British Guiana on the 10th July, 1885, said piece of land having a facade "of 44 roods running southward from the centre draining trench of said "northern half of said plantation by the entire depth of said plantation."

In this judgment the land so described in the transport is referred to as "the land."

Ramdhun died on the 17th July, 1903, leaving the land to his wife Jathanee and his daughters Jimony, Jamny, Lilmony, Phulmony and Lallmony. After the death of her husband, Jathanee seems to have resided on the land but it is not clear from the evidence whether the daughters occupied the land at any time.

Some time prior to the birth of Bennie Jhaman, his father was living on a part of the land probably as a tenant. Bennie was born there and he and his family lived there all their lives.

The defendant is married to a niece of Jamny. In 1933, he purchased from the Official Receiver an undivided 3/5th of an undivided l/7th share in the land, and at various dates, other parties interested in the land by virtue of Ramdhun's will, authorised him to act on their behalf. About 1938 he envisaged himself as the nominal owner of the land, erected a house and went to live there. But it is a far cry from 1903, when Ramdhun died, to 1938, and in the meanwhile due no doubt to the fact that the land was of little value, Bennie Jhaman was living there paying no rent and planting the land. When Anroop appeared on the scene in 1938, it must have been a shock to Bennie who had already regarded himself as the owner.

Subsequent events were to be expected. Now one, now the other began to take steps to exercise acts of ownership. The land was surveyed at the instance of each other. Bennie cut wood and burnt coal. Anroop prosecuted some persons and threatened violence to others.

The incessant and continuous disputes between these two protagonists culminated on the 18th October, 1947, when the plaintiffs were arrested at the instigation and by the authority of the defendant and charged with larceny. The charges having been dismissed by the Magistrate these actions were instituted.

It will be convenient firstly to deal with the claim for malicious prosecution since the burden of proof upon the plaintiffs is so much heavier than in a claim founded on false imprisonment.

It is common ground that in order to succeed on this part of the claim the plaintiffs must prove:

(1) that the defendant prosecuted them;
(2) that the prosecution ended in the plaintiffs' favour;
(3) that the prosecution lacked reasonable and probable cause; and
(4) that the defendant acted maliciously.

(1) *Did the defendant prosecute the plaintiffs.*

The most reliable evidence surrounding the institution the criminal proceedings is the evidence of Sergeant Baynes whose testimony I accept. Prior to the 18th October and again on the morning of the 18th, Baynes advised the defendant to take proceedings in the Supreme Court in order to determine whose claim to the land was justified. After the arrest of the plaintiffs, it was the defendant who insisted that they should be charged for larceny. That the defendant was the complainant was proved by production of a certified copy of the charge Exhibit "A".

All this evidence indicates that the defendant was not content merely to make a report to the police that an offence was being committed and rely on the result of their investigations and their discretion as to whether the facts warranted a prosecution or not, but that he had resolved on the prosecution of the plaintiffs and was not to be deterred by an opinion inconsistent with his resolution.

(2) *Did the prosecution end in the plaintiffs' favour.*

There is no dispute and indeed it is conceded that the charges were dismissed on the 5th May, 1948, and thereby the prosecution ended in favour of the plaintiffs.

(3) *Did the prosecution lack reasonable and probable cause.*

It was contended on behalf of the defendant that he is entitled to the land or at least is of an honest opinion that he is entitled to the land and in addition he honestly believed in the plaintiff's guilt and therefore had reasonable and probable cause. Hicks v. Faulkner (1878) 8 Q.B.D. 167, cited in support of that proposition decided that the question of reasonable and probable cause depends in all cases not upon the actual existence but upon the reasonable bona fide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of. I accordingly agree that if there is an honest belief that a person is stealing property, even though the belief is mistaken, the charge may still be reasonable and probable. But there can be no honest belief that a person is stealing property when the accuser is aware that the accused, too, is equally sincere in laying claim to the property. Assuming without deciding that the defendant's wife and her relatives are the true owners of the land, and assuming without deciding that the plaintiff Bennie Jhaman has acquired no possessory title I am convinced that the defendant is fully aware of Bennie Jhaman's contention that he was entitled to a declaration of ownership on account of his sole and undisturbed possession for upwards of thirty years. I can well conceive, of a thief, caught in the act of stealing property making some groundless claim to ownership in the vain hope of escaping conviction. A situation may well occur where such a defence is successful and yet there was reasonable and probable cause as in subsequent proceedings it might be established that the claim of right was suddenly raised and always groundless. But where for years the parties have been at enmity, where the alleged theft is committed openly, where the alleged thief has for years exercised acts of ownership and where the accuser has been advised to seek redress in a civil court but refrains from doing so because of expense, he can hardly be heard to say that he has an honest belief in the other party's guilt. The defendant, no doubt, ignorant of the law could not understand why he, armed with all his documents of title, should be helpless against an adversary devoid of any document; but he was advised more than once by the Sergeant and he Was warned by the ranger. Yet he was not prudent enough to avail himself of legal advice. In addition to all of this he knew that the plaintiff, Bennie Jhaman, had caused a Sworn Land Surveyor to survey portions of the land and was asserting his claim to the

land. And while I do not accept the evidence of Mr. Insanally that the plaintiff, Bennie Jhaman said in presence of defendant that the land was being surveyed so that certain house lots could be let to the defendant, yet I accept the evidence that defendant was aware of the survey and offered no objection.

In Herniman v. Smith 1938 A.C. 305, the House of Lords approved of the definition of reasonable and probable cause by Hawkins J. in Hicks v. Faulkner as:

> "an honest belief in the guilt of the accused based upon a full conviction, "founded on reasonable grounds, of the existence of a state of circum- "stances, which, assuming them to be true, would reasonably lead any or- "dinarily prudent and cautious man placed in the position of the accuser, "to the conclusion that the person charged was probably guilty of "the "crime imputed."

Applying this test and rejecting as I do, the defendant's version where it, conflicts with Baynes' or Howell's, I have come to the conclusion that there was an absence of reasonable and probable cause.

(4) *Did the defendant act maliciously.*

In Koodratali v. A. Chin (1939) L.R.B.G. p. 220, Camacho C.J. said:

> "If as must be taken to be the fact, the accusation was false to the defen- "dant's knowledge, there can be no reasonable and probable cause for him "and if a false charge was made by the defendant and false to his knowl- "edge, malice is made out."

In the present case, the defendant did not institute the proceedings because of information received; he instituted the charges and relied on facts known to him. The allegation that he is representing the legal owners of the land may or may not be true but he knew that the plaintiffs were not thieves because when their cows were impounded in 1947 and 1949, charges for illegal impounding were brought. He was therefore aware that the plaintiff, Bennie Jhaman, was asserting a right to the land. I do not regard as reliable that portion of Howell's evidence in which it is alleged that the wood was cut from Crown Land but the importance of that evidence is that Howell warned the defendant to do nothing until the Lands and Mines investigated, to which the defendant replied that he would know what to do. What he had decided was to have recourse to the criminal law, not to vindicate the law but to terrorise an opponent, and force him to leave the land.

On account of the defendant's conduct, malice has in my opinion been established not only because of an absence of reasonable and probable cause but also because the sole cause of the prosecution was the result of a feud and for no other motive.

That part of the claim grounded on false imprisonment remains to be decided.

I have already indicated my acceptance of the plaintiff's and Baynes' evidence and the rejection of the defendant's evidence.

It was the defendant who obtained the rural constable, who instructed him to arrest the plaintiffs and who signed the charge at the police station. These facts distinguished this case from Sewell v. National Telephone Co., Ltd., 1907 1 K.B. 557 where the signer of the charge sheet did so after an arrest had been made by someone else.

The defendant for reasons indicated above has failed to establish that there was reasonable and probable cause for the arrest.

The plaintiffs will have judgment as follows:

Bennie Jhaman:	Special damages	$ 91.52
	General damages	120.00
		$211.52
Paul Jhaman:	General damages	$120.00

The defendant must pay the plaintiffs' costs. Cost will be on the lower scale.

Judgment for the plaintiffs with costs.

Solicitors: *D. P. Debidin* for defendant.

HOPE and MANSELL v. SAGAR

(In the Supreme Court, Civil Jurisdiction (Stoby J. (Ag.)
June 18, 26, 27 September, 28, 1951)

Rent Restriction Ordinance—consent order for possession—repairs—breach—cancellation of order—action for damages —sale—forcible reentry—trespasser.

The first named plaintiff was the owner of premises in Georgetown and the defendant her tenant.

During 1948 the first named plaintiff obtained an order by consent from the Magistrate whereby the defendant agreed to deliver up possession of the premises on the ground that repairs were necessary and he would resume possession on their completion.

In breach of the consent order, no repairs were carried out, and the defendant obtained $150:—damages against the first named plaintiff.

On the 23rd May, 1949, he had not re-entered the premises.

On the 1st June, 1949 while the defendant was still out of possession, the first named plaintiff sold the premises to the second named plaintiff.

On the 16th June, 1949 the defendant re-entered the premises without the consent of the plaintiffs.

The plaintiffs claimed a declaration that the defendant was a trespasser and damages.

Held: The defendant was a trespasser and the second named plaintiff entitled to damages.

P. A. Cummings for plaintiffs.

H. A. Fraser for defendants.

Stoby, J. (Ag.): When this action came on for hearing, counsel for the plaintiff and counsel for the defendant informed me

that there was no dispute as to the facts but that substantial questions of law fell to be decided from the facts as agreed.

Before deciding the questions of law it will be convenient to record in detail the agreed facts.

The first-named plaintiff, Jane Hope, was the owner by transport of premises situate at lot 103, Queenstown, Georgetown. During the year 1939 the first-named plaintiff and the defendant Sagar entered into an oral contract of tenancy as a result of which, the defendant became the first-named plaintiff's tenant at an agreed rental. On the 21st September, 1948, the first-named plaintiff obtained an order by consent from the Rent Assessor, Georgetown, whereby the defendant by consent agreed to deliver up possession of the premises of 103 Queenstown, on the ground that the premises were in need of repairs and that he would resume possession on completion of the repairs. In pursuance of the consent order, the defendant vacated the premises and some repairs were commenced.

During 1949, the defendant applied to the Magistrate to discharge the consent order of the 21st September, 1948, and the order was accordingly discharged on the 14th March, 1949. The consent order of the 21st September, 1948, and the order discharging it was tendered as Exhibit "A".

On the 22nd March, 1949, the defendant filed an action in the Magistrate's Court against the first-named plaintiff claiming $150 damages on the ground that the first-named plaintiff had failed to effect repairs and had refused to replace the defendant into possession—vide Exhibit "B".

On the 23rd May, 1949, the Magistrate gave judgment in favour of the present defendant in the sum of $150. From this decision there was an appeal but the Full Court dismissed the appeal and confirmed the Magistrate's decision. No written decision was given by the Full Court but the Magistrate's reasons for decision and the appellant's grounds of appeal form part of exhibit "B".

On the 1st June, 1949, the first-named plaintiff sold the property to the second-named plaintiff Mansell for the sum of $4,000 and delivered possession on that day by handing over the keys to her. The property was sold with vacant possession as there was no one in occupation on the 1st June, 1949.

On the 16th June, 1949, the defendant Sagar without the permission of either plaintiff broke and entered the premises and has since refused to depart therefrom.

The second-named plaintiff Mrs. Mansell purchased the premises in order to effect substantial repairs and on completion thereof to reside in the house with her family.

The defendant wrote the second-named plaintiff on the 6th July, 1949, and she replied to him on the 11th July, 1949. These letters were tendered as Exhibits "C" and "D" respectively. On the 26th July, 1949, and on 6th August, 1949, counsel for Mabel Mansell wrote the defendant but received no reply. Those two letters were tendered as Exhibits "E" and "F".

On the facts recited above, counsel for the plaintiffs submitted that there was no defence to the claim of the second-named plaintiff since the Magistrate and Rent Assessor had no jurisdiction to attach a condition to the order for possession; that the defendant was not a tenant at the time when the second-named plaintiff purchased; and that the correspondence exhibits "C", "D", "E" and "F" did not stop her from alleging that defendant is a trespasser.

In Cameron v. Daly decided by the Full Court on the 17th February, 1951, it was held that a Magistrate had no statutory authority to attach a condition when making an order for possession. Counsel for the defendant invited me to express an opinion contrary to Cameron v. Daly in view of the fact that the respondent in that appeal was unrepresented. A decision of the Full Court is binding on a single Judge and I must therefore decline the invitation to differ from a decision which is clearly binding on one. Indeed it is not difficult to appreciate why Magistrates fell into error in attaching a condition to an order for possession. Under section 7 (1) (e) of the Rent Restriction Ordinance, No. 23 of 1941, before it was amended, when a landlord obtained an order for possession of premises for improvements or structural alterations or rebuilding, the tenant was entitled to continue the tenancy at the rent and on the conditions to be determined by the Court. It was on the original application for possession that the Court determined whether the tenant should resume possession. But under the Rent Restriction (Amendment) Ordinance, 1947, (No. 13), the procedure was completely changed by the re-enacted section 7 and, as explained in Cameron v. Daly, there is no statutory authority to impose any condition on the original application for possession.

The next point which falls for consideration is the effect of the first-named plaintiff's consenting to the defendant's continuing the tenancy on the conclusion of the repairs. On behalf of the plaintiff the argument has been pressed upon me that no consent can give to the court a jurisdiction it did not have and consequently the Magistrate's order should be treated as having no binding effect.

In J. & F. Stone Lighting and Radio Limited v. Levitt, 1947 A.C. 209, it was decided that neither estoppel nor res judicata could give the Court a jurisdiction under the Rent Restriction Acts which it did not have. There is nothing in the judgment which suggests that landlord and tenant cannot enter into a valid contract regarding the terms of tenancy once those terms are not in conflict with the Rent Restriction Acts. Lord Porter at page 217 said:

> "Under the Acts a tenant cannot be liable to pay more than the standard "rent but there is nothing to prevent his paving less."

If landlord and tenant can agree that rent should be less than the standard rent, there is no logical reason why they cannot agree that on repairs being completed the tenancy is to continue. The Ordinance does not prevent such an agreement being made. A magistrate cannot assume a jurisdiction he does not have by

making an order which purports to compel a landlord to continue a tenancy, but the parties themselves can make such a contract and if the Magistrate embodies it in his judgment or order, such judgment or order becomes available as evidence to prove the contract. I am of opinion therefore that although the Magistrate's order was a nullity and unenforceable as such, in view of the fact that it was a consent order, it is positive proof that the first-named plaintiff did agree with the defendant that the tenancy was to continue on the completion of repairs.

The result of this agreement was not to invest the defendant with the cloak of tenancy. Once the possession order was made, he ceased to be a tenant. The agreement endowed him with the right to become a tenant. If the premises were not made available to him, appropriate action in damages was open to him. I do not have to decide what his position would have been had a forcible entry been made at that stage but it may well be that the agreement would have protected him.

The defendant, however, failed to adopt one or other of the courses open to him under his agreement, but filed an action in the Magistrate's Court claiming damages on the ground of misrepresentation. In so doing he acknowledged that he was no longer the tenant of the first-named plaintiff. If he were still a tenant his action could not lie. His whole claim is grounded on deceit and he was awarded substantial damages on that basis.

The final point which now arises is whether the defendant having obtained damages can still claim to be a tenant under the agreement. The admitted facts on this aspect of the case are important. It was on the 22nd March, 1949, that the defendant instituted proceedings in the Magistrate's Court. He obtained judgment in his favour on the 23rd May, 1949, and on the 1st June, 1949, the property was sold to the second-named plaintiff with vacant possession. There is no evidence that the second-named plaintiff either knew of the existence of the agreement of 21st September, 1948, or of the Magisterial action for damages, hence it must be assumed that she was an innocent purchaser who bought without knowledge of any dispute between vendor and any previous tenant. The whole scheme of the Rent Restriction Ordinance is to protect a resident in a dwelling house vide Skinner v. Geary 1931 2 K.B. 546 C.A.; Hicks v. Scarsdale Brewery Co. 1924 W.N. p. 189; or an occupier of business premises Williams v. Cameron Full Court 14.9.51 As was explained in Cameron v. Daly (supra), a tenant against whom an order for possession has been made has if the order was obtained by misrepresentation or fraud, either an action under the Ordinance or his common law action of deceit. Furthermore, the Ordinance provides for the institution of criminal proceedings against the landlord in addition to the remedies referred to above. Since the defendant was not a tenant oh the 1st June, 1950, or if he were a tenant since he was not in possession of the dwelling house, he could acquire no rights against the second-named plaintiff who was an innocent purchaser. The second-named plaintiff was justified in assuming that if there was a previous tenant of the premises who was no longer in occupation, that such tenant had

been lawfully ejected or if not lawfully ejected would have recourse to his statutory or common law remedy. When on the 10th June, 1949, the defendant forcibly entered, his entry was wrongful and his occupation was that of a trespasser.

The claim by the first-named plaintiff fails, but there must be judgment for the second-named plaintiff. There will be an order in her favour that she recover possession of the premises on or before the 1st day of November, and damages in the sum of $308.00 with costs, being $258.00 accrued rental for 27½ months and $50 general damages with costs.

Judgment for second-named plaintiff.

ALEXANDER v. PARWATEE PERSAUD

(In the Supreme Court, Civil Jurisdiction (Ward J.) October 2; December 7, 1950; September 3, 17; October 1, 1951).

Rent Restriction Ordinance—Standard Rent—Overpayments—recoverable.

The plaintiff rented premises from the defendant at a rental of $60.—per month from June 1, 1949 to March 31, 1950.

Before vacating the premises, he applied to have the standard rent ascertained and the maximum rent certified. On July 19, 1950 the Rent Assessor issued his certificate certifying the maximum rent at $32.50. The certificate did not specify any particular date from which it would take effect.

The plaintiff claimed to recover the difference between the maximum rent and the rent actually paid, the excess amounting to $276.00 for the ten months of the tenancy.

The defendant resisted the claim contending that excess rent could only be recoverable from the date of the certificate.

Held: The amount of $276:—paid in excess of the amount as certified in the certificate was recoverable.

Sugrim Singh for plaintiff.

H. A. Fraser for defendant.

Ward, J.: In this action the facts are not in dispute. The premises were rented by the plaintiff from the defendant for $60 per month from June 1, 1949 to March 31, 1950, when the tenant vacated the premises. Before giving up possession the tenant applied to the Rent Assessor, under Section 4B(1) of the Rent Restriction Ordinance 1941, as amended by Section 5 (1) of the Rent Restriction (Amendment) Ordinance No. 13 of 1947, to have the standard rent of the premises ascertained and certified and the maximum rent assessed, fixed and certified. The rent Assessor on July 19, 1950, issued his certificate under Section 4B (22) certifying the maximum rent at $32.40 per month. The plaintiff claims in this action to recover the difference between the maximum rent as certified and the rent actually paid, the excess amounting to 276.00 for the ten months of the tenancy.

Mr. Fraser for the defendant submitted in a persuasive argument that although Section 5 (2) of the Rent Restriction Ordin-

ance 1941, as amended by Section 6 of the Rent Restriction (Amendment) Ordinance of 1947 gives a tenant the right to recover from the landlord any rent paid in excess of the standard rent plus the permitted increases, for any period subsequent to the material date, this right is restricted by the provisions of Section 4B (23) and of Section 4E (6). His submission shortly stated is that while the standard rent is defined by the Ordinance, the maximum rent cannot be assessed and fixed unless the Rent Assessor so certifies; and that the certificate of the Rent Assessor by which the maximum rent is fixed only takes effect, according to the provisions of Section 4B (23), either from the date of the certificate or from such date whether before or after the date of the certificate as may be specified in the certificate.

For deciding this question it is my view necessary to examine the relevant sections, bearing in mind both the purpose of the Rent Restriction Ordinances and the rules of interpretation relating to statutory enactments. The provisions of Section 5 (2) are clear beyond question or doubt: "Where, in respect of any period subsequent to the material date any tenant has paid, whether before or after the aforesaid date, rent on premises to which this Ordinance applies, or any sum on account of such rent, which exceeded the standard rent by more than the amount permitted under this Ordinance, the amount of such excess shall, notwithstanding any agreement to the contrary, to recoverable from the landlord who received the payment or from his legal personal representative by the tenant by whom it was paid". The material date for the purposes of this case is March 8, 1941.

It is impossible, in my opinion, to accept the suggestion that the existence of this right to recover all rent paid in excess from the material date was overlooked by the Legislature *per incuriam.* The Rent Restriction (Amendment) Ordinance 1947 introduced amendments to Section five simultaneously with the amendments to Section four contained in Sections 4B (23) and 4E (6). If these sections set limits to or restrictions on the right to recover rent paid in excess from the material date the Legislature must be taken to have done so by design.

It appears to me that Mr. Fraser's argument really rests upon his submission that the landlord has the right to add the permitted increases to the standard rent without any application to the Rent Assessor. Under the Rent Restriction Act 1920 a landlord in England was given this power, but it was surrounded by necessary safeguards. The landlord had to give the tenant a statutory notice of the increase which by the Rent Restriction (Notices of Increase) Act 1923 operated as a notice to quit. If the tenant was dissatisfied as to the amounts of such increase or as to whether the increase was lawfully justified, he could apply to the County Court to adjudicate on the matter. This was substantially the position under the provisions of the Rent Restriction Ordinance 1941. But the Rent Restriction (Amendment) Ordinance 1947 contains no provisions corresponding to these provisions of the Rent Restriction Acts in England. On the contrary the provi-

sions of the 1947 Ordinance show clearly that the calculation or assessment of increases is not left to the landlord, but the only permitted increases are the amounts assessed by the Rent Assessor under Section 6 (1) paragraphs (a), (b) and (c). Section 6 (1) provides that "the amount by which the increased rent of premises to which this Ordinance applies may exceed the standard rent shall, ... be an amount assessed by the Rent Assessor and set out in his certificate under Section 4B or 4C". Further section 4C (1) provides that an application may be made by a landlord, who has incurred expenditure, for the issue of a new certificate in respect of the permitted increases.

It is understood that it is still a customary practice for landlords to calculate the permitted increases and add them to the rent, and tenants have sometimes acquiesced in these increases even after the Rent Restriction (Amendment) Ordinance 1947 came into force. This course has been justified on the ground that the Rent Assessor would be unable to consider the flood of applications which would be filed if the assessment of the permitted increases in respect of all leases had to be made by the Rent Assessor. But it is clear from the sections considered that a landlord since 1947 makes such a calculation at his own risk, and there is no obligation on a tenant to pay any increase which is not an amount assessed by the Rent Assessor under the provisions of Section 6 (1) and certified as provided under sections 4B and 4C. The determination of this question makes intelligible the provisions of Section 4B (23) and 4E (b). The certificate speaks from either the date of the certificate or from a date fixed by the certificate and the permitted increase is only legally recoverable as from that date, since the only increases permitted are the amounts assessed by the Rent Assessor under Section 6 (1) of the Ordinance and so certified. In this case it is admitted that an amount of $276 has been paid in excess of the amount as certified as the maximum rent by the Rent Assessor, and the plaintiff is entitled to recover it. Judgment is accordingly entered for the plaintiff for the sum of $276 and the taxed costs of the action.

Judgment for the plaintiff with costs.

REX v. LUCY ADAMS

(In the Supreme Court, Criminal Jurisdiction (Stoby J. Ag.)
October 15, 1951).

Criminal Law—murder—absence of body.

The accused was indicted for the murder of her baby. The body of the child was never recovered but in order to establish its death, the prosecution led evidence that the accused admitted that the child had died accidentally and she had thrown away the body.

On a submission that there was no case fit to be left to the jury because there was no satisfactory proof of death and no evidence that a crime had been committed.

Held: There was satisfactory evidence of death because the accused had admitted the death of the child and confessed to disposing of the body but there was no evidence that its death was due to an intentional act of the accused.

J. A. Luckhoo for the Crown.

V. E. Crane for accused.

Stoby, J. (Ag.): The accused is charged with having murdered Brentnol Adams on the 9th January, 1951. The prosecution has established that the accused was married on the 16th October, 1950. She gave birth to a child at the Public Hospital on the 1st January, 1951, and was discharged from the Hospital on the 9th January, 1951.

After leaving the Hospital she visited her father and told him that her husband was not admitting paternity of the child and while he was willing to have her return home he had stipulated that the child was not to accompany her. The father suggested that she should remain in Georgetown and he was willing to assist in maintaining her but he was unable to offer her a home.

The accused decided to go to her god-mother in Regent Street and left with that intention accompanied by her brother Carl Hoyte. On the way to her god-mother she decided to visit her god-father instead and as her brother did not wish to accompany her any longer she continued the journey alone. She arrived at the house of her god-father without the baby and when questioned stated that she had given birth to twins both of whom had died some days before.

On the 12th January after her return to her husband's home at Nabaclis the police, having received certain information, paid her a visit and asked her to account for the child born on the 1st January, 1951. She stated that while taking the child to her god-father on the 9th January the rain began to drizzle and in order to protect the child from the elements she had covered it with a shawl which caused it to suffocate and that becoming alarmed she had thrown it into the Lamaha Canal. The body has never been found.

At the close of the case for the prosecution, counsel for the

accused submitted that the prosecution had failed to establish a prima facie case:

(a) because there was no satisfactory proof of the death of the child; and

(b) there was no evidence that a crime had been committed.

The learned author of Halsbury's Laws of England 2nd Edition Vol. 9 at p. 449 states:

> "Where no body or part of a body has been found which is proved to be "that of the person alleged to have been killed, the accused person should "not be convicted of murder or manslaughter unless there is evidence ei- "ther of the killing or of the death of the person alleged to be killed. In the "absence of sufficient evidence there is no onus on the prisoner to account "for the disappearance or non-production of the person alleged to be "killed."

This passage does not support the argument that there has been no satisfactory evidence of the death of Brentnol Adams since the accused has admitted that Brentnol Adams died on the night of the 9th January and the body disposed of on that date.

But it is not enough for the prosecution to establish death alone. The prosecution must give satisfactory proof of the *corpus delicti,* that is, must prove that the offence charged has been committed by someone. Hale's Pleas of the Crown Vol. 2 at p. 290 states:

> "I would never convict any person of murder or manslaughter unless the "fact were proved to be done or at least the body found dead."

In order to establish the offence of murder the Crown must prove (a) death as a result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication for malice may be implied where death occurs as a result of a voluntary act of the accused which is intentional and unprovoked. See Woolmington v. The Director of Public Prosecutions 1938 Appeal Cases 483.

In this case while the prosecution has established death as the result of an act of the accused, there is no evidence from which the jury can infer that death was intentional, and since some such evidence should first be given it follows that the prosecution has failed to discharge the onus which rests on it and I must direct the jury to return a verdict of not guilty.

Accused found not guilty.

SHANKLAND v. BILLYEALD

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Boland C.J. (acting), Ward and Stoby J.J.) September 7, 14, 21, 28; November 10, 1951).

Criminal Law—Corrupt Transaction—Accomplice—Document produced by accomplice—Corroboration—Receipt of money to show favour in sale of articles—No authority to sell—Receipt of money in relation to principal's business.

The appellant was convicted of being an agent of the Disposals and Security officer at the Air Base Atkinson Field corruptly accepted from John Henry Quan the sum of one hundred and forty dollars as an inducement or reward for showing favour to the said Quan in relation to his principal's business by selling Quan a quantity of articles below their real value.

The Magistrate regarded Quan as an accomplice and warned himself of the danger of convicting on the uncorroborated evidence of an accomplice. He found corroboration in various witnesses and in a document which Quan produced and said the appellant had given it to him. The document showed what was contained in the building when it was handed over to the British Guiana Government.

It was admitted at the trial that the appellant had no authority to sell any articles of Quan.

Held: In the circumstances of this case the document produced by Quan was corroborative of his testimony.

To bring a person within the terms of the section it is only necessary to show that he was in a position to show favour in the manner alleged.

L. M. F. Cabral, C. L. Luckhoo with him for the appellant.

C. A. Burton Legal Draftsman for the respondent.

Judgment of the Court: The appellant was convicted on August 24, 1950 by a Magistrate of the Georgetown Judicial District of an offence under section 106 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13. The particulars of the offence as stated in the order of conviction are that "he on the 2nd day of November, 1949, at Atkinson Field in the Georgetown Judicial District being an agent, that is to say, the Disposals and Security Officer at the Air Base, Atkinson Field, corruptly accepted from John Henry Quan the sum of one hundred and forty dollars as an inducement or reward for showing favour to the said John Henry Quan in relation to his principal's business by selling to the said John Henry Quan below its real value a quantity of copper tubing, galvanized tubing, galvanized fittings, steel tubing fixtures, meat hooks, ice cans and pitch pine boards, the property of the inhabitants of the colony of British Guiana". The magistrate ordered the appellant to pay a fine of two hundred and twenty dollars, or in default of payment to undergo three months' imprisonment with hard labour.

Learned counsel for the appellant submitted that the appeal should be allowed on four grounds: firstly that there was no sufficient evidence that the appellant had received the sum of one hundred and forty dollars from John Henry Quan; secondly that the learned magistrate misdirected himself in holding that the wit-

nesses, Kam and Hengist Cummings were not accomplices and wrongly accepted their evidence as corroboration of the evidence of Quan; thirdly that the magistrate misdirected himself in holding that the documents, Exhibits N and R, produced by Quan from his custody, afforded corroboration of Quan's testimony; and fourthly that even if appellant did appropriate to himself the said sum of $140.00 the magistrate misdirected himself as to the law in holding that the appellant was an agent to sell the articles enumerated in the order of conviction when in fact he had no authority to sell these articles, and that consequently the appellant could not be said to have accepted the said sum as an inducement or reward for doing something in relation to his principal's business.

The evidence given by Quan in support of the charge was that on November 1, 1949, the appellant and Quan visited the refrigerating plant building No. 1120 at Atkinson Field, and that after inspecting the installations in the building with the aid of a torchlight, they entered into an agreement for their sale at the price of ten dollars. But the written agreement for sale, Exhibit E, prepared the same day in the office of the Board of Control at Atkinson Field by the direction of the appellant as Disposals and Security Officer purported to be a contract for the sale of "an odd lot of scrap pipe, junk iron and some old pitch pine to Quan for ten dollars". On the following day the appellant met Quan at Atkinson Field, in company with the witnesses Kam, Morgan and Chin. Quan was understood to be acting as agent for Chin in the purchase of the articles agreed to be sold. Chin handed one hundred and fifty dollars to Quan, who went into the office building with the appellant and handed this sum to him. The appellant then returned Quan the sum of ten dollars to pay to the cashier in respect of the contract of sale prepared the previous day, and kept one hundred and forty dollars for himself. At the same time it appears that the right to dig in a garbage heap for junk was entered on the same contract of sale, Exhibit E, in respect of which Quan agreed to pay a further sum of fifteen dollars. As some question about this second contract was raised by Mr. Medford, the cashier, the appellant appended his initials to both of the items listed in the contract Exhibit E. After Quan had paid the cashier twenty-five dollars and Major Hargreave, the acting Chief Executive Officer of the Board of Control Atkinson Field, had signed the contract on behalf of Government, Quan, Chin, Kam and Morgan drove to the refrigerating plant building, whither a lorry belonging to Quan had preceded them. The articles in the refrigerating plant building were removed and loaded on lorries on November 1st and 2nd, and the necessary authority to be passed out of the Air Base was given by Hengist Cummings, the delivery clerk. The articles recovered by Quan from the garbage pit were removed by lorries belonging to Quan between November 8th and November 11th, and the appellant countersigned the delivery sheet on November 14th. It is not disputed that the articles removed from the refrigeration plant building far from being of the small value of $10.00 did in fact greatly exceed one hundred and fifty dollars in value.

On November 4th the removal of the fittings from the refri-

gerating plant building was discovered and Major Hargreave interrogated the appellant about the matter. The appellant said that he was not aware that anything had been removed from the building, and that he had sold to Quan under the contract only boards and piping lying outside the building. He said further that he was not aware that anything was in the building. Later the appellant was instructed to send in a written report and he forwarded on November 9, 1949, to Major Hargreave the document, Exhibit J. In this he pointed out that when he checked the buildings against the U.S.A.F. and B.G. government agreement the refrigerating plant building contained only a switchboard, from which some of the fuse boxes had been removed, and that all other motors etc. had already been taken away. In his evidence before the Magistrate Quan who was a witness called by the prosecution produced a carbon copy of Exhibit J—Exhibit R—and another document Exhibit N. He stated that the appellant had handed him these two documents on November 25th, and had told him that the document Exhibit N shows what was contained in the Building at the time when it was handed over to the British Guiana Government.

The Magistrate, rightly, in our opinion, considered Quan as an accomplice and warned himself of the danger of convicting the appellant on the uncorroborated statement of an accomplice. He however found that there was ample corroboration in the evidence of the witnesses Kam, Wilfred Armstrong and Edward Dey and in the document Exhibit N.

Mr. Cabral for the appellant contended that the witness Kam had been clearly proved to be an accomplice, that the evidence of Armstrong and Dey was not sufficiently "proximate" to amount to corroboration, and that the document Exhibit N which came from Quan's custody might have been given to him by some person who wished to help Quan to exculpate himself and that its production by Quan was with a view to gain favour for himself by incriminating the appellant.

There is no doubt that the evidence of Kam, if he is not an accomplice, can be regarded as fully corroborative of the evidence of Quan as to the delivery of one hundred and fifty dollars by Chin to Quan and the transfer of this sum by Quan to the appellant. The Court has been asked to find that Kam is an accomplice as established by the evidence of Stephen Chin, who alleged that Kam is the brother-in-law of Quan and that Quan and Kam usually acted as partners. Chin, who was a witness called by the defence, gave evidence which, if believed, might establish that Kam was an accomplice. Amongst other things he said that Kam had come to him in a car with Police Constable Mason and, having left Mason in the car, had persuaded him to go with them to Brickdam and give a statement to the police. He alleged that the statement contained many untrue assertions, but that he was persuaded to tell these lies by Kam, who warned him that Quan, Kam and he would be charged for larceny and receiving. The magistrate expressed the opinion that Chin was a liar, and the magistrate in our view had ample grounds for this opinion. Further, as was pointed out by learned counsel for the

respondent, none of these allegations were put to Kam in cross-examination. It is possible that Kam did possess some knowledge of what was taking place, but knowledge that a crime is being committed does not make the person possessing the knowledge an accomplice. An accomplice is a person who has actively participated in the commission of the offence either by counselling and procuring, or by aiding and abetting in its commission. There is nothing in the evidence, except the statement of Chin that Quan and Kam usually acted as partners, which would bring Kam within the definition of an accomplice, and it is admitted by Chin that this transaction by Quan was carried out by Quan as his agent and not on his own behalf. We are satisfied that the magistrate did not misdirect himself in accepting the evidence of Kam as corroborative of the evidence of Quan.

It was objected that the evidence of Armstrong and Dey was not sufficiently proximate to afford corroboration. Their evidence showed that between 1.30 and 2 p.m. the Land Rover usually driven by the appellant was parked near the cold storage building while the lorry was being loaded with articles from the refrigerating plant room. At the same time the appellant was speaking to Quan who was standing beside his car outside the building. Dey's evidence is specific as to the presence of the appellant at the time the lorry was being loaded with pipes from the refrigerating plant building. He said: "On Wednesday 2nd November, 1949 I was visiting sentries at No. 3 and 4 roads about 1.30—2 p.m. in area No. 1. As I was on No. 3 road I saw a car by the side of the road. It was Quan's car. I saw a Land Rover, the vehicle defendant used to drive. I also saw Quan's lorry driven by Kelly. These were parked near the cold storage. Kelly called me. I spoke to him. I saw Quan. He was beside his car. Defendant was speaking to Quan. I also saw about 6 men in addition to Kelly . . . . . Men were loading the lorry with pipes from the cold storage building. The defendant was present while the lorry was being loaded". Added to this evidence there is the statement of Cummings that he saw the defendant's Land Rover on the main road opposite the cold storage and the defendant come from inside the building and drive away the Land Rover about 1.30 p.m. This evidence was material to rebut the appellant's statement that on November 2nd he never went into the cold storage building and had no knowledge that fittings were being taken from it. This evidence showed clearly that the appellant's statement was untrue and helped to establish the connection between Quan and the appellant in relation to the removal of the installations in the refrigerating plant. It was in our opinion directly probative, of the facts alleged by the prosecution and therefore sufficiently proximate to be accepted as corroborative of the evidence of Quan.

The learned magistrate regarded the document Exhibit N as strongly corroborative of the evidence of Quan in a material particular. This document contains an extract from the document Exhibit M, which described among others the refrigerating plant building handed over by the U.S.A.F. to the Government of British Guiana. In addition it contains a note to the following effect: "Note no mention of any refrigerating equipment is made

whatsoever, nor was any paid for in the building by the B.G. Government; value of the building is all that is shown on the contract. There is no inventory or list of any kind showing any equipment pertaining to refrigeration in this building, as far as the B.G. Government is concerned it was taken over as an empty shell". A magistrate examining this document in conjunction with Exhibit J, L and O could reasonably come to the conclusion that the person who prepared Exhibits J, L and O was the author of Exhibit N, for it contains exactly the same excuse which was presented in these documents. The suggestion that some wicked person, having got possession of Exhibit J or a copy, prepared Exhibit N for the purpose of implicating the appellant appears to us to be farfetched. We agree with the learned magistrate's opinion, that the document, though coming from the custody of Quan, is strongly corroborative of his evidence. In our view it establishes that in the transaction by which the installations came to be passed dishonestly into the possession of Quan, appellant and Quan had acted in concert and that in all the circumstances the $140 which appellant received for himself was a payment by Quan to him for the purpose of bribery.

There is further corroboration of Quan's story in the evidence of the witness Morgan. He corroborates Quan as to the visit paid by the appellant and Quan to the refrigerating plant on November 1st in every detail. The magistrate clearly preferred this evidence to that of the appellant who alleged that he never entered the building on the evening of November 1st.

A magistrate in assessing the evidence is entitled to take into consideration all the surrounding circumstances and the demeanour of the witnesses. A court reviewing his findings will not set aside his findings on questions of fact unless it is satisfied either that he misdirected himself or that he failed to take into consideration relevant factors which he should have considered and which, if considered, would have led him to a different conclusion. In this case we are satisfied that the magistrate did not misdirect himself, and we agree with the conclusion which he reached as to the reliability of the various witnesses. Reading the record, the Court is satisfied that it is clearly proved that the appellant did receive from John Henry Quan the sum of one hundred and forty dollars as an inducement or reward for showing him a favour in relation to his principal's business by assisting him in obtaining equipment from Atkinson Field greatly exceeding in value the ten dollars which Quan paid for it.

Mr. Cabral's final submission was that the appellant was not an agent for the sale of these articles and that, if he committed any offence at all, he was guilty of larceny and not of an offence under section 106 of the Summary Jurisdiction (Offences) Ordinance. He bases this submission on the fact that the appellant was expressly forbidden to sell installations attached to buildings. Major Hargreave in his evidence in cross-examination said: "There were written instructions that installations were not to be removed from any building without prior discussion between the Disposals Officers and the engineer. If George King or the defendant desired to sell the equipment and materials in the Cold

Storage building they would have to get permission from me, and I in turn might have had to get permission from the Chairman of the Board of Control". Mr. Cabral's contention is that in view of this evidence it is impossible to hold that the appellant was an agent to sell in respect of this equipment and materials. If he purported to sell and even certified a contract of sale between the Board of Control and Quan he was acting outside the scope of his authority and was in fact acting in concert with Quan in stealing these articles.

This argument is in our opinion completely fallacious. It ignores the obvious fact that a man may be guilty of two distinct offences in relation to the same act or series of acts, and though he cannot be convicted of both he may be convicted of either. The question in this case is simply this: Did the appellant receive this sum of money from Quan for showing him a favour in relation to his principal's business so that his act falls within the mischief contemplated by the Ordinance? In the course of the argument reference was made to the case of Went v. Billyeald, decided by this Court on June 24, 1950. In the judgment of the majority of the Court it was pointed out that "as soon as the onus 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 purpose is rebutted by prima facie evidence". In that case it was proved that the appellant was not in a position to show favour in relation to his principal's business in the manner alleged by the prosecution because he had nothing whatever to do with the awarding of contracts. The position in this case is entirely different. The appellant has given no explanation which either establishes prima facie that the money was received for a lawful purpose or raises a doubt as to whether the money was received for the corrupt purpose alleged. In the absence of any such explanation the appellant being a person employed in a public office is deemed by the provisions of sub-section (3) of section 106 to have received the money corruptly.

Nor can we agree with the suggestion that the appellant ceased to be an agent of the Board of Control because he acted in breach of clear instructions. Every person who accepts a secret commission or a bribe acts outside the scope of his authority and in breach of the trust reposed in him. To bring a person within the terms of the section it is only necessary to show that he was in a position to show favour in the manner alleged. This principle was clearly stated in R. v. Dickinson and Rabble 33 Cr. App. R. at p. 9: "If Dickinson was using his position as an important person in the Ministry of Aircraft Production to get commission corruptly I do not think that it would matter whether the work in relation to which he was to get commission was work which his duties brought him into direct contact with or not". The position of the appellant differs in no way from that of the watchman of a warehouse who for a bribe delivers to another person articles in the warehouse which he had no authority to deliver. Such a person may also be guilty of larceny, but he would none

the less be guilty of receiving money corruptly for showing favour in relation to his principal's business because he had abused a position of trust which enabled him to show favour, even though he was exceeding his lawful authority. We are therefore of opinion that the decision of the magistrate was correct and that the appeal should be dismissed with costs to the respondent.

Appeal dismissed.

SAMPSON v. ROBERTS.

(In the Supreme Court, Civil Jurisdiction (Boland C.J. acting)
January 30, 31; November 13, 1951)

Rent Restriction Ordinance—standard rent—overpayments—recoverable.

The plaintiff occupied premises as tenant to the defendant. During the period of his tenancy he paid rent in excess of the standard rent. On having the standard rent ascertained and the maximum rent fixed he claimed the overpayments from the defendant his landlord.

Held: Any rent paid by a tenant which exceeds the standard rent by more than what is permitted is recoverable from the landlord by the tenant.

P. A. Cummings for plaintiff

C. R. Wong for defendant

Boland, C. J. (Acting): The plaintiff claims against the defendant the sum of $395.81 on a specially endorsed writ in which he alleges that this sum represents the amount which the plaintiff as tenant of the defendant's premises at Lot 246 South Road, Bourda, Georgetown, paid to the plaintiff in excess of what the defendant was entitled in law to receive as rent for those premises in respect of the period from 1st April, 1946 to the 30th April, 1950. His calculation that this sum is due to him is as follows. He alleges that for the period from 1st April, 1946 to 31st March, 1947 he paid rent to the defendant at the rate of $22.00 per month; for the period from 1st April, 1947 to 28th February, 1948 he paid at the rate of $21.00 per month; for the period from 1st March, 1948 to 31st January, 1949 he paid at the rate of $21.21 per month; for the period from 1st February, 1949 to 28th February, 1950 at $21.84 per month; from 1st March, 1950 to 30th April, 1950 at $22.96 per month.

In proceedings filed by plaintiff as tenant for an assessment of the maximum rent of the premises the Rent Assessor had issued his certificate dated 1st May, 1950 fixing the maximum monthly rent of the premises at $11.62. In exercise of the right given to him by section 5 (2) of the Rent Restriction Ordinance 1941 as amended by section 6 of Ordinance 13 of 1947, plaintiff credited defendant with the sum of $92.96 in payment of rent due by him for plaintiff for 8 months from 1st May, 1950 to 31st December, 1950 at $11.62 per month leaving due and owing by the defendant to plaintiff after that day the sum of $395.81 as claimed. The

defendant does not deny the receipt of the moneys alleged to have been paid to him by plaintiff for rent of the premises, nor is it denied that on 1st May, 1950 the Rent Assessor as shown by his certificate fixed the maximum rent of the premises as $11.62.

Section 5 (1) of the Rent Restriction Ordinance 1941 as amended by section 6 of Ordinance No. 13 of 1947 provides that when the rent of premises to which this Ordinance applies, exceeds the standard rent by more than the amount permitted under this Ordinance the amount shall, notwithstanding any agreement to the contrary be irrecoverable from the tenant; and by section 5 (2) when, in respect of any period subsequent to the "material date", any tenant has paid, whether before or after the aforesaid date, rent on premises to which this Ordinance applies, or any sum on account of such rent, which exceeded the standard rent by more than the amount permitted under this Ordinance, the amount of such excess shall notwithstanding agreement to the contrary, be recoverable from the landlord who received the payment or from his legal personal representative, by the tenant by whom it was paid, and the tenant may without prejudice to any other method of recovery, deduct such excess from any rent payable by him to the landlord. In respect of premises to which the Ordinance applies as from the 8th November, 1941, the "material date" is the 8th March, 1941. In this case the Rent Assessor found that the premises were a cottage separately let as a dwelling and was being so let on the 3rd September, 1919. This is not disputed. Consequently these premises are premises to which the Ordinance applied at the date of the passing of the Ordinance on the 8th November, 1941 and therefore the "material date" under section 5 (2) is for these premises the 8th March, 1941. Accordingly any rent paid by the tenant of these premises for any period subsequent to 8th March, 1941 which exceeds the standard rent by more than what is permitted is recoverable from the landlord by his tenant.

It is necessary to ascertain first what was the standard rent applicable to these premises on the 1st April, 1946—that is, at the date from which according to his writ the plaintiff claims that he began to pay rent in excess of what was permissible, and secondly whether what plaintiff paid was in excess of what was permissible in law as an increase over the standard rent. So far as the amount of the standard rents concerned there can be no doubt about that: the Assessor did not have to assess the amount of the standard rent; on the 1st May, 1950 on application by the plaintiff tenant he found as a fact that the premises—a cottage—were being rented on 3rd September, 1939 as $6.00 per month—and that that sum therefore in law was the standard rent. It is true that in August 1947 in a previous application for assessment because of evidence that the place was first rented in 1940 the Assessor had fixed the standard rent $21.00 per month, and in fixing the maximum rent allowed no increase on that figure. There has been no appeal against the assessment of the 1st May, 1950, and accordingly as between plaintiff and defendant the standard rent of the cottage must be taken to be $6.00 as declared, in the Assessor's certificate dated 1st May, 1950.

Whatever may have been previously the rights of landlords as to any increase of rent over the standard rent in respect of premises brought under control by the Rent Restriction Ordinance 1941, from the 23rd April, 1947, at which date Ordinance No. 13 of 1947 came into force, that power was in express terms restricted. Section 6 of the Ordinance of 1941 as amended by section 7 of Ordinance No. 13 of 1947 lays down the conditions under which any increase over the standard rent is permissible. In each instance given in section 6 as amended no increase is permissible unless authorised by the Rent Assessor who is directed as to the factors that must govern his assessment. In this case the rent assessor on the 1st May, 1950 fixed the maximum rent at $11.62 based on his finding of the standard rent at $6.00. But the Rent Assessor had previously on the 18th August, 1947 fixed the maximum rent at $21.00, which was binding on both landlord and tenant as from that date until varied to $11.62 on the 1st May, 1950. In the result this would seem to me to be the adjustment that should be made between plaintiff and defendant in respect of rents payable up to 31st December, 1950—

Amount received for rent from 1st April, 1946 to 30th April, 1950 as per writ	—	$1,058.15
Amount which should have been paid:		
From 1st April, 1946 to 22nd April, 1947 at $6.60 per month	—	$ 84.04
From 23rd April, 1947 to 17th August, 1947 at $6.00 per month	—	22.89
From 18th August, 1947 to 30th April, 1950 at $21.00 per month	—	681.48
From 1st May, 1950 to 31st December, 1950 at $11.62 per month	—	92.96
		$ 881.37

The amount overpaid is therefore $176.78 which the plaintiff is entitled to recover from the defendant, and accordingly judgment is given to the plaintiff for this sum and with costs, although the amount recovered is less than $250.00 and therefore within the jurisdiction of the magistrate.

Judgment for the plaintiff with costs.

DEVEAUX v. COMMISSIONERS OF INCOME TAX

(In the Supreme Court, In Chambers (Hughes J.)
October 26; November 3, 6, 1950; December 21, 1951).

Income Tax—domicile of origin—domicile of choice—principles—earned income—meaning.

The appellant failed to furnish the Income Tax Commissioners with a return of his foreign income from all sources, as requested by them, and was assessed in the sum of $15,000. He appealed on the grounds that

(a) the income arose outside the colony and was not received in the Colony, and
(b) that at all material times he was not domiciled in the Colony; or
(c) that he is not ordinarily resident in the Colony; or
(d) that the income is earned income and that he was ordinarily resident in British Guiana.

It was proved and accepted that the appellant who was born in 1875 went to live in Panama in 1905. He married there in 1913 and returned to this Colony on a visit in 1919. He returned to British Guiana in 1932 and purchased immovable property. In 1933 he purchased another property, in 1934 he established a printing business and between 1934 and 1936 transferred a considerable sum of money from Panama to the Colony. Between 1938 to 1949 he visited Panama on six occasions for varying periods of two to eight months.

His income was obtained from rents of property in Panama.

Held: His income was not earned income. Even if the appellant had abandoned his domicile of origin the evidence was overwhelming to show a revival of that domicile.

Appeal dismissed.

L. M. F. Cabral for appellant.

A. C. Brazao Solicitor General for respondent.

Hughes, J.: The circumstances which have given rise to this appeal are, in brief, that in November, 1947, the appellant was requested by the Commissioners to furnish particulars of his foreign income from all sources for the year ended 31st December, 1946. In December, 1947, the appellant was, at his request, allowed until 10th March, 1948, to furnish such particulars; he failed to do so and, on the 19th April, 1948, an assessment was raised on him in the sum of $15,000. To that assessment the appellant objected, by notice dated 4th May, 1948. The objection was heard by the Commissioners who, in a written decision, dismissed it and confirmed the assessment: it is from that decision that this appeal is brought.

The grounds on which the appeal is brought are—

(a) that the income arose outside the Colony and was not received in the Colony;
(b) that the appellant was at all material times not domiciled in the Colony and is not now so domiciled;
(c) that the appellant was not, and is not, ordinarily resident in the Colony;
(d) that the income is earned income;

and therefore, under section 5 of the Income Tax Ordinance, Chapter 38, as amended by Ordinance No. 6 of 1947, such income is not taxable,

It is necessary first to consider the grounds of appeal in relation to the provisions of section 5 of the Ordinance. Under that section income arising outside the Colony and not received in the Colony (which is the class of income to which this appeal relates) is not liable to income tax where such income is—

(a) earned income; or

(b) arises to a person who is either not ordinarily resident in the Colony or is not domiciled therein.

The conditions set out in (a) and (b) are disjunctive and accordingly if it is found that any of those conditions is fulfilled the income is hot taxable under the Ordinance.

The first point for consideration is whether the income, which is derived from the renting of properties owned in Panama by the appellant and his wife, and managed by an agent there, is "earned income". The local enactment does not define the expression "earned income" and it is accordingly of assistance to refer to the United Kingdom legislation for guidance. The expression is defined in section 14 (3) of the Income Tax Act, 1918 (8 & 9 Geo. 5 Ch 40) and from that definition it is abundantly clear that the income which forms the subject of this appeal cannot be regarded as earned income, It may be mentioned in passing that the grounds on which the appellant applied to the Commissioners to review and revise the assessment did not include an allegation that the income was earned income.

The next matter for consideration is whether the appellant is ordinarily resident in the Colony. It is to this aspect of the matter, and the cognate matter of domicile, that almost all the evidence and legal argument were directed. Certain of the relevant facts are contained in the "Statement of Material Facts" filed by the Commissioners in accordance with rule 5 of the Income Tax Appeal Rules, 1929, and in the decision of the Commissioners which accompanied that statement. It is necessary, however, to consider the matter in the light of the evidence of the appellant, who was the only witness, given on the hearing of this appeal.

The appellant was born in this Colony in 1875 and lived here until he was thirty years of age when in 1905, he went to Panama. There he worked and in the year 1913 married someone of French nationality with whom, before marriage, he made what is described in the translation of the original document as "a contract of articles of marriage in the sum of 8,650.00 balboas." In that document is set forth the property, real and personal, which each party "brings to the marriage"; their respective rights over such property; the manner in which the profits therefrom are to be divided and the distribution of the property in the event of divorce. Provision is also made in the document for the management of the properties and for "the maintenance expenses of marriage".

In 1919 the appellant and his wife visited this Colony and after a stay here of two or three months returned to Panama.

In 1922 the appellant went to Europe, for reasons of health, and returned to Panama at the end of 1924.

In 1931 the appellant was commissioned by the British Guiana Association in Colon to present an address to the Governor of this Colony on the occasion of the celebration of the Colony's centenary. In that year (and before he had been approached regarding his appointment as Panamanian Consul in this Colony) the appellant purchased for $1760 the property known as "Dunoon", of 1,588 acres—the Transport is dated 15th February, 1932. The appellant claims that this property was purchased on speculation but as he was unable to find a purchaser he decided to cultivate it and has in fact spent between thirty and forty thousand dollars in so doing: he is still the owner of that property.

In 1933 the appellant bought, for $6,000, two lots of land and a house in Lamaha Street and in the following year he purchased a printing business in the Colony and published a newspaper. The printing business was not closed down until the year 1945.

After the purchase of "Dunoon", of the property in Lamaha Street and of the printing business the appellant was appointed Consul for Panama in this Colony; the document from the Panamanian Government relating to that appointment is dated 3rd December, 1935 and the Exequatur was received by the appellant in 1936.

The Gazette Notice referring to the appellant's appointment as Consul for Haiti is dated 8th June, 1935, and the appellant has stated in his evidence that he was approached by the Government of Haiti in this connection before being asked by the Panamanian Government to be Consul for Panama in British Guiana. The appointment as Haitian Consul was the appellant states, for a period of six months in the first instance.

The appellant remained in the Colony from 1935 to 1937 and in the latter year went on a visit to Europe and to Panama returning in the same year. Between 1937 and the date of the hearing of this appeal the appellant has visited Panama in the years 1938, 1940, 1942, 1945, 1946 and 1949; the duration of those visits varies from two to eight months.

Among the amounts transferred by the appellant from Panama to the Colony are $40,000 about the year 1934; $50,000 about a year later and $30,000 "a year or two after the $50,000". The reasons for the transfer of these amounts, the appellant states, was first the unrest brought about by a new constitution in Panama under which non-nationals were discriminated against and secondly the fact that the new President was at the time confiscating property. Evidence was also given by the appellant that in 1934, while he was in this Colony, he was defrauded in Panama by his agent there: between 1934 and 1949 further frauds were perpetrated, the amount involved being over $10,000.

Despite the transfer to the Colony of the not inconsiderable sums already mentioned there is still in Panama a large sum of money belonging to the appellant and his wife as well as, according to the appellant's evidence, a fully furnished home.

There remains for mention one other fact which, together with those set out above, it is submitted on behalf of the appellant, go to show abandonment by the appellant of his domicile of origin

and the adoption by him of Panama as his domicile of choice: that fact relates to enquiries made by the appellant regarding the regulations governing the sending of a corpse out of the Colony: such enquiries, it is claimed, were made in consequence of the intention on the part of the appellant that should he die in this Colony, his remains be sent to Panama. In this connection a letter from the Director of Medical Services, dated 7th February, 1950, was put in evidence.

The matters for consideration are—

(a) Whether the appellant did adopt Panama as his domicile of choice; and, if so,

(b) has he subsequently reverted to his domicile of origin.

The principles to be borne in mind in deciding these matters are—

(i) that slighter evidence is required to warrant a conclusion that a man intends to abandon an acquired domicile and to resume his domicile of origin than that he means to abandon his domicile of origin and acquire a foreign domicile—Lord v. Colvin (1859) 28 L.J. Ch. 361;

(ii) no special or technical meaning is attached to the terms "resident" and "ordinarily resident", accordingly the question whether a person is "resident" or "ordinarily resident" is essentially a question of fact for the Commissioners—Lysaught v. Inland Revenue Commissioners (1928) A.C.;

(iii) as regards intention to acquire domicile animo et facto, animus may be inferred from the *factum* of the residence but in order to be so inferred the colour and characteristics of the residence, as deduced from the whole story of what had happened, must be taken into account. Residence alone is not enough—Bowie or Ramsay v. Liverpool Royal Infirmary and others. Law Times Reps. 1930 Vol. 143;

(iv) the domicile of origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as the sole domicile is clearly shown—Winana and another and Attorney General—L.R. (1904) A.C.;

(v) in order to lose the domicile of choice and revive the domicile of origin it is not sufficient for the person to form the intention of leaving the domicile of choice, but he must actually leave it with the intention of leaving it permanently—In re Marrett. Chalmers v. Wingfield 1887 36 Ch. Div.;

(vi) a change of domicile once effected will not be undone by mere subsequent fluctuations of opinion on the part of the settler as to whether his choice of the new residence has been wise, or by expressions which lead one to think he entertained vague and floating ideas of going to reside elsewhere—In re Marrett. Chalmers v. Winfield *supra*;

(vii) domicile of origin only remains in abeyance while domicile of choice is in force;

(viii) where issue is joined on the question of domicile the burden of proof is on the party setting up the abandonment of the domicile of origin.

On the question as to whether the appellant, at some stage during his residence in Panama—a period of some thirty years—did abandon, animo et facto, his domicile of origin I consider that it

is possible that he might have so abandoned that domicile. Facts which may be regarded as supporting such a view are his prolonged residence in Panama, his marriage there (and it is from the time of his marriage, in 1913 that it is submitted on his behalf that his intention was crystallised), and the erection by him of several buildings in Panama. Such facts are, however, insufficient to lead to a positive finding that the domicile of origin was in fact abandoned. But even if it were the case that the domicile of origin had been abandoned there is overwhelming evidence to show a revival of that domicile. In this connection it is sufficient to mention (a) the purchase, in 1931, of the property known as "Dunoon" and the expenditure in cultivating that property of a sum in excess of thirty thousand dollars; (b) the purchase in 1933 of two properties in Lamaha Street, Georgetown; (c) the purchase, in 1934, of a printing business which was continued in operation until 1945; (d) the transfer from Panama to this Colony, during a period of about two years commencing in 1934, of over one hundred thousand dollars in cash; (e) the acceptance of the post of Consul for Panama in British Guiana: as to this, from the dates given by the appellant in his evidence, there can be no doubt that acceptance of the appointment followed, and did not precede, the decision to reside in this Colony; (f) residence in this Colony from 1935 to the date of the assessment which forms the subject of this appeal.

The circumstances of this case can in no way support the view that the resumption of residence in this Colony by the appellant is on his part a mere fluctuation of mind and that he has not abandoned Panama as his permanent home if indeed he ever did so regard it.

I find that, as already stated herein, the income to which this appeal relates is not earned income and that at all material times the appellant was ordinarily resident, and domiciled in this Colony. This appeal is accordingly dismissed with costs to the respondents.

Appeal dismissed.

KING *v.* POWELL and POWELL.

(Civil jurisdiction (Boland J) January 9, 11, 12; February 2, 1951).

Immovable property—transport—untransported gift inter vivos—opposition.

The defendants inherited immovable property from their father who died in 1941 and obtained transport in their favour. On the defendants advertising transport by way of sale of the said property, the plaintiff opposed on the ground that it had been made a gift to her by the defendant's father since 1927 as a result of which she had gone into possession and had remained continuously in possession up to the present day. She also opposed under the Limitation Ordinance by virtue of possession allegedly *nec vi, nec clam, nec precario* for more than 12 years, but less than 30 years.

Held: The plaintiff was not entitled to enter opposition on the ground of the imperfect gift, but she was entitled to do so on the ground of adverse possession for over 12 years.

P. A. Cummings for plaintiff.

Boland, J.: The plaintiff brings this action to enforce an opposition filed by her against the passing by the defendants of a transport by way of the sale of a piece of land. In her reasons for opposition, the plaintiff claims that this piece of land which comprises a half lot in Stanleytown Village on the West Bank of the Demerara River and which was being sold for $100 by the defendants had been made a gift to her since the year 1927 by the father

of the defendants, one Simon Powell, the then owner by transport. Plaintiff alleges that this gift was effected by a written document duly signed by Simon Powell, but that subsequently the document was missing after a thief or thieves had broken into her house, and it has never been recovered. Although she had not been given a transport in pursuance of the gift, plaintiff had gone into possession immediately and she had remained continuously in possession up to the present day; alternatively she bases her right to opposition on a protective possessory title by virtue of the Limitation Ordinance, Chapter 184.

The defendants are the children of Simon Powell who at the time of his death on the 19th February, 1941, was the registered owner by transport of this piece of land. By his will dated 8th July, 1939, which was admitted to probate on 8th April, 1941, Simon Powell gave all his estate real and personal to his children, the two defendants; and after the executors had advertised transport in the manner prescribed by law, the defendants without opposition had had transport registered in their favour. They dispute the existence of any title in the plaintiff either by gift or otherwise which can debar them from selling the land.

At the outset, it seems to me, the question the Court has to decide is this: would either of the grounds put forward by the plaintiff give her a right to oppose the proposed sale by the defendants? Firstly as regards her claim that there was a gift in writing which was not completed by transport, would that entitle the plaintiff to the land as against the defendants whose claim is founded on a subsequent gift to them by virtue of the will of the donor and who without opposition have had transport passed in their favour? There is indeed an abundance of decided cases which clearly establish that the equitable interest in land held by a purchaser for valuable consideration, who has not obtained transport, will be protected against a subsequent attempt by the vendor to pass transport to another to the prejudice of the holder of the equitable interest: but I have not been able to find any authority which has determined the competing claims of the donee of land by an untransported gift *inter vivos* and that of a donee under the donor's will.

Under Roman Dutch law, the right to oppose would seem never to have been denied to one who had in fact some right to the "*dominium in res*" over and above the holder of the transport, no matter that he did not hold the transport. The protection afforded such a person, though not the legal owner, was analogous to the restraint imposed on the legal owner by courts of equity in England so as to ensure that he will act fairly and with a good conscience towards persons having equitable interests in the land.

In the absence of judicial authority on the point as to the priorities between the donee *inter vivos* and the devisee, it may be helpful to consider the relative rights and obligations of each such person under English equity juris prudence in similar circumstances seeing that the governing principles of English equity and Roman Dutch law in regard to the protection of the non-legal owner of land are more or less the same.

It is a well known rule in equity that equity will not assist an imperfect gift. For such a donee to obtain recognition and for

him to be enabled to invoke a remedy in equity, the intending donor must have done all that it was possible for him to do to effectuate the gift to the donee. There was nothing to prevent Simon Powell in whom was vested the land by transport to have passed transport in favour of the plaintiff as an assurance of the gift to her. A Court of equity will compel neither an intending donor nor his representative to render an imperfect gift *inter vivos* effective, Edwards v. Jones (1836) 5 L.J. Ch. 194, and where the donee of land under a will has perfected his gift by obtaining a deed in assent to the devise his title as against a donee *inter vivos* without a conveyance would be even less assailable. Applying the above principles in equity to the procedure by way of opposition, I have no difficulty in holding that the plaintiff by virtue of the alleged gift to her in writing has no such interest in the land as would prevail against the title of the defendants who perfected their testamentary gift by obtaining transport from the executor. The plaintiff is therefore not entitled on this ground to enter opposition to the proposed transport.

I may add that on the evidence I was not satisfied that there had been in fact any gift in writing as the plaintiff has alleged. That she did go into possession of the land in 1927 and with the consent of Simon Powell was indeed established by the evidence; but I was not satisfied that Simon Powell executed any written document purporting to transfer his interest in the land to her. If there was a writing the inference to be drawn from the fact that she went into possession, paid the taxes and reaped the produce of a farm which she cultivated there, would not be conclusive of her having had the land as a gift. The law demands that there should be the strictest proof that the deceased had in his lifetime alienated his rights. In my view, the mere saying by the plaintiff that there had been a gift to her followed immediately by her long occupation of the place without interference by the deceased is not a sufficient discharge of the burden of proof that is on her.

I now turn to the ground of opposition which the plaintiff puts forward in the alternative namely her possessory title by virtue of her continuous occupation of the land *nec vi, nec clam, nec precario* since the year 1927. Though the period is less than 30 years which is the time required to found a petition to this Court for a declaration of title, it has been held that uninterrupted occupation for 12 years in circumstances which would be sufficient under the Limitation Ordinance, Chapter 184 to bar any action for recovery of possession would suffice to give a right to the entry of opposition to the passing of a transport to a third person. *Archer et al v. Rodrigues—Decision of B.G. Supreme Court 28th February*, 1912. The passing of transport in favour of the defendants in implementation of the bequest under Simon Powell's will had been preceded by advertisement in the press in accordance with the prescribed provisions of the law. No opposition was filed by the plaintiff to this transport, but it was not shown that plaintiff had had actual notice of this advertised transport and accordingly, plaintiff would not be estopped from an entry of opposition to a subsequent dealing with the property by the transferee who without opposition had obtained transport *vide*

Abdool Mohan Khan *v.* Boodhan Maraj 1930 L.R.B.G. 9 (per Savary J. at pp. 16—18).

Accordingly I hold that although not entitled under her claim of a gift in writing, yet in regard to her claim to a possessory title plaintiff comes within the class of persons entitled to file an opposition to transport.

Having settled the capacity of the plaintiff to enter opposition I now proceed to examine the facts. Plaintiff's case is that she went into occupation by virtue of the grant made to her by Simon Powell. I have already declared above my not being satisfied that there was a gift to her as she declares, but her occupation was, though not a gift, indeed with the permission of Simon Powell. She was certainly not a trespasser, Simon Powell lived in Georgetown and his occupation brought him to the district not very frequently. Evidence was given that prior to the plaintiff's occupation the place was in high weed and bush. Plaintiff's possession of the land, her clearing up the place and her devoting attention to its cultivation would not be inconsistent with an arrangement between her and Simon Powell that she could do whatever she liked on the place if she would undertake to pay the taxes. During the long period between 1927 and his death in 1941, he hardly visited the place except on one or two occasions and even then he did not actually enter on the land on which there was never any dwelling house. But plaintiff used to sell fruits and vegetables reaped from the land but to Simon Powell she would take some fruits and vegetables occasionally but without payment. She consulted Simon Powell about the bringing of a prosecution against a trespasser before she laid the case for trespass as she would be entitled to do in the Magistrate's Court though not the actual owner but a tenant.

As I stated above, very strict proof is required in a case when it is alleged that a person now dead had parted with his rights. Once admitting the grant the plaintiff must show that for the period of twelve years, she was in uninterrupted possession *nec vi, nec clam, nec precario* in relation to this man who is now dead. Her own witness Mr. Thompson admitted that he himself had placed a man on a piece of land which he owns in the country with the right to cultivate so long as he paid the taxes and he Mr. Thompson never went there, and would be surprised if a protective possessory title would be claimed in course of time.

Whatever plaintiff may have done since the death of Simon Powell—and the period since the death is less than twelve years—would be immaterial. Accordingly I disregarded the evidence of the steps taken by the plaintiff with the Village Council to get title through the procedure of parate execution, also the evidence of her getting receipts for taxes after Powell's death with an endorsement that the tax money was paid by her. All this was *post litem motam.* The defendants were hardly in a position to give evidence in contradiction of the plaintiff but as I say, the burden was on the plaintiff to satisfy the Court that her possession was adverse to Simon Powell. She has not satisfied me as to this and I give judgment for the defendants, declaring that the opposition is neither just, legal nor well founded. There will be costs to defendants.

BRAITHWAITE *v.* HARRIS.

(In the Full Court, on appeal from the Magistrate's Court for the West Demerara Judicial District (Worley C.J., Ward and Hughes JJ) January 3, February 17, 1951).

Unlawful possession—essential ingredients—search warrant—procedure—conviction—detective.

The appellant was convicted by a magistrate of the unlawful possession of three blankets. The respondent executed a search warrant in a house where the defendant and his reputed wife lived. At the time of the search the wife was not at home. Under a bed was found a wash basin covering a paper parcel containing three blankets. The respondent said that the appellant asked him for a chance as soon as the paper parcel was discovered, whereupon he became suspicious and his suspicion was confirmed when the contents of the parcel proved to be blankets not sold in the Colony. The appellant in a statement to the police said that his wife had purchased one of the blankets and that he did not know of the existence of the others. During the search his wife entered the premises and the three blankets were shown to her. She said she knew nothing about the articles and this caused the appellant to say "God man this ah trouble see what you can do." She then made a statement claiming the blankets as her property and naming the shops at which she purchased them. The appellant and his wife were charged jointly with the unlawful possession of the three blankets. At the trial the wife was not discharged at the close of the prosecution's case; she gave no evidence and called no witnesses and the case against her was dismissed. The appellant who adhered to his statement that he never had possession or control of the blankets was convicted. He denied asking for a chance. The search warrant authorised the police to search for paint, canvas, electrical appliances or other articles. It made no mention of blankets. The appellant appealed against his conviction.

Held: A magistrate, in writing his reasons for decision, should state what in his view are the particular ingredient or ingredients in issue at the trial, what evidence was relevant thereto, his findings thereon and his reasons for so finding.

Held Further: In a case of unlawful possession, after the prosecution have proved possession and reasonable suspicion the onus shifts to the accused to give a reasonable explanation of his possession but it is only in connection with the nature or quality, whether innocent or criminal, of the accused's possession that the onus shifts and that there is no shifting of the onus in respect of the fact of possession.

Held Further: Where a wife is living in her husband's house there may be a presumption that the furniture and bedding in the house are his property; but this presumption does not arise if a man and woman are living together in concubinage.

On the case as a whole it was not proved beyond reasonable doubt that the blankets were in the appellant's possession.

Appeal allowed.

P. A. Cummings for the appellant.

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

Judgment of the Court: The appellant was charged jointly with one Thelma Rodney, his reputed wife, before the Magistrate, West Demerara Judicial District under section 97 (1) of the Summary Jurisdiction (Offences) Ordinances, Chapter 13, as amended by section 4 (a) of Ordinance No. 6 of 1937 and section 5 of Ordinance No. 6 of 1946, with unlawful possession of three blankets and some wire mesh. Thelma Rodney was acquitted and the appellant convicted in respect of the blankets. The grounds of appeal against the conviction were in substance:

(1) that the evidence did not establish possession in the defendant;

(2) that there was no or no sufficient evidence of reasonable suspicion;

(3) it was practicable and consequently incumbent upon the prosecution to prove that the explanation given by the co-defendant was false or true; and that the prosecution having failed so to do there was at least a reasonable doubt as to whether or not the explanation was true.

The circumstances which led up to this appeal were as follows. On the 29th April, 1950, at Mackenzie the respondent obtained a search warrant under section 10 (1) of the Summary Jurisdiction (Procedure) Ordinance, Chapter 14, authorising him to search the premises or out-house of the appellant at Wismar for "paint, canvas, electrical appliances and other articles which will afford evidence as to the commission of an offence under the Summary Jurisdiction (Offences) Ordinance," suspected of being concealed in the said premises. The respondent executed this warrant the same day, "on the premises of the defendants who are man and wife at Wismar". There is no evidence as to what these premises were. When the respondent entered the appellant was at home alone. The constable read the warrant to him and the appellant said he had no articles as stated in the warrant. He sent for Thelma Rodney. The respondent then started to search, his evidence on this point being:

> "I started to search in bedroom. The bed was low. I asked defendant (ap-
> "pellant) if he had anything under the bed. The defendant said 'No'. I saw
> "a galvanised wash basin turned upside down. I asked defendant why he
> "had said he had nothing. The defendant said he had forgotten. I asked de-
> "fendant if he had anything under the wash basin. The defendant said
> "'No." I lifted up the wash basin and found a paper parcel under it. Then
> "defendant said 'Mr. Harris please for a chance'. I became suspicious. I
> "asked defendant to open the parcel. The defendant continued asking for a
> "chance. I opened the parcel and found these three blankets (Ex. B1-B3).
> "My suspicion was confirmed as blankets such as "B1-B3" are not sold in
> "the colony. I have seen blankets such as "B1-B3" on ocean going ships.
> "Ocean ships call at Mackenzie City".

According to his evidence he then cautioned the defendant who made a statement which was admitted in evidence as Ex. C. This

cannot be the correct sequence as Ex. C relates chiefly to some wire mesh which was discovered subsequently. The respondent's evidence continues:

> "At this stage No. 2 defendant (Thelma Rodney) came in. I read the war-
> "rant to her. I asked if she had any of the articles mentioned. The defen-
> "dant said 'No'. I showed defendant Ex. B1-B3. She said she knew noth-
> "ing about "articles "B1-B3". The defendant No. 1 then said 'God man
> "this ah trouble, see what you can do'. I cautioned defendant No. 2. She
> "made this statement Ex. E."

The remainder of his evidence related to the discovery of the wire mesh referred to in the charge. In cross-examination he said:

> "I can't say why defendant put the blankets under the bed. The defendants
> "were not expecting me to search their house. The blankets were not on
> "the bed. I have bought blankets on several occasions in the City and town
> "of New Amsterdam."

In relation to the blankets the appellant in his statement Ex. C said:

> "One of the blankets coloured grey was purchased at Mr. Yhip. I don't
> "know when but I think a few months ago. I don't know anything about
> "the other blankets. I have nothing more to say."

In Rodney's statement Ex. E she said:

> "This grey blanket I bought from town with blue bars and the cream blan-
> "ket was purchased at Mr. Yhip at Wismar. The other I purchased at Mr.
> "Yhap at Christianburg this year February. I now remember I bought the
> "grey blanket at Mr. Yhip at Wismar."

The prosecution called no other evidence and the Magistrate ruled that no case had been made out as regards the wire mesh, but he called on the two defendants to give an explanation as regards the blankets only.

The appellant elected to give evidence and swore:

> "The police found blanket Ex. B3 at the foot of the bed. Ex. B2 was found in a box wrapped in a parcel as it came from the store (Yhap's). The blanket B2 was bought by defendant No. 2 Her name was on the parcel. Ex. B1 was spread out on the top of the bed. I now say that blanket "B2" was bought from Yhip as stated in the statement to the police. I now say that I told the police Yhap and not Yhip."

In cross-examination by the prosecution he said:

> "Defendant No. 2 is my wife. I was present when No. 2 defendant gave
> "her statement to the police. The defendant No. 2 did not deny knowledge
> "about three blankets. She told Constable Harris where they had come
> "from. I never used the word "trouble". There is a galvanized wash basin
> "or tub which is kept in the kitchen. It was not under the bed. The parcel
> "was in a box under the bed in the bedroom".

Counsel for the appellant then requested the magistrate to put Rodney into the witness box as a witness for the appellant but

the magistrate very properly ruled that he had no power to compel her, being a defendant, to give evidence. Counsel for the appellant called no further evidence and counsel for Rodney called no evidence at all nor did Rodney make any statement to the Court.

Such being the state of the evidence the magistrate then discharged the second defendant, Rodney, and found the appellant guilty, fining him $26 or 60 days' imprisonment with hard labour. The formal conviction sets out that the appellant

"Did have in his possession three blankets reasonably suspected of having "been stolen, contrary to section 97 (1) of the Summary Jurisdiction (Of-"fences) Ordinance."

The material passages of the statement of the Magistrate's reasons for decision are

"The prosecution not having established a case in law against the reputed "wife of the appellant the Court discharged her. The prosecution estab-"lished to the satisfaction of the Court all the essential ingredients in law "and facts necessary to support the case of unlawful possession with re-"spect to the three blankets found in the house and possession of the ap-"pellant. The Court accepted as reasonable and trustworthy the evidence "of Constable Harris as regards the finding of the said blankets, the en-"treaties of the appellant and the desperate appeal made by the appellant "after his reputed wife had told Harris in his presence that she knew noth-"ing about the blankets. After hearing and observing the demeanour and "behaviour of the appellant and considering the possibilities and prob-"abilities of the case and the contradictions made by the appellant, the "Court found that his evidence was unreasonable and unconvincing "and "his explanation as regards the blankets not satisfactory."

It is well established that an appellate court will be reluctant to interfere with the findings of fact of a tribunal which has seen and heard the witnesses: but this rule must not be made an excuse for indulgence in vague general statements as reasons for decision. A statement such as "The prosecution established to the satisfaction of the Court all the essential ingredients in law and facts" is of little assistance to this Court which requires to be informed which particular ingredient or ingredients were in the Magistrate's view in issue in the case, what evidence was relevant thereto, the Magistrate's findings thereon, and his reasons for so findings. The requirements of the statute are not satisfied by vague generalities which leave us to grope for the issues and require us to presume that the Magistrate has appreciated them and fairly weighed the relevant evidence.

Before we consider the grounds of appeal we desire to call attention to certain defects in the search warrant and in the formal conviction on the record. The only power to issue the warrant, which the Magistrate in this case had, was conferred by section 10 (1) of the Summary Jurisdiction Procedure Ordinance (Chapter 14) which provides:

"Any Magistrate who is satisfied by proof upon oath that there is reason-"able ground for believing that there is in any building, ship, box, recepta-"cle or place—

"(a) anything upon or in respect of which any summary conviction offence "has been or is suspected to have been committed for which, according to "any statute for the time being in force, the offender may be arrested with- "out warrant; or

"(b) anything which there is reasonable ground for believing "will afford "evidence as to the commission of that offence . . . . . may at any time is- "sue a warrant under his hand, et cetera."

(paragraph (c) is irrelevant in the present instance).

The record shows that in this case the respondent's sworn information merely stated "there is reason to believe" that the appellant had in his "possession, premises or out-house paint, canvas, electrical appliances and other articles which will afford evidence as to the commission of a Summary Jurisdiction Offence." Both the information and the warrant issued upon it drive a coach and six through the provisions of the section. It was never intended that, as was done in this case, the police should be given carte blanche to enter a house for the purpose of searching for any object which they might find there and which might afford evidence that some unspecified Summary Conviction Offence had been committed. It is not sufficient for the informant to say that he has reason to believe; the Ordinance requires the Magistrate to be satisfied that there are reasonable grounds for such belief. If the belief is based upon information received the substance of that information must be set out though the source of it need not be disclosed, but the sworn information must specify the thing or things for which search is to be made and, if it does not in itself particularise the suspected offence, it must, be sufficiently precise to enable the Magistrate to do so and to satisfy himself that it is an offence for which the offender may be arrested without warrant.

The formal conviction is defective because it does not set out that the appellant failed to give an account to the satisfaction of the Court as to how he came by the three blankets. It has been said that the offence under section 97 consists in the suspected party failing to give to the Court a satisfactory account of how he came possessed of the articles in question (see Evans and Fingall v. Miles 7th October, 1865 and Edun v. Anderson A.J. 14th September, 1906, printed in Crane on the Law of Unlawful Possession 1921 at p. 86 and p. 118). Without deciding the correctness or otherwise of this proposition, this much at least may be said, namely, that the offence is inchoate and incomplete unless and until the accused has been called upon to give an explanation and has failed to satisfy the Court thereon. This is an essential ingredient of the offence and must not be omitted from the conviction.

It has often been remarked that the offence created under section 97 is a peculiar exception to the general rule of the criminal law that the onus remains throughout on the prosecution to prove the guilt of the accused beyond reasonable doubt. It is important therefore to consider at what stage and in what circumstances the onus in this type of offence is shifted by the statute on to the accused person.

The two elements of the offence which the prosecution must prove are:—

(a) that the accused had the thing, the subject matter of the charge, in his possession or under his control at a certain time and place, which will generally be the time and place of his arrest;

(b) that at such time (or, if a summons is issued, at the time of swearing the information) the officer concerned reasonably suspected the thing of having been stolen or unlawfully obtained.

If and when these two ingredients have been established, then the onus shifts to the accused of giving an account to the satisfaction of the magistrate as to how he came by the thing in question.

It is important, however, to bear in mind that it is only in connection with the nature or quality, whether innocent or criminal, of the accused's possession that the onus shifts and that there is no shifting of the onus in respect of the fact of possession. It follows therefore that as regards the fact of possession the general rule will apply, that is to say, that at the close of the case for the prosecution, there must be evidence which, if unrebutted, would warrant a conviction; and if, after hearing the defence, the Court is left with a reasonable doubt the accused is entitled to be acquitted. *A fortiori* if the Court is satisfied that he was in fact never in possession.

With regard to the second element, namely the existence of reasonable suspicion, it must be shown that the suspicion preceded the detention or arrest of the accused and that it was reasonable. Whether it was reasonable is a question for the Magistrate to determine and the yard-stick to be applied is that he must be satisfied that the grounds of suspicion were such as would lead any reasonable person to the belief that the goods had been stolen or unlawfully obtained (see Butts v. Brunker A.J. 16th January, 1900. printed in Crane op. cit. at p. 104). It is not sufficient for the police officer merely to state that he had grounds for suspicion or that he was acting upon information received, at least if that information is not disclosed to the Court. The witness must state facts upon which the magistrate can bring his mind to bear for the purpose of determining whether the necessary suspicion existed in the mind of the policeman and, if so, whether it was reasonable.

If the accused is called upon and gives an explanation as to how he came by the goods, which may reasonably be true having regard to all the circumstances, the magistrate must direct himself that if it either satisfies him that the possession was innocent or leaves him in doubt whether it was innocent or guilty he should acquit.

Such being the principles applicable to cases of this type we turn to consider the grounds of appeal, the first of which relates to the evidence of possession. The fact of possession must, as has been said, be proved beyond reasonable doubt. In this case possession was charged jointly in the appellant and Rodney and it must be assumed that when the magistrate called on both the defendants to give an explanation of their possession he was sat-

isfied at that stage that a prima facie case of possession had been made out against both of them. Rodney neither gave nor called any evidence and did not seek to rebut her statement to the police in which she gave an account of how she acquired the three blankets. The only inference we can draw from the reasons for decision is that the Magistrate not only rejected this account (for if he had accepted it he could not have convicted the appellant) but also considered that the prosecution had not established possession in her. If that is so it is difficult to understand why he did not discharge her without calling on her to give an account of how she came by the blankets. Had he done so she would of course have been available as a witness for the appellant, but by keeping her in the position of a defendant until after the appellant had closed his case he deprived the appellant of the benefit of her evidence. When the magistrate says that the prosecution satisfied him that the three blankets were found in the house and possession of the appellant he must be taken to mean that he was satisfied beyond reasonable doubt that they were in the appellant's sole possession; but when he says that he found the appellant's explanation as regards the blankets not satisfactory, we are left in doubt as to whether he appreciated that, in the appellant's case, the issue was the fact of possession, which was denied and that the appellant was therefore not giving an explanation of how he came by them.

The Magistrate having accepted the respondent's evidence as to the finding of the blankets, the facts for our purposes are that all three of them were done up in a parcel, which lay under the bed covered by a wash basin. The bed was low and the basin apparently not visible to anyone standing in the room. Where a wife is living in her husband's house there may be a presumption that the furniture and bedding in the house are his property, but this presumption does not arise if a man and woman are living together in concubinage. In such a case the man may have come to live with the woman or, if the woman has come to live with the man, she may have brought her own furniture and bedding and there was no evidence in this case which would justify the assumption that everything in the bedroom was the property of the appellant. Indeed it was not shown which of them was the owner or tenant of the premises and the fact that Rodney was out when the blankets were discovered would not, of course, prevent possession being in her if they did in fact belong to her. Even assuming that the blankets were stolen or unlawfully acquired by Rodney and that she was keeping them in the room under the bed, that would not warrant a finding that the appellant necessarily knew they were there or, if he knew, that they were in his possession, unless it were shown that he took an active part in the matter: see R. v. Dring 7 Cox 382: R. v. Pritchard 23 Cox C.C. 682 9 C.A.R. 210 (cases of receiving by a wife).

If there is no justification for the assumption that everything in the bedroom belonged to the appellant, the evidence to support the view that the blankets were in his possession, or even that he knew of their presence was:—

(a) his denial that there was anything under the bed or under the wash basin;

(b) that he "asked for a chance;"
(c) his statement that one of the blankets was bought by Rodney;
(d) Rodney's denial of ownership or possession.

(c) is clearly no evidence of possession in the appellant and cannot fairly be dissociated from his concurrent denial that he knew nothing about the other two. (d) might have been evidence against him if he had remained silent but, in fact, he immediately protested whereupon it was retracted and Rodney never subsequently withdrew her admission of ownership. Counsel for the respondent suggested that the Magistrate was justified in treating this as a "desperate appeal" to Rodney to become the scape-goat but we can see nothing in the evidence to warrant this assumption. There remains then only (a) and (b) which at best provide very slight and equivocal evidence to offset the appellant's consistent denial of possession and Rodney's unretracted admission.

Where the proof hangs in the balance, a Court should be cautious in giving weight to denials and pleas of this nature which are sworn to by only one witness. With regard to (a) it is not clear why the question was asked at all unless it was a trap. It did not relate to the blankets the existence of which was not then known to the respondent. It was quite unnecessary and the constable had no right to ask it or, if he asked it, to expect an answer. He was authorised to search by the warrant and in such circumstances, to adopt the words of Cave J. in Reg. v. Male and Cooper (1893) 17 Cox C.C. 690:

> "Under these circumstances a policeman should keep his mouth shut "and his ears open . . . . . He is not bound to stop a prisoner in making a "statement: his duty is to listen and report."

The danger to be guarded against is, as the same learned judge points out, that such questions "may lead a prisoner to give answers on the spur of the moment, thinking perhaps he may get himself out of a difficulty by telling lies". The police should therefore in these circumstances avoid putting any questions except such as are necessary to enable them to carry out their search. In the present case, assuming that the appellant's answers showed knowledge that the blankets were under the bed and an intention to divert the respondent from searching there, they are nevertheless not inconsistent with Rodney's ownership and the appellant's desire to avert the trouble which might come upon her from their discovery.

As regards (b), similar statements occur so frequently in the evidence of police witnesses that they should be received with great caution especially when, as here, they are disputed and not corroborated.

On the case as a whole we were not satisfied that the Magistrate clearly appreciated the issue raised by the appellant's defence or that it was proved beyond reasonable doubt that the blankets were in the appellant's possession.

This conclusion was sufficient to dispose of the appeal without considering the other grounds, and we accordingly allowed the appeal with costs and set aside the conviction and sentence.

LOWE *v.* LA BORDE

(In the Full Court, on appeal from the Magistrate's Court for the North West Judicial District (Worley C.J., Ward and Hughes JJ) January 2, 3; February 17, 1951)

Unlawful possession charged—receiving stolen property proved—conviction for unlawful possession—set aside.

The appellant was charged with being in the unlawful possession of a quantity of white paint. By arrangement with an employee of the Transport and Harbours Department he went on board a dredge and obtained from the employee a small tin of white paint. The employee had stolen the paint and the appellant had received it under circumstances in which he should have been charged with receiving. The Magistrate did not require the appellant at the close of the prosecution's case to answer a charge of receiving nor was the procedure outlined in subsection (7) of section 41 of the Summary Jurisdiction (Procedure) Ordinance Chapter 14 as enacted by section 9 of the Criminal Justice Ordinance, 1932 (No. 21) observed. The appellant was convicted of unlawful possession. On appeal.

Held: If the appellant had committed any offence it was that of receiving stolen property and the Magistrate should have followed the procedure enacted in the Ordinance. As the case was too trivial for re-trial, the appeal was allowed.

L. M. F. Cabral for the appellant.

A. C. Brazao Solicitor General for the respondent.

Judgment of the Court: The appellant herein was convicted by the Magistrate of the North West Judicial District under section 97 (1) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, as amended by section 4 of Ordinance No. 6 of 1937 and section 5 of Ordinance No. 6 of 1946 of unlawful possession of "a quantity of white paint." The formal conviction drawn up sets out that the paint was reasonably suspected of having been stolen or unlawfully obtained but does not aver that the appellant had failed to give an account to the satisfaction of the Court as to how he came thereby. As we have pointed out in Brathwaite v. Harris, Appeal No. 687 of 1950, this is an essential ingredient of the offence which must not be overlooked nor omitted from the conviction. At the close of the hearing we allowed the appeal with costs and now briefly give our reasons for doing so.

The facts which the Magistrate accepted were that at about noon on March 2, 1950, the appellant by arrangement with and at the invitation of one Walter Dare went on board the Transport and Harbours Department dredge, Sir Crawford, which was lying alongside the stelling at Morawhanna, and was given by Dare (who was employed on the dredge) a small tin containing about three-quarters of a pint of white paint. The Magistrate found that when the appellant accepted the paint he knew "it was being unlawfully obtained." In fact the paint belonged to the Transport and Harbours Department and Dare was stealing it. He should

have been charged with larceny and the appellant with receiving. (See Figueira v. Franklin A.J. 24th April, 1913).

In the instant case the Magistrate could and should have acted under sub-section (4) of section 41 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 14, under which he could have convicted Dare of the larceny and the appellant of receiving, and it was suggested by counsel for the respondent that this Court, in exercise of its powers under section 28 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, could enter the judgment which the magistrate ought to have made.

It is, however, a condition precedent to the exercise of powers under section 41 (4) of the Summary Jurisdiction (Procedure) Ordinance, that the Court should observe the procedure prescribed in sub-section (7) of the same section, as enacted by section 9 of the Criminal Justice Ordinance, 1932 (No. 21 of 1932). That procedure has not been followed and in these circumstances, and also because the onus of proof which lies upon the prosecution in charges of larceny and receiving is heavier than in a charge of unlawful possession, this is not a case in which this Court can properly exercise its powers of amending or correcting the conviction. We cannot remit the case to the Magistrate as we are told he has ceased to exercise functions in the North West Judicial District and the case is too trivial to send for a re-trial before another Magistrate. We therefore allowed the appeal and set aside the conviction and sentence.

The man Dare who was charged together with the appellant has not appealed; we therefore have no jurisdiction to deal with his case. Section 15 of the Summary Jurisdiction (Appeals) Ordinance is of no avail as the time therein prescribed for review has run out, but we hope that the proper authorities will take appropriate action so that justice may be done in his case.

HENRY v. BLACKMAN.

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Worley C.J., Ward and Hughes JJ.) February 6, 17, 1951).

Rent Restriction Ordinance 1941—*Order for possession—Misrepresentation—damages—how assessed.*

A tenant vacated premises rented by him in pursuance of a Magistrate's order for possession obtained by his landlord on the grounds that he wished to effect repairs. After the tenant's departure, the landlord proceeded to carry out structural alterations in such a manner that the tenant could no longer occupy the premises. The tenant claimed damages on the ground that the order for possession was based on misrepresentation. The Magistrate awarded vindictive damages. The landlord appealed.

Held: The Magistrate had ample evidence to support his finding that the order was obtained by misrepresentation. In an action of this nature damages must not be vindictive but must be based on loss or

damage suffered by the tenant as a result of the order for possession.

Case remitted to Magistrate for damages to be assessed on the correct principle.

P. A. Cummings for appellant

C. R. Wong for respondent.

Judgment of the Court: The appellant is the owner of premises situate at Lot 131, Regent Road. Bourda, in which the respondent rented a room at a monthly rental of $3.62. The appellant applied for an order for possession under paragraph (h) of subsection (1) of section 7 of the Rent Restriction Ordinance 1941, as amended by section 8 of the Rent Restriction (Amendment) Ordinance, 1947, alleging that she needed the place for repairs. On February 9, 1949, the Magistrate made an order for possession on the 1st day of April, 1949, and the respondent apparently gave up possession on May 17, 1949. According to the evidence of the respondent and his witness, Nathaniel Kelly, the appellant proceeded to carry out structural alterations to the room in such a manner that the appellant could not occupy the room. Kelly said:

> "The room in which Blackman lived no longer has a door giving egress to "the outside. A second partition has been placed across the passage way so "that in order to get to Blackman's room one has to pass through another "room."

The appellant agreed in substance with this statement. On this evidence the learned magistrate came to the conclusion that:

> "The course of conduct was adopted by the appellant as an oblique method "of ousting the tenant altogether from possession."

In other words he found that the appellant had obtained the order for possession by a misrepresentation.

This Court is of opinion that the magistrate had ample evidence on which he could so find. When a landlord applies for an order for possession on the ground that he needs the premises for the purpose of effecting repairs he must act in good faith; and the best test of his good faith is whether he carries out the repairs which he has represented to be necessary. If he finds that he cannot carry out the repairs as planned, the Ordinance provides that before he uses or occupies or lets the premises he must apply to the Rent Assessor for permission. When, as in this case, the landlord, instead of effecting repairs, makes a radical alteration in the structure of the premises so that they can no longer be used as a separate dwelling, it is a reasonable inference that at the time of making application for possession he knew his representation to be false.

The condition attached to the order for possession and the purported discharge of the order on the 27th August, 1949, do not affect the respondent's claim for compensation. The Court has indicated in Appeal No. 210 of 1950, Cameron v. Daly, its reasons for the opinion that a magistrate has no power in making an order for possession to attach any condition that the landlord shall

permit the tenant to occupy the premises and it is unnecessary to repeat them.

On the question of damages against which the appellant also appealed, it is evident that the learned magistrate misdirected himself. In his reasons for decision the magistrate says:

> "It appeared to me that the well-known case of Lavender v. Betts (1942) "All E.R. applied."

The reference to this case shows that the magistrate misdirected himself that he could award vindictive damages to mark his disapproval of the appellant's conduct. It is a well established rule that, where an Ordinance provides that compensation shall be awarded for loss or damage, the actual loss or damage must be assessed without reference to the moral demerits of the party in default. In the instant case the respondent gave no evidence of any loss sustained by him. Counsel for the respondent has submitted that the loss of a tenancy protected by the Rent Restriction Ordinance is a loss contemplated by subsection (4) of section 7 of the Rent Restriction Ordinance. We are of opinion that the making of an order for possession on the misrepresentation of the appellant would entitle the respondent to compensation only if he in fact suffered loss or damage as a result of the order for possession.

It is possible that, if the magistrate had directed himself as to the right principle for the assessment of compensation under subsection (4) of section 7 of the Rent Restriction Ordinance, the respondent would have given evidence of the actual loss sustained by him. We therefore order that the case be remitted to the magistrate for him to take evidence as to the actual loss sustained by the respondent and to assess the compensation on the principle which we have indicated. Each party will bear its own costs of the appeal.

SHARPLES *v.* LAWRENCE

(In the Full Court on appeal from the Magistrate's Court for the Georgetown Judicial District (Worley C.J., Ward and Hughes JJ) January 5, February 17, 1951).

Appeal—Summary Jurisdiction (*Appeals*) *Ordinance Chapter* 16)*—copies of record for use of Court—consequence of failure to lodge within time prescribed.*

Subsection (2) of section 13 of the Summary Jurisdiction (Appeals) Ordinance, chapter 16 requires an appellant within ten days of the Registrar notifying him of the receipt of the copy of the record of appeal, to prepare and lodge with the Registrar two additional copies of the record for the use of the court, at the hearing of the appeal. The appellant failed to lodge the additional copies within the prescribed time and the Registrar treated the appeal as abandoned. He later entered it on the hearing list and the appellant applied for special leave to appeal under section 14(1) of the Ordinance on the footing that his client was a person "entitled to appeal but unavoidably prevented from so doing".

Held: (Hughes J dissenting). The appellant exercised his right to appeal when he gave notice to the opposite party and to the Magistrate of his intention to appeal and thereafter was an appellant and not a person entitled to appeal. The court had no jurisdiction to extend the time limited by sub-section (2) of section 13 of the Ordinance.

. . . . Appeal struck off the hearing list.

P. A. Cummings for Appellant.

L. F. S. Burnham for Respondent.

Judgment of (Worley, C.J., Ward, J.): In this matter the plaintiff-appellant appealed from a decision of the Magistrate and Rent Assessor of the Georgetown Judicial District refusing his claim for possession of certain premises of which the defendant-respondent was in occupation. The decision was given on 25th November, 1949, and on 7th December, 1949, Mr. Sharples personally gave written notice of appeal in the form and manner prescribed by paragraph (b) of subsection (1) of section 4 of the Summary Jurisdiction (Appeals) Ordinance (Chapter 16) and lodged the sum of $28 for the prescribed security. In due course a copy of the proceedings and of the grounds of appeal was prepared and transmitted to the Registrar in pursuance of subsection (1) of section 13 of the Ordinance and on 22nd February, 1950, the Registrar notified the appellant in writing of this fact. Under the provisions of subsection (2) of the same section an appellant is required, *within ten days of the notice,* to prepare and lodge with the Registrar additional copies of the record for the use of the Court at the hearing of the appeal, and, upon these being received, the Registrar is to enter the appeal on the list for hearing.

On Saturday 4th March, 1950, (i.e. on the tenth day excluding the 22nd February) the appellant was in default of lodging the additional copies and on Monday, 6th March, the Registrar treated the appeal as abandoned under the provisions of section 16 and notified the Magistrate's Court accordingly.

On the same day, a solicitor acting for Mr. Sharples, tendered the additional copies which were refused by the Registrar: but, upon representations being made that in the computation of the

period of ten days both the first and last days should be omitted, the Registrar, after consultation with a Judge of this Court, entered the appeal on the list for hearing.

At the hearing, counsel for Mr. Sharples wisely abandoned the contention as to the computation of time. Neither the Interpretation Ordinance nor O. XLIII of the Rules of Court 1900 (which relates to appeals) contains any special rule for the computation of time; the general rule will therefore apply, namely:

> "In cases in which a period is fixed within which a person must act or take "the consequences, the day of the act or event from which the period runs "should not be counted against him". (Halsbury's Laws of England: 2nd "Ed. Vol. 32 para. 207).

The act must therefore be done either before or at latest on the last day of the prescribed period, which in the present case was the 4th March.

Counsel for Mr. Sharples, however, applied for special leave to appeal under section 14 (1) of the Ordinance on the footing that his client was a person "entitled to appeal but unavoidably prevented from so doing in the manner or within the time specified" in the Ordinance by the default or negligence of his solicitor. His argument was that an appeal is not "in being" until it is actually before the Court for hearing or, at least, is on the list for hearing, that during all the preliminary stages Mr. Sharples was a person "entitled to appeal" and that the Court could relieve him of the consequences of any failure to comply with the prescribed procedure by giving special leave under section 14.

The argument is, we think, completely fallacious. As was said in a Canadian case (cited in Burrows "Words and Phrases" Vol. I p. 211):

> "A person appeals when he formally gives notice to the opposite party of "his intention to appeal although he does not in fact comply with the con- "dition precedent required to bring the appeal on for hearing."

In the present instance Mr. Sharples appealed when he gave notice to the opposite party and to the Magistrate of his intention to appeal as prescribed by section 4 (1) (b). Up till then he had been a person entitled to appeal: thereafter he was an appellant and could not revert to his former position.

If we had acceded to this application, we should, in effect, have been overruling the decision of the Full Court in Slater v. Wieting and Richter, Ltd. 1942 (L.R.B.G. 420) in which it was held that this Court has no jurisdiction to extend the time limited by section 13 (2). The *ratio decidendi* of that decision has been frequently accepted in subsequent eases and this application was merely an attempt to get round it. We therefore refused the application with costs. The Registrar correctly deemed the appeal abandoned and accordingly we struck it off the hearing list.

We take this opportunity of expressing our agreement with the view expressed in Slater v. Wieting and Richter, that it is most undesirable that an appeal should be deemed abandoned or be dismissed by reason only of failure to comply with a require-

ment aimed solely at securing the convenience of the Court and we invite the attention of the proper authorities to the last paragraph of the judgment in that case.

Hughes, J.: The opinion here expressed relates solely to the interpretation to be placed on section 14 (1) of the Summary Jurisdiction (Appeals) Ordinance, Chapter 15. That subsection reads—

> "14. — (1) If anyone entitled to appeal is unavoidably prevented from so "doing in the manner or within the time hereinbefore specified, he may "apply to the Court for special leave to appeal".

The question of the construction to be placed on that subsection, and in particular on the words "entitled to appeal", arose on an application, made during the course of the hearing of the appeal, for special leave to appeal. Such application was a result of the fact that the appellant was, under section 16, deemed to have abandoned the appeal in consequence of his failure to comply with the requirement imposed by section 13 (2).

The point for consideration, as I see it, is this: does a person by giving notice of appeal under section 4 thereby extinguish his right to apply for special leave to appeal (under section 14) by reason of the fact that by giving such notice he in fact appeals and can no longer be regarded as one "entitled to appeal" within the meaning, of section 14? The effect of an affirmative answer to that question is that where a person is unavoidably prevented from giving notice of appeal within the time prescribed he may apply for special leave to appeal but where a person, having given such notice in due time, is unavoidably prevented from taking some subsequent step (for example, lodging and serving a copy of the notice of the grounds of appeal) he may not apply for such leave. In my opinion it was not the intention of the Legislature to restrict the right conferred by section 14 to persons who are unavoidably prevented from taking the first in the chain of steps necessary to bring about a review by this Court of the decision of a Court of Summary Jurisdiction. The word "entitled" in the expression "entitled to appeal" in section 14 refers, in my view, not to the time of the application for special leave to appeal, but to the time of the pronouncing of the decision by the Magistrate: in other words, the section seeks to exclude cases in which the decision of the Magistrate is final. The fact that it becomes necessary for a person to apply for special leave to appeal itself indicates that, as far as the imperative requirements of Chapter 16 are concerned, that person is not, at the time of the application, "entitled to appeal".

A person appeals, in my opinion, not when he gives notice of appeal (which is merely an intimation to the opposite party and to the Magistrate that the Full Court will be moved in the matter) but when he has taken all the steps necessary to bring about a review of the decision with which he is dissatisfied.

The opinion expressed above is not, I consider, in conflict with the decision in Slater v. Wieting and Richter, Ltd. 1942 (L.R.B.G. 420) which relates, not to an application under section 14, but to one for an extension of time. It is undoubtedly the case that this Court has no power to extend the time prescribed for the doing of a specific act but the Court can, where it is satisfied that a person is unavoidably prevented from appealing, grant special leave to appeal and the effect of so doing is that stated in section 14 (3). Where such leave is given the applicant in fact obtains an extension of time.

In conclusion I may say that, in the circumstances stated by counsel for Mr. Sharples, I do not consider that the applicant for special leave to appeal was unavoidably prevented from appealing and, assuming that the application could properly be made in the manner in which it was in fact made, I would not have agreed that special leave to appeal be given.

CUMMINGS v. JACKMAN

In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Worley C.J., Ward and Hughes J.J.) January 2, February 17, 1951).

Criminal Law—larceny—accomplice—corroboration—handwriting expert—method of comparison.

On the trial of the appellant for larceny of a quantity of articles, the person in whose possession the articles were found gave evidence that they were purchased from the appellant and produced a book in which he alleged the appellant had signed as having received payment for the articles. The Magistrate found that the purchaser knew that the articles were unlawfully obtained and treated him as an accomplice whose evidence should be corroborated. A police witness qualified to give evidence as an expert in handwriting gave it as his opinion that the signature in the purchaser's book was the appellant's. Before obtaining the appellant's signature for examination, the expert knew that he was a suspected person. The appellant appealed from his conviction.

Held: The specimens of handwriting should be submitted to the expert without his knowing who had written them. In this case the failure to take that safeguard so weakened the corroborative evidence that it carried insufficient weight to supply the necessary corroboration of the accomplice's evidence. Appeal allowed.

C. E. R. Debidin for appellant.
A. C. Brazao, Solicitor General for respondent.

Judgment of the Court: The appellant was charged before a Magistrate of the Georgetown Judicial District jointly with one William Durant with the larceny of one tool box, three saws, three chisels, one hammer, one pair of pliers, two planes and one steel square, the property of one Mentore. After hearing the evidence for the prosecution

the Magistrate amended the charge against Durant to one of receiving certain of these articles knowing them to have been stolen. After hearing the defence of both accused persons, the Magistrate found Durant not guilty, convicted the appellant of the larceny and fined him $50 and costs. The formal conviction records that the appellant was convicted of the larceny of one saw, one panel saw, one tenon saw, one hammer, one chisel, one pair pliers and one square, the property of Mentore, between the 13th and 18th February, 1950.

The prosecution proved the loss by Mentore on 13th February, 1950, of the articles specified in the charge, and the discovery on 18th February, of those specified in the conviction in the possession of Durant who keeps a "poor man's shop" in Regent Street. The only evidence which connected the appellant with these articles was volunteered by Durant who alleged that he had bought them from the appellant on 15th February, 1950, together with a ratchet screw-driver and a chisel which he had subsequently sold. In support of his statement he produced a receipt book containing an entry dated 15.2.50 alleged to be written by the appellant. This entry reads:

> "15|2|50 Received from W. Durant the sum $1.68c. for three saws one "hammer two chisel one square one schar driver one plaiser the same "being my property at the time of sale.
>
> "Albert Cumming 94 Regent Street.

Durant admitted that at the time of receiving these articles he suspected them to be stolen and the Magistrate properly directed himself on the danger of convicting the appellant on Durant's evidence alone.

It is, indeed, not clear to us how the Magistrate arrived at his decision to acquit Durant of the charge of receiving. In his reasons he states that he was left in reasonable doubt as to whether or not when Durant received the articles he intended to hand them over to the police and cites R. v. Matthews (1950) All E.R. 137, in which Goddard L.C.J. said:

> "If the appellant received the property with the intension of at once "handing over to the Police that would not be a felonious receiving."

We do not in any respect question that proposition, but we find it difficult to understand its application to the facts in Durant's case, who not only kept the articles in his possession until Mentore discovered them, but had actually re-sold two of them.

But, however that may be, the Magistrate did direct his mind to the need of some corroborative evidence implicating the appellant and found it in the testimony of a police constable who was called as a handwriting expert and who, after comparison of the entry in Durant's receipt book with other entries in the same book and with specimens of the appellant's handwriting, formed the opinion that the entry dated 15.2.50 had been written by the appellant.

Evidence of this nature is admissible under Section 20 of

the Evidence Ordinance, provided that the Court is satisfied either that the witness is acquainted with the handwriting of the accused person, or that he is qualified to give evidence as an expert. The police constable gave evidence as an expert qualified by a correspondence course and four years' experience in the identification of handwriting, and it was primarily a question for the Magistrate to decide whether his qualification was sufficient.

But it is generally recognised that the identification of handwriting has not yet attained any degree of scientific accuracy, especially when, as in this case, it depends solely upon visual comparison; and it ought only to be accepted under proper safeguards. Specimens voluntarily written by an accused before trial, while detained by the police for inquiries and although not cautioned, are admissible (R. v. Voisin (1918) 1 K.B. 531) and may be used for purposes of comparison.

But their value for this purpose and the value of the opinion formed by the comparison depends to a great extent upon the circumstances in which the specimens are obtained. In the present instance, the expert witness first examined Durant's receipt book and formed the opinion that the entry dated 15.2.50 and five earlier entries signed "Albert Cumming" were written by one and the same person. On the same day, he was shown a slip of paper on which appellant, at the request of the police had written "Egbert Cummings" and an address and "Albert Cummings" and he formed the opinion that the handwriting was that of the person who had written the entries in the receipt book. He then dictated a passage which the appellant wrote down, and from that he formed the opinion that the appellant was the person who had written the entries in the receipt book and on the slip of paper.

We do not consider this method satisfactory for the reason that, before the expert formed his opinion, he knew that the appellant was the person who had written the words on the slip of paper and was suspected of having written the entries in the receipt book. In other words, he knew before hand which answer would fit in with the case for the prosecution. In these circumstances, however conscientious the expert may be, one cannot exclude the possibility of unconscious bias and, when to this is added the possibility of an honest mistake, the weight to be given to the opinion is drastically reduced.

We think that in these cases the expert should not himself take any part in the investigation and that the specimens should be placed before him without any indication as to who wrote them or what answer is expected. The question should be presented to him as an impersonal and abstract one — were documents A, B and C, or any two of them written by the same or by different persons? In this way his independence of judgment is safeguarded and the possibility of bias eliminated or, at least, reduced.

In the present instance, there were obvious divergences in the handwriting of the specimens as well as resemblances and we consider that, in the circumstances of this case, the expert opinion carried insufficient weight to supply the necessary corroboration of Durant's testimony.

For these reasons we allowed the appeal and quashed the conviction and sentence.

In the matter of The Georgetown Town Council Ordinance, Chapter 86,

and

In the matter of an election of a Councillor for Ward No. 3, South Cummingsburg (East and West) holden upon the 6th day of December, 1950.

CYRUS *v.* WIGHT and JAGAN

(In the Supreme Court, Civil Jurisdiction, (Worley C.J.) January 8, 9, 10, 11, 25, 1951).

Georgetown Town Council Ordinance—City Councillors—elections— candidates absent from the colony—nomination—written consent—time for production and deposit with returning officer—validity—effect of void nominations—distinction where error due to returning officer and not solely to candidates.

At the appointed time and date the returning officer attended at the Town Hall, Georgetown for the purpose of receiving nominations of persons capable of being elected as town councillors to represent the various wards of the city.

Sub-section (2) of section 34 of the Town Council Ordinance is as follows: "Every candidate shall be proposed and seconded by two persons . . . . . but the nomination of a candidate absent from the colony shall be void unless his written consent, given within six weeks from the date of his nomination in the presence of two witnesses, is produced and deposited with the returning officer at the time of the nomination".

The respondents who were absent from the colony on nomination day were both nominated but their consents were deposited with the returning officer before the time fixed for receiving nominations and they were not produced on demand made by the petitioner a duly nominated candidate.

On election day the first respondent received 222 votes, the second respondent 135 votes and the petitioner 10 votes.

The petitioner sought a declaration that the nomination of both respondents was void and as he was the only properly nominated candidate he ought to have been returned.

Held: In the case of a candidate absent from the colony his written consent should be produced and deposited with the returning officer contemporaneously with his nomination and should receive the same degree of publicity. The nominations of both respondents were void and the only duly nominated candidate was the petitioner.

As the returning officer was chiefly to blame for the perpetuation of the mistake of presenting the consents before the due hour and. as his conduct was the cause of the failure to cure the mistake, a new election must be held.

Where notice is given to voters that a candidate's nomination is null and void such notice must contain the fact or supposed fact which it is alleged makes the nomination void.

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

B. O. Adams for the first respondent.

L. F. S. Burnham associated with *H. A. Fraser* and *C. R. Wong* for the second respondent.

Worley, C.J.: In this petition, brought under section 70 (5) of the Georgetown Town Council Ordinance, (hereinafter in this judgment referred to as the Ordinance) the petitioner questions the return made under the provisions of section 60 (1) by the Town Clerk, as returning officer, of the election on the 6th December, 1950, of the first-named respondent as member for Ward No. 3, South Cummingsburg; he also in respect of the same election questions the nomination of the second-named respondent and claims the seat for himself as the only duly nominated candidate.

The biennial election of councillors for all the wards of the City of Georgetown, prescribed by section 26 of the Ordinance, fell due to be held during the first fifteen days in December, 1950, and, accordingly, on the 13th November, 1950, the Town Clerk was appointed to be returning officer for the general elections.

On the 18th November, 1950, the returning officer gave the prescribed notice that he would attend at the Town Hall on Monday the 4th December, 1950, at 11 a.m. for the purpose of receiving nominations of persons capable of being elected as town councillors to represent all the nine wards of the City. The notice concluded:

> "Therefore all persons duly registered as voters at the election of Town
> "Councillors are hereby called upon to elect Town Councillors to represent
> "the said wards respectively, on the day and at the hour herein specified."

Sub-section (1) of section 34 of the Ordinance provides:

> "On the day and at the place so fixed, the returning officer shall attend at
> "eleven o'clock in the forenoon and for fifteen minutes thereafter and re-
> "ceive the nomination of any duly qualified candidate for the seat to be
> "filled."

By 11 o'clock on the day in question, several hundred people had

gathered in the main hall of the Town Hall building and there was a general hubbub and movement among them. At precisely 11 o'clock, according to his evidence and that of others who were present, the returning officer rose to call for silence and, when order had been established, announced that he was ready to receive nominations and would take them for each ward in numerical order. At approximately six or seven minutes after 11 o'clock he called for nominations for Ward No. 3, and in respect of that ward, Mr. Claude Vibart Wight was first proposed and seconded, next Mr. Cheddi B. Jagan and then the petitioner, Mr. Samuel I. Cyrus. The last nomination for Ward No. 9 was received at about 11.13 a.m.

On the day in question, Mr. Wight and Mr. Jagan were absent from the Colony and their absence was a matter of public knowledge, they being both members of the Legislative Council and prominent figures in public life; but, at the time of their nominations, no reference was made by anybody to the absence of either of them from the Colony, nor, in either case, was any written consent produced and deposited with the returning officer.

When the nominations for all wards had been declared closed and the returning officer was about to announce the unopposed returns and to fix dates for the wards in which there were to be contested elections, the petitioner approached the returning officer saying that he had not seen any consents handed in for Messrs. Wight and Jagan and asked to see them. The returning officer refused to produce them saying he had them both before him in his election book, was satisfied that they were in order, and that he did not think he was permitted to show them to any rival candidate. The petitioner, who had gone prepared for some such eventuality as this, produced a copy of the Ordinance and requested the returning officer to read subsection (2) of section 34 which is as follows:

> "Every candidate shall be proposed and seconded by two persons whose "names appear on the register of voters for the ward, who shall give assur- "ances to the satisfaction of the returning officer (whose decision upon "this point shall be final) that the candidate has consented to the nomina- "tion, but the nomination of a candidate absent from the colony shall be "void unless his written consent, given within six weeks from the date of "his nomination in the presence of two witnesses, is produced and depos- "ited with the returning officer at the time of the nomination."

When the returning officer refused to do so, the petitioner himself then read the subsection in a loud voice and again openly and loudly asked to see the consents. The returning officer replied that he would not show them to the petitioner or to anyone and the petitioner asked that his protest be noted.

Mr. Wight's agent heard this dispute but did not intervene. Mrs. Jagan also heard a dispute but did not realise that it related to her principal's nomination.

The returning officer then fixed Wednesday the 6th

December, for the election for Ward No. 3 and at the close of the poll on that day, publicly declared the result to be Claude Vibart Wight—222 votes, Cheddi Jagan—135 votes, Samuel Ignatius Cyrus—10 votes and declared Mr. Wight to be duly elected. In the statutory return to the Council on December 11, he returned Mr. Wight as elected.

The petitioner thereupon brought this petition praying that it be determined that by virtue of the provisions of section 34 (2) of the Ordinance, neither Mr. Wight nor Mr. Jagan was duly nominated and that their nominations were void; that Mr. Wight was not duly elected or returned and that his nomination, election and return were and are wholly null and void and that he, the petitioner, as the only duly nominated candidate, was elected and ought to have been returned.

Both respondents appeared to the petition and filed notices of opposition in which each denied that his written consent, as required by law, was not produced and deposited with the returning officer at the time of his nomination.

At the hearing, counsel for each of the respondents admitted that no consent was handed in to the returning officer between the time when he rose to open the nominations at 11 o'clock and the closing, of the nominations at 11.15, but called evidence to show that the consents were handed to the returning officer before the nominations began. There was a sharp conflict of evidence on this point, but after hearing the oral testimony of a number of persons who had been present in the hall on the nomination day and inspecting two documents produced by the returning officer, I found it proved as a fact that the written consent of Mr. Jagan dated November 21, 1950, signed by him and duly witnessed by two witnesses was handed by Mrs. Jagan, who was her husband's election agent, to the returning officer as he sat at his table preparatory to opening the nominations at some time between 10 minutes to 11 and 11 o'clock. I also found that subsequently to this, but also before 11 o'clock, the consent of Mr. Wight dated the 10th November, 1950, duly signed and witnessed was handed to the returning officer by Mr. Azim Khan who was Mr. Wight's election agent. Further, I am satisfied on the evidence that the petitioner and his witnesses did not know that these documents had been handed in before 11 a.m. and that, in the crowded state of the hall, it is highly probable that very few persons there could have seen or were aware that any documents were handed in before 11 o'clock.

The issue therefore on this part of the petition is narrowed down to the question whether this handing in of the written consents before the statutory time prescribed for receiving nominations is a sufficient compliance with the section or is such a failure to comply as will render the nominations void.

Before I proceed to consider this, I think it well to put on record a ruling on a question of procedure which I gave in the course of the hearing. Neither of the respondents in his notice of opposition questioned the qualification of the petitioner for nomination but counsel for the first-named respondent sought to

cross-examine the petitioner on this point and, on objection being made, I upheld it. Counsel for the respondent contended that these proceedings are of a quasi-criminal nature, that the petitioner is put to strict proof of everything alleged in the petition, that there is no obligation on the respondent to indicate his answer or defence beforehand and that it is open to him to bring forward any issue which he thinks fit, without notice, during the course of the trial.

As I said at the time of giving my ruling, that proposition seems to me inconsistent with the provision in section 78 of the Ordinance that the petition is to be tried as a civil action, nor am I aware of any local or English case which gives any support to it. Since no special rules of procedure are prescribed for the trial of these petitions, I think it must be inferred that the Legislature intended that the general principles of pleading and practice in civil actions should apply. The significance of that, to my mind, is that the ultimate purpose of the relevant rules in civil procedure is to clarify and determine the questions at issue before the matter comes to trial so that the parties are not taken by surprise and the Court knows what are the issues before it for consideration. That principle has, I think, been recognised in the practice followed here (which I believe to be of long standing) of filing a notice of opposition setting out how much of the petition is admitted and how much is denied or not admitted.

A general denial in such a notice amounts to no more than a general traverse in civil pleadings and has the effect only of putting the petitioner to the proof of what is not admitted. If I am right in this then, if the petitioner claims the seat and the respondent intends to prove that the election of the petitioner was undue, for example, by reason of his disqualification, the respondent should do so by way of an objection in the notice of opposition. Such a practice is, it may be observed, in accordance with statutory provisions in England: (See Halsbury, Laws of England 2nd Ed. Vol. XII para. 947), and with the Legislative Council (Election Petitions) Rules, 1948 of this Colony.

As I understand the law and practice, if there is no specific objection raised, it is sufficient for the petitioner to satisfy the Court that he was nominated in due form according to law without any apparent disqualification, without any defect on the face of his nomination and that no objection was raised thereto and, if satisfied on these points, the Court will not itself undertake an enquiry as to whether there is any latent defect in the nomination.

Apart from the question of taking the petitioner by surprise, it seems to me that there are other good reasons for the adoption of this procedure. In the first place, I would draw an analogy from the rule in civil pleadings which forbids "fishing," interrogatories, for it seems to me that in a proceeding of this nature, the Court should set its face against "fishing" cross-examination, put merely in the hope of discovering some defect in the petitioner's nomination. If the objection is raised in the notice, the party making it undertakes the onus of establishing at least a *prima*

*facie c*ase which the petitioner may or may not be able to rebut; but, if that course is not followed, the petitioner may be subjected to a lengthy and intricate cross-examination on his private affairs, which may be highly embarrassing and yet prove to be entirely irrelevant, and I think a petitioner should not be exposed to this unless and until the respondent has laid a foundation for it.

Another factor to be borne in mind is that the question of the petitioner's disqualification is a separable issue. If he does not succeed in the first prayer of his petition for a declaration that the respondent was not duly nominated and elected, the question of his own disqualification may never arise and it may be found that a great deal of time has been spent and costs incurred in taking evidence on an issue which, in the event, proves to have been irrelevant. I am fortified in this by the observations of Lord Coleridge C.J. in Drinkwater v. Deakin (1874) L.R. 9 C.P. 626 at p. 633 where he says:

> "It has first to be established that the candidate was at the time of the "election in point of law disqualified; and, if this cannot be made out, any "further enquiry becomes useless."

To the above I would add that since there are no special rules governing the hearing of these petitions the Court ought always to be indulgent to a respondent who has not filed a notice of opposition, or, having filed one, asks leave to amend. In this case an opportunity to amend was offered to counsel for the respondents but they did not wish to avail themselves of it.

I pass on now to consider whether or not the nominations of Mr. Wight and Mr. Jagan were void; there can be no distinction between their cases on the facts which I have found; the order in which their consents were handed to the returning officer is immaterial and their nominations are either both valid or both void.

First of all, it is quite clear that if the required consent is either not delivered at all or is delivered after the expiry of the prescribed time, the nomination is void: see Brown v. Benn 1889 (53 J.P. 167); Boyce v. White 1905 (92 L.T. 240); Cutting v. Windsor 1924 (90 T.L.R. 395); Humphrys v. Mc Arthur 1926 (L.R.B.G. 109). In all these cases the requirements of the relevant statute were held to be imperative; in the first two cases the required consent to nomination was not delivered, as required, at the time of nomination or at all. In Cutting v. Windsor (supra) a nomination paper was delivered forty minutes after the expiration of the prescribed period and, in delivering the judgment of the Divisional Court of the King's Bench, Avory J. said:

> "So far as (the rule) provided for the time within which nomination papers "must be delivered at the Town Clerk's office it was mandatory. It was not "within the discretion of the Town Clerk to receive nomination papers af-"ter the hour specified in the rule, nor was it competent to the Court to say "that the delivery of a nomination paper after the

"prescribed time constituted a good nomination. Mr. Windsor had never "been duly nominated and his election must be declared void".

See also Howes v. Turner 1876 (1 C.P.D. 670, 680) in which it was held that the statutory authority of the Mayor to determine objections did not give him power to dispense with the statutory day for the delivery of nomination papers.

In Humphrys v. Mc Arthur (supra), the respondent failed to deliver the requisite statutory declaration of qualification "at the time of nomination or within forty-eight hours thereafter" as required by law and Douglass J. said that he had thereby failed to complete the necessary steps to become a candidate; consequently his nomination was not valid and his election must be held void.

Reg. v. Glover 1866 (15 L.T. 289) is, so far as my researches go, the only case in the reports which relates to the delivery of nomination papers before the prescribed time: it was not cited by counsel in the argument. In that case, the Municipal Law Amendment Act (22 Vict. C. 35) provided that notices of nomination were to be sent to the Town Clerk "at least two whole days (Sunday excluded)" before the day of election. The Town Clerk having appointed Thursday November 1 for the election, directed that nomination papers were to be sent in by the 28th October which happened to be a Sunday and refused to receive some which were tendered on Monday, October 29. The Bail Court (Blackburn and Shee J.J.) held that the Town Clerk had no discretion to fix a day earlier than two days before the election as the last day for receiving the notices.

It will not be necessary for me in this case to decide exactly what period is intended in the expression "at the time of the nomination" in the last line of subsection (2) of section 34. The section originally related only to procedure for a by-election but, by section 26A of the Ordinance (as enacted by section 12 of the Georgetown Town Council (Amendment) Ordinance 1946 No. 29 of 1946), sections 34 to 38 are to be applied *mutatis mutandis* to a general election held under section 26. This was no doubt a convenient device to make good what was lacking in section 26 but it appears to have had the peculiar result that the returning officer now appoints one period of fifteen minutes, between 11 a.m. and 11.15 a.m. on one day, for nominations for all the nine wards of the city, whereas this period was originally considered a reasonable period for nominations for a single ward. That, at any rate, is how the section has been interpreted and applied in practice, but the question whether this is a necessary result of the adaptation of section 34 to general elections may some day fall to be decided in these Courts.

Another result of the adaptation has been to introduce some doubt as to the meaning of the expression "the time of the nomination." The narrowest interpretation of these words is that contended for the petitioner who would limit it to the time during which the returning officer was receiving nominations for Ward No. 3 i.e. after he had called for them and before he had passed

on to Ward No. 4. The widest is that put upon it by counsel for the respondents who would have me read the word "nomination" as "nominations" when applied to a general election, and construe the period as any time between 11 a.m. and 11.15 a.m. I think the natural meaning of the words is that which Mr. Humphrys puts upon them, but I would not exclude the possibility that, if there were time and opportunity before the fifteen minutes had expired, a further nomination for any ward might be made. However the point is immaterial here since it is admitted that the consents were handed in before 11 a.m. and before the returning officer had announced that he was ready to receive nominations.

Is there then a sufficient compliance with the section if the consents are handed in before the time of the nomination, or, to adapt the language of Avory J., has the returning officer a discretion to receive the consents before the hour specified in the section or is it competent to this Court to say that the delivery of a consent before the prescribed time constituted a good nomination?

"The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning" (Nokes v. Doncaster Amalgamated Collieries (1940) A.C. 1014 at p. 1022). *Prima facie*, the section means what it says: the consent is to be produced and deposited with the returning officer at the time of nomination, and it is obvious that if one is going to enlarge the meaning of the phrase, one has to face the question whether the enlargement is to be limited to- any precise number of minutes, hours or even days. Counsel for the respondents, no doubt realising this, contended that the requirements of the section would be satisfied if a consent made according to law were produced and deposited with the returning officer at any time after his appointment as such, the production and deposit being deemed a continuing act, provided (and the proviso is significant) that the consent lies before him on his table at the time of the nomination. The proviso is, as I say, significant because it would have the very peculiar effect that a nomination otherwise valid could be rendered nugatory and void by the negligence of a returning officer who omitted to bring the consent with him to the place of nomination. In other words the validity of a nomination would depend, not upon the acts of the candidate, his sponsors or his agent, but upon the act or omission of an officer over whom they have no control.

The respondents conceded that a nomination made before the statutory time would be ineffective and also conceded that the exclusive determination of the validity of oral consents conferred upon the returning officer did not apply to written consents under the latter part of the subsection; but they contended that these consents were merely ancillary to the nomination and that the section should receive a liberal construction and full effect be given to the intention underlying it, namely that the returning officer should be satisfied that the candidate has in fact consented. They further argued that, as the section does not specify who is to produce the consent, nor expressly state that it shall be

produced publicly, the Court ought not to declare a nomination void if it is shown that the returning officer was in fact in possession of a consent at the time of a candidate's nomination.

It seems clear that the source of the requirement of the written consent of a candidate absent from the Colony in the second part of sub-section (2) of section 34 is to be found in the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50 Sch. 3 Pt. 2 r. 16) which provides as follows:—

> "The nomination of a person absent from the United Kingdom shall be void unless the written consent, given within one month before the day of his nomination, in the presence of two witnesses is produced at the time of his nomination."

The two cases above cited, Brown v. Benn and Boyce v. White arose out of default in complying with this rule.

Counsel for the respondents stressed that the English rules do not specify any public production of a consent but the practice in this colony with regard to nominations is so different from that in England, where written nominations have to be deposited in The Town Clerk's office within a prescribed period, that any arguments or analogies drawn from English practice are apt to be misleading. It is, as the Privy Council has pointed out in more than one case, the first duty of a Colonial Court to construe colonial enactments as they stand. There are, however, two comments which may usefully be made on the English practice in municipal elections; firstly, that although nominations are not made in public there is provision that the Town Clerk shall forthwith send notice of every such nomination to each candidate and that the Mayor shall attend at a stated time to decide on the validity of every objection made in writing to a nomination paper, and that each candidate may object to the nomination paper of any other candidate. It is obvious that this impliedly confers a right to inspect any documents required by the statute as part of a valid nomination. Secondly, although section 72 of the Act of 1882 provided that an election should not be invalidated by noncompliance with the rules if it appeared to the court that the election was conducted in accordance with the principles laid down in the body of the Act, the Court in Cutting v. Windsor expressly rejected the contention that the late delivery of the respondent's nomination paper was a mere technicality, Mr. Justice Horridge saying that if Mr. Windsor had never been nominated, it was impossible for the Court to say that his election was in accordance with the principles laid down in the body of the Act.

Under section 34 of the Georgetown Town Council Ordinance, nominations are made orally by a proposer and seconder; the returning officer's notice invited all voters to attend at the time and place appointed for the receiving of nominations and this is in accordance with the intention of the section and long-standing practice. Even in the first part of the subsection dealing with the nomination of candidates present in the Colony, although it is expressly provided that the returning officer's decision as to whether or not they have consented shall be final, the section clearly contemplates that the necessary assurances should be given by the proposer and seconder at the time of nomination, and that any objection thereto shall be determined there and then by the returning officer.

It seems to me therefore beyond doubt that it was the intention of the legislature that, in the case of a candidate absent from the colony, his written consent should be produced and deposited with the returning officer contemporaneously with his nomination and should receive the same degree of publicity. There is no provision in the Ordinance for any subsequent attendance or appointment to receive objections and the time of the nomination is the only occasion on which a rival candidate has an opportunity to make an objection to the returning officer. If the written consent is produced at that time, the rival candidates have notice that the candidate is absent from the Colony and that he has given his written consent as required by the section and, if he has, of inspecting it. The Town Clerk's refusal in this case to show the consents to the petitioner was clearly unjustified. I would further observe that the interval between the nominations and the day fixed for contested elections appears generally to be very short and was in this case less than two clear days; it is therefore advisable that candidates ought to be given the earliest opportunity of inspection and, if necessary of raising an objection and warning the voters.

In the instant case, nothing was done or said by anyone at the time of nomination which can be construed either as a constructive production or deposit or as constructive notice to the petitioner that the consents had been delivered.

I would further observe that there is a sound reason of public policy for giving publicity to the consent of a nominee: the assembled voters, or a section of them, on hearing Mr. X nominated and his consent announced or seeing it produced might be content to accept him as their representative or candidate but, if it appears either that he has not consented or that there is a doubt about it, they might prefer to safeguard their interests by making an alternative nomination there and then.

The conflict of evidence in this case as to what occurred before 11 o'clock emphasizes the desirability of adhering closely to the enactment and observing the necessary publicity.

After giving careful consideration to the arguments put before me, I have come to the conclusion that, whatever canon of construction be applied, the section cannot, without doing violence to the language and ignoring all precedents, be construed so as to enlarge the time for producing the consent to any period before the nominations are called for. The provisions of the section are mandatory and the returning officer has no authority to receive written consents before the time of the nomination; and it is not competent for this court to say that the delivery of the consents before the prescribed time was a sufficient compliance with the section. It follows therefore that I must hold the nominations of both respondents to have been void, that the first-named respondent ought not to have been returned and that the only duly nominated candidate was the petitioner.

I now pass on to consider the difficult question of what effect this finding should have upon the election and whether the petitioner is entitled to claim the seat. Subsection (3) of section 34 provides:

> "If only one candidate has been nominated the returning officer shall declare him to have been duly elected;"

and it would seem that, if the returning officer had correctly conceived the legal position, he should there and then have declared the petitioner to have been elected. However, he did not do so but appointed a day for the election, which was carried out. Unfortunately the law is not altogether clear as to what effect this has on the petitioner's right to the seat.

A distinction has been drawn in election cases between a nomination which is totally null and void *ab initio* and one which, though defective, becomes a valid nomination to this extent that it may form the basis of an election and the nominee be properly treated as a person for whom votes could be given, though the nomination may subsequently be questioned in an election petition. In the latter case the nomination may be declared invalid but the court will not award the seat to a validly nominated candidate unless it is shown that the voters had notice that they would be throwing away their votes if they voted for the ineligible candidate. One instance of such a case is where the objection is based upon disqualification and is one which the returning officer is not competent to determine.

But where a nomination is deemed to have been no nomination at all, it has been held in more than one case that, if there were only one other candidate, who was duly nominated, he was entitled to the seat even though he had only a minority of votes at the election. The basis of these decisions is that nomination is essential to the right to be elected and none can go to the poll but such as are duly nominated.

The Principle is to be found in Monks v. Jackson 1876 (1 C.P.D. 683) where the petitioners, whose nominations had been rejected, sought to question the election of the respondents. Lord Coleridge C.J. said (at p. 690):

> "Petitioners were not duly nominated as candidates and had no right to go "to the poll and if they had been elected their election must have been set "aside . . . . . if the petitioners were not duly nominated, it was the duty "of the Mayor to declare the candidates who were duly nominated to be "elected."

In Brown v. Benn (1889), Huddleston J. said:—

> "The gentleman (i.e. Benn) was nominated to be Town Councillor when "absent from the United Kingdom. The statute declares the nomination of "a person absent from the United Kingdom void, unless he has given writ-"ten consent to his nomination within one month, in the presence of two "witnesses, and it is produced at the time. In this case the written consent "was not produced therefore his nomination must be declared void. The "nomination of the other candidate was valid. He was the only other can-"didate and he claims the seat. We declare him to be elected."

In Cutting v. Windsor (1924), Avory J., said:

> "Mr. Windsor had never been duly nominated and his election must be de-"clared void. Mr. Cutting was the only

> "other candidate and he must be declared to have been duly elected." Horridge J. agreed.

Avory J. also said that the irregularity might seriously have affected the result; but that was not, it appears, the *ratio decidendi* of the Judgment. Neither Brown v. Benn nor Boyce v. White was cited.

In Humphrys v. McArthur (1926), Douglas J. had to consider section 17 (1) of the British Guiana Constitution Ordinance 1891 as amended in 1909 (which appears in the 1930 Edition of the Laws of British Guiana as section 33 (1) of the British Guiana (Constitution) Order-in-Council 1928). This was the section referred to above which required every candidate nominated at any election as a member of the Legislative Council to deliver or cause to be delivered at the time of nomination or within forty-eight hours thereafter, a statutory declaration of his qualification; and the section further provided:

> "If such statutory declaration is not delivered as aforesaid, the nomination "or election as the case may be of such a candidate shall be deemed to be "void, and the returning officer shall thereupon proceed as if such candi- "date had withdrawn from his candidature or had not been elected."

Referring to this, Douglas J. said:

> "I am of opinion that no disqualification of the respondent arises within "the meaning of the rule that in such a case notice of it ought to be pub- "lished to the electors: to admit it would in effect be to eliminate section "17 (1) which definitely meets the present case . . . . . had the said section "not existed, and such was the case previous to 1909, I should have seri- "ously considered the necessity of a fresh election, but the Court cannot "place the petitioner in a worse position owing to the fault of or misunder- "standings of other parties, and I must again emphasise the fact that there "was no disqualification of the respondent as a candidate; he failed to "complete the necessary steps to become a candidate, and so put himself in "the position of a candidate who withdraws from an election."

After referring to the case of Cutting v. Windsor, the learned Judge concluded:—

> "Mr. Humphrys remained the only candidate and must be declared to have been duly elected."

The only case to which I have been referred which is against this current of authority is that of Boyce v. White, decided in 1905 before Kennedy and Joyce JJ. sitting as a Divisional Court of the King's Bench. That, as has already been said, was a case where the respondent, being out of the United Kingdom at the time of the delivery of his nomination papers, no written consent was produced then or at all. The petitioner claimed the seat and the respondent, having been served with a copy of the petition, gave notice of his intention not to oppose. Counsel for Boyce cited Brown v. Benn and urged upon the Court that the case was an exception by statute from the rule laid down in Hobbs v. Morey (1904) 1 K.B. 74 being a case not of disqualification but of failure to nominate, and, there being no nomination of another candidate,

the petitioner ought to be declared duly elected. The Court however, refused to accede to this argument. Kennedy J. said:

> "We are both of opinion that this case is indistinguishable in principle "from Hobbs v. Morey and it is therefore unnecessary to go into the rea- "sons for that decision which will be found in the judgments in that case. "Here, a person was "elected who was not qualified to go to the poll and "he got a large majority of lawful votes. He went to the poll apparently "correctly and duly qualified so far as the knowledge of the voters was "concerned for his nomination was in no way disputed to the knowledge "of those electors. He ought not to have gone to the poll and he ought not "to have been elected."

Jelf J. said:

> "If this matter were *res integra* there might be much to be said, for it is "certainly hard that where the knowledge of the invalidity of the nomina- "tion only came at the last moment so that there was no time to give no- "tice to the electors, the validly nominated candidate cannot claim to be "duly elected but must go to the trouble of another contest. But it was "considered in Hobbs v. Morey that on the whole it was in the interest of "voters there ought to be a new election. I think Hobbs v. Morey was "perfectly right and we must follow it."

The election was declared void; leave to appeal was given but it seems that the matter was not further pursued. This decision was not referred to in Cutting v. Windsor, nor, so far as I can discover, has it ever been followed or referred to in any subsequent case in England.

I do not think that the decision in Hobbs v. Morey has ever been questioned and I myself followed it in Robinson v. Whitehead Petition No. 279 of 1947 (unreported). But with all respect to the learned judges who decided Boyce v. White, Hobbs v. Morey did not lay down any general rule that in all cases of undue elections there ought to be a new election. Hobbs v. Morey was not a case of a nomination declared void by statute but was one where the disputed nomination was delivered in time and was valid upon the face of it and the objection was one which the Mayor had no jurisdiction to determine: it was therefore a case in which (to use the words of Lord Watson in Pritchard v. Mayor etc., of Bangor 1888 (13 A.C. 241) "the nomination paper so sustained should form the basis of the election and the nominee in that paper should be treated as a person for whom votes could be given before the returning officer." I can find nothing in either Hobbs v. Morey or in Pritchard's case (upon which it was based) to justify the assumption of such a rule in cases where the nomination is a nullity. In Boyce v. White the Court appears to have been influenced by the fact that no notice was given to the electors, but that was immaterial if the nomination were void.

There are of course occasions on which "void" may be read as "voidable", even in a statute, but the general rule of construction is that when an enactment has some object of public policy in view which requires strict construction, the word "void" should be given

its natural full force and effect (see Maxwell on Interpretation of Statutes, 9th Ed. p. 221).

In my opinion, therefore Boyce v. White was wrongly decided and ought not to be followed, and the correct rule is that laid down in Cutting v. Windsor, Humphrys v. McArthur and the other cases cited above, namely, that where the respondent was never duly nominated his election must be declared void, and where the petitioner was the only other candidate and was duly nominated he must be declared to be duly elected. There is, however, at least one exception to this rule which I shall consider later, but unless the present case can be brought within the exception, the rule must be applied.

I was not impressed by any arguments that I should favour "substantial justice and good sense" or that "the spirit and general intention" of the statute must prevail or that "the interests of the electorate" are predominant. It is not for me to usurp the function of the Legislature, which must be taken to be acquainted with the actual state of the law and to have intended the effect of what it enacted.

(See Jeffrey v. Mendes 1928 L.R.B.G. 43, Sir Anthony de Freitas C.J. at page 50). I am fortified again, in my view that these provisions must be strictly construed by the opinion of Lord Coleridge in Mather v. Brown 1876. (L.R. 1 C.P.D. 596), a case heard under the Municipal Elections Act, 1875. After stating that he had yielded to the objection to a nomination paper with the greatest possible reluctance, the learned Chief Justice said (at pp. 601—3):

> "It must be remembered that, in dealing with cases under these Acts, we "are sitting as a final tribunal of Appeal, in the exercise of a duty cast upon "us under peculiar circumstances and as a sort of compromise between "conflicting parties in the legislature, and therefore are more especially "bound to keep ourselves strictly within the letter of the Acts, and to ab- "stain from any attempt to strain the law."

Lindley J. added: "I am of the same opinion . . . . . .

> "Having regard to the principles upon which these Acts are framed, it is "not for us to cure what we may conceive to be defects in them."

To that I would humbly add that, if the election Court should abandon the strict application of the statute in favour of what are loosely termed the equities or the real merits of the case, it may well expose itself to suggestions that its decision has been influenced by personal sympathies or prejudices.

No doubt in some cases the rule operates harshly as it has the effect of putting into office a person who received only a minority of the votes cast; but the very strictness of the rule may be considered to promote the public interest in the long run by impressing upon intending candidates the necessity of doing what the law says they must do to secure nomination; and so, it may be hoped, reduce the number of disputed elections.

It appears to me, however, that the stringency of the rule is subject to, at least, one exception which arises when

the ineligibility of the respondent is attributable to a mistake of the returning officer. In Howes v. Turner 1876 (supra) a case not cited during the argument, a nomination paper was delivered a day late owing to a mistake in the Town Clerk's notice. The Court (Brett, Denman and Archibald JJ.) held that the notice was so defective as to be calculated to mislead the candidates and so prevent a fair election: the whole proceeding was declared void and a new election ordered. In that case, the appellant did not claim the seat but, as I understand the judgments, even if that claim had been made, it would not have affected the result.

In the present instance the evidence is that ten days or so before the nomination day, the agent of each respondent sought the returning officer's advice as to whether his candidate's consent paper was in order and was told, according to the returning officer's evidence, "to bring them again on nomination day." This advice or direction, though not so precise as it might have been, was not necessarily misleading and on the day in question, the respondents' agents acted spontaneously in handing in the written consents before eleven o'clock without any prompting or direction from the returning officer. The latter ought not to have received them at that time, but neither his mistake nor the agents' can avoid the consequent invalidity of the nominations. "When the validity or invalidity of an act depends on a question of law no one can make such an act valid in law when it would otherwise be invalid by saying that he did not know the law"—per Brett J. in In re Launceston Election Petition: Drinkwater v. Deakin (1874) L.R. 9 C.P. 626, 642.

But when the question is whether the seat should be awarded to a petitioner who had only a minority of votes, it is most relevant to consider to what extent the returning officer's mistake contributed to the defect which make the respondents ineligible as candidates.

The peculiar feature of this case, which distinguishes it from others cited above is that here both the consents were produced and deposited with the returning officer, though not at the proper time, and were in his possession when the respondents were severally nominated. In other words, while in the cases cited time had run out through the fault of the candidate or his agent before the relevant document was lodged and the defect was therefore incurable, in the present case the defect was curable and, it is only reasonable to suppose, would have been cured in time but for the returning officer's mistake. In the event which happened he should, as I have said, have declared the petitioner elected if he had known the actual state of the law: but, equally, if he had known the law, the event would never have happened for he would then have refused to receive any consent paper before the prescribed time. Had he done this, can there be any doubt that each agent would have presented the paper again, probably when his principal was proposed and seconded but, in any event, between 11 and 11.15 a.m.?

It seems to me therefore that, although the mistake may not have originated with the returning officer, he was chiefly to blame for its perpetuation and the failure to cure it in due time. He is

appointed under the Ordinance to conduct the proceedings and is assumed to be acquainted with the relevant law; and when he accepted the consent papers without demur it was not unreasonable for Mrs. Jagan and Mr. Khan to take it for granted that everything was in order. Many others more skilled in the law than they might have made the same assumption. But the returning officer owed a duty to the candidates and also to the electorate not to make a mistake of that nature. By his conduct he not only misled the respondents into the belief that their nominations were in order but he also led the voters, who were not party to the mistake, into thinking that all three candidates had been duly nominated, If, in these circumstances, the petitioner were awarded the seat then the Court would be giving to the returning officer's mistake a consequence so "contrary to the real views of the constituency" that there would be no real election at all. I therefore think that I am bound to declare the election void and that a new election must take place.

In this class of case it seems that there can be no question of giving notice to the voters but I do not propose to prolong this already lengthy judgment by discussing that question or the question of the extent of the notice to be given, where notice is necessary. The petitioner did in fact, give notice by advertisement in a newspaper on the election day, by setting up placards at the principal entrance to the polling station, and by distributing handbills and personally warning voters as they went to the polling booth. There is no evidence of the form his verbal warnings took but the documentary notices were all in identical words and they were all, in my view, defective in form in that they contain no statement of the fact or supposed fact which was alleged to make the nominations null and void. The notices allege that the respondents "being absent from the Colony of British Guiana at the time of their nomination on Monday the 4th day of December, 1950, as Councillor for the said Ward . . . . did not comply with the requirements of section 34 sub-section (2) of the Georgetown Town Council Ordinance, etc."

If I may for a moment borrow the language of the criminal law, the notice lays a charge but does not condescend to particulars. There has at times been a difference of judicial opinion as to whether, if the voters have knowledge of a fact which grounds a disqualification, it ought to be inferred that they know the legal consequences of that fact: the better opinion seems to be that the maxim "ignorantia juris haud excusat" will apply. But however that may be, knowledge of the fact is a condition precedent to such an inference. This knowledge may be established either by distinct notice or by notoriety, but it is not to be inferred that, because the voters are told that a candidate has failed to comply with the statute, they thereby are given notice of the fact which is alleged to constitute the non-compliance. There are several ways in which the section cited might be contravened and, if particulars are given, the opposing candidate may be able to refute them at once. In the present case, although the returning officer wrongfully refused to give inspection of the written consents, the petitioner could, of his own knowledge, have given notice that the written consents of the respondents were not delivered at the

time of nomination, and he could further if he so thought fit, have alleged a belief that they had not been given at all.

My conclusion therefore upon the whole case is that the election of Mr. Wight must be declared void, the return set aside and a new election be held.

It remains to consider the question of costs. In Ewing v. Wong 1934 (1931—37 L.R. B.G. 241 at p.252) Sir Bernard Crean C.J., after consultation with the other judges, indicated that, in election cases, the general rule that costs follow the event should prevail unless special circumstances are shewn to the Court to displace this rule.

This was, I assume, intended as a general guide for judges hearing election petitions: costs always lie in the discretion of the trial judge unless a statute provides otherwise and I will therefore hear counsel, if they wish to be heard on this aspect, before making any order.

Solicitor: *H. C. B. Humphrys* for the petitioner.
A.G. King for the first respondent.
W. D. Dinally for the second respondent.

MAHADEO *v.* THE CHIEF IMMIGRATION OFFICER.

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Worley C.J., Ward and Hughes J.J.) January 2, 4, 5, February 17, 1951)

Immigration Ordinance 1947*—permit to enter Colony—extension— prohibited immigrant—procedure irregular—appeal allowed.*

The appellant, a British subject, arrived in this colony on November 30, 1949 and was given a permit to remain for three months. On February 27, 1950 he applied to the Chief Immigration Office for an extension who, instead of extending it or refusing it under section 10 of the Ordinance granted a permit under section 12 without fixing any time for its expiration. On August 28, 1950 the appellant was given a temporary permit under subsection (3) of section 10 of the Ordinance — permitting him to remain until September 5, 1950. An application for a further extension was refused and the appellant was deemed a prohibited immigrant. He appealed to the Magistrate who dismissed his appeal. On appeal to the Full Court.

Held: Having granted on February 27, 1950, a permit under section 12 of the Ordinance, this permit was still in force on August 28, 1950 when the Chief Immigration officer purported to grant a temporary permit and this latter permit was void. The Chief Immigration officer could not deem the appellant a prohibited immigrant for failing to comply with the terms of a void permit.

Appeal allowed.

P. A. Cummings for the appellant.

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

Judgment of the Court: The appellant, who is a British subject, arrived in this Colony on November 30, 1949. He was in possession of a passport issued to him at Trinidad on 6th September, 1948, and, having complied with the formalities required by sections 7 and 8 of the Immigration Ordinance. 1947, was allowed to enter the colony by the Immigration Officer who gave him a permit under section 10 of the Ordinance to remain in the colony for three months. On February 27, 1950, the appellant applied to the Chief Immigration Officer for an extension of the period specified in the permit. The Immigration Officer, instead of extending the period specified in the permit as provided by subsection (3) of section 10 of the Ordinance, granted a permit to the appellant under section 12 of the Ordinance, requiring as a condition that the appellant should deposit the sum of ninety-six dollars. No period for the expiration of the permit was specified. On August 15, 1950, the appellant was convicted by a magistrate of the Georgetown Judicial District of offering a bribe to a Government officer and was ordered to pay a fine of one hundred and twenty dollars. On August 28, 1950, according to the evidence of Charles Robert Binns, the Immigration Officer, the appellant "was given a temporary permit under section 10 (3) permitting him to remain until September 5, 1950". On September 4, the appellant applied for an extension of the period specified in this permit which was refused by the Chief Immigration Officer.

On October 13, 1950, the appellant was served with a notice under section 21 of the Immigration Ordinance in the following terms: "Notice is hereby given that I have decided that you are a prohibited immigrant within the meaning of the Immigration Ordinance, 1947, and that the grounds of my decision are as hereunder:—

> "That having been allowed to land in the Colony of British Guiana on "the 30th November, 1949, and your permit having been extended to 5th "September, 1950, you failed to leave the Colony on or before the expira- "tion of the period for which the permit was granted, contrary to section "11 of the Immigration Ordinance, No. 42 of 1947."

Under section 25 the appellant gave notice of appeal against this notice. The appeal was dismissed by the magistrate, on November 3, 1950, who ordered the appellant to be removed from the Colony. The appellant has now appealed to this Court against the magistrate's decision and order.

The question which falls to be decided is whether the appellant was a prohibited immigrant on October 13, 1950, when the notice under section 21 of the Immigration Ordinance was served upon him. The appellant is a British subject as shown by his passport, and, by the common law, is entitled as of right, subject to the provisions of any local Ordinance with respect to the entry of persons into a Dominion or Colony, to enter any part of the King's dominions. The right of entry into this Colony is restricted and controlled by the provisions of the Immigration Ordinance, 1947. Under the provisions of this Ordinance, no prohibited immigrant is allowed to enter the colony expect under the provisions of section 15. No person arriving in the colony by sea or air is allowed to disembark without the consent of an immigration officer. Every such person is required by sections 7 and 8 to supply an immigration officer with such information as is properly asked for, and may be required by an immigration officer to sign the prescribed declaration and to submit to examination by a Government Medical Officer. When these formalities have been complied with, the immigration officer may either issue a temporary permit under section 10 for a period not exceeding three months or he may decide that the immigrant is not a prohibited person and issue a certificate accordingly, or he may, by section 12, "for the purpose of making further enquiry and for such period as may be necessary therefor, postpone deciding whether an immigrant is or is not a prohibited immigrant" and grant a permit to the immigrant to remain in the Colony on such conditions as he may deem expedient. Sub-section (6) of section 10 of the Ordinance provides that, where a temporary permit has been granted under this section and the immigrant applies for an extension of the period specified in the permit, "he shall be dealt with, subject to the provisions of subsection (3) of this section, as if he were an immigrant then entering the Colony."

It is therefore clear that, when the appellant, on February 27, 1950, applied for an extension of the period specified in the permit granted him on November 30, 1949, the Chief Immigration Officer had power to refuse the application or to extend the permit under the provisions of sub-section (3) of section 10 and subject to such conditions as he might see fit to impose under the provisions of

subsections (4) and (5) of section 10. But it was also competent for an immigration officer to treat the appellant as an immigrant entering the colony for the first time and to grant a permit under section 12. In granting the permit under the statutory authority, the immigration officer, either by an oversight, or intentionally, fixed no date for the expiration of the permit, which could therefore remain in force until it was revoked under the provisions of sub-section (4) of section 19. When the Chief Immigration Officer purported to grant a temporary permit on August 28, 1950, the permit issued under section 12 was still in force; and as the Ordinance nowhere gives the Chief Immigration Officer power to issue a second permit while another permit granted under the provisions of the Ordinance is still in force, it is clear that the purported grant of a temporary permit under section 10 on August 28, 1950, was *ultra vires* and the permit void.

Before an immigrant can be deemed to be a prohibited immigrant under the Ordinance, it must be shown that he either falls into one of the categories enumerated in section 3 (1), or that he is a member of the class of persons or a person declared by the Governor under section 3 (3) to be prohibited immigrants, or that he has failed to leave the colony on or before the expiration of the period specified in a permit granted to him under section 10. The notice served on the appellant in this case shows that the decision of the immigration officer that the appellant was a prohibited immigrant was based upon the fact that the appellant had failed to leave the colony on or before September 5, 1950, the date specified in the temporary permit granted on August 28, 1950. As this permit was, in our view, void, there could be no breach in connection with it to make the appellant a prohibited immigrant under section 11. This is the only ground specified in the notice from which the appellant gave notice of appeal to the Magistrate, who had no power to find and declare, as he appeared from the Memorandum of Reasons for Decision to have done, that the appellant was a prohibited immigrant on grounds other than those specified in the notice. For these reasons, we are of opinion that it has not been proved that the appellant is a prohibited immigrant within the meaning of section 11. The appeal is therefore allowed with costs and the order of the Magistrate set aside.

CAMERON *v.* DALY

(In the Full Court on appeal from the Magistrate's Court for the Georgetown Judicial District (WORLEY C.J., WARD and HUGHES J.J.) January 5, February 17, 1951).

Rent Restriction Ordinance 1941—*Tenancy—possession—order for resumption of possession—breach—damages—validity of order* . . . . . .

The landlord obtained an order for possession of his premises on the ground that repairs were necessary. The Magistrate attached a condition to the order whereby the tenant was to resume possession after the repairs were completed. The landlord never effected any repairs but demolished the property and sold it at a profit. In an action by the tenant for damages he based his claim on two grounds, first, disobedience to the court's order for resumption of possession and secondly misrepresentation by the landlord in obtaining the order. The Magistrate awarded damages on the first ground but did not consider the second. The landlord appealed.

Held: The Magistrate had no authority to attach a condition to the order for possession and consequently an action founded thereon must fail. As the Magistrate had not considered the alternative cause of action and as there was no evidence on the record which would enable the court to decide this issue the case would be remitted to him.

Case remitted to Magistrate.

A. G. King for appellant.

Respondent in person.

Judgment of the Court: This is an appeal from a decision of a magistrate of the Georgetown Judicial District who gave judgment for the respondent for the sum of $150 and $18.28 costs on a claim against the appellant for damages and pecuniary compensation in respect of an alleged misrepresentation by the appellant.

The respondent was a monthly tenant of premises situate at Lot 60, Light and Fifth Streets, Alberttown, owned by the appellant. On June 8, 1948, an order for possession was made by a magistrate of the Georgetown Judicial District in favour of the appellant, who claimed possession on the ground that he wanted vacant possession to effect repairs to the premises. The order for possession was in the following terms:—

> "Judgment for possession on August 1, 1948. Defendant to be at liberty to resume possession after repairs are completed. Repairs to be completed in three months."

Later the time for vacating the premises was extended to September 10, 1948. when the respondent gave up possession of the premises.

No repairs were ever effected. According to the appellant he found on examination that the premises were in such a state of disrepair that it was necessary to seek the consent of the Georgetown Public Health Authority to effect a reconstruction. He alleges that the plan for reconstruction was so radically altered that it was uneconomic for him to effect the reconstruction. The

appellant called no evidence in support of these allegations. The tenant on the contrary asserted that the appellant demolished the premises after obtaining possession and transported the property to a new owner about eleven months after he had obtained possession at a profit of over $4,000.

The respondent in his plaint based his claim on two grounds first, that the appellant had disobeyed the order of the Court made on June 8, 1948, and so made it impossible for him to resume his tenancy of the premises and, secondly, that the appellant had been guilty of a misrepresentation in obtaining the order. He accordingly claimed damages and pecuniary compensation.

The learned magistrate did not consider the claim for compensation for damage or loss sustained by the respondent as a result of the order alleged to have been obtained by misrepresentation. In his reasons for decision the magistrate says:

> "I held that the plaintiff was entitled to damages against the defendant as he had deprived the plaintiff of his right to possession of the premises let, alternatively for the breach by the defendant of the orders of the Court dated June 8, August 10, and September 14, 1948."

The appellant contends that these orders, in so far as they purported to attach: a condition for the resumption of his tenancy by the respondent to the order for possession, were invalid.

The Rent Restriction Ordinance gives to a tenant who has been given a notice to quit premises, which fall within the provisions of the Ordinance, a statutory right to continue as tenant until the landlord has satisfied a court that he is entitled to possession on any of the grounds specified in section 7 of the Rent Restriction Ordinance as amended by section 8 of the Rent Restriction (Amendment) Ordinance, 1947. This statutory right gives a large measure of security to a tenant, who if he is ordered to give up possession as a result of a misrepresentation by the landlord is entitled either to claim compensation under subsection (4) of section 7 of the Rent Restriction Ordinance 1941 (as amended by section 8 of the Rent Restriction (Amendment) Ordinance, 1947) or, as was pointed out in the case of Thorne v. Smith (1947) K.B. 307, to claim damages in an action of tort if he has been induced to give up possession on account of the landlord's misrepresentation.

An order for the possession of premises subject to the Rent Restriction Ordinance may be made by a magistrate on any of the grounds specified in sub-section (1) of section 7 of the Rent Restriction Ordinance where he considers it reasonable to do so. By subsection (2) of the same section he is given power to stay or suspend execution of the order, or postpone the date of possession for such period as he thinks fit, and from time to time to grant further stays or suspensions of execution. The future use or occupation of premises in respect of which an order for possession has been made is restricted by the provisions of section 7A of the Ordinance. By this section a landlord is guilty of an offence if, without first obtaining the permission of the Rent

Assessor he at any time uses or permits to be used, or occupies or permits to be occupied or lets the premises; and the Rent Assessor is authorised to attach conditions to his permission (including a condition that the former tenant is to be given the option of again becoming the tenant of the premises) or to refuse permission. Sub-section (3) of this section specifies the procedure to be followed in the case of an investigation of an application for permission made by the landlord under subsections (1) and (2) of this section, and subsection (4) provides that the Rent Assessor shall on the determination of any such application cause to be sent by registered post to the landlord and the tenant a copy of his order thereon. It would appear that a practice has arisen by which a magistrate in making an order for possession attaches a condition to the order for the protection of the tenant. This practice is in our opinion without statutory authority. When an order for possession is made and has not been discharged or rescinded before the tenant gives up possession, the tenancy ceases to exist, and this is clearly indicated by the words of paragraph (b) of subsection (1) of section 7A "that the former tenant is to be given the option of again becoming a tenant". The fact that the landlord is guilty of an offence under the Ordinance cannot create a new tenancy in favour of the former tenant. The learned magistrate was clearly wrong in holding that the appellant had deprived the tenant of his right to possession as the option to enter into a new contract of tenancy can be given by the Rent Assessor alone in whose discretion it lies whether he will attach such a condition to a permission to use or occupy the premises. This is not an inchoate or contingent right but a new right created by the Ordinance and only comes into existence when the Rent Assessor in the exercise of a judicial discretion decides that permission for the future use or occupation of the premises is granted on condition that the former tenant is to be given the option of again becoming a tenant of the premises. It is equally clear that the appellant cannot be guilty of the breach of an order which the magistrate had no authority to make.

It is unfortunate that the magistrate did not apply his mind to the question of misrepresentation, which forms the second ground of the respondent's claim. Where a landlord obtains an order for possession by alleging that he reasonably requires the premises for the purpose of effecting repairs it appears to us that he must either effect the repairs, or, if he finds it impossible to do so, make an application to the Rent Assessor in accordance with the provisions of subsection (2) of section 7A of the Ordinance. Where the landlord fails either to effect repairs or to make application to the Rent Assessor it may be reasonable to assume, unless there is evidence negativing such a conclusion, that the original application for an order for possession was founded on a misrepresentation. As the magistrate has not considered this question and has elicited no evidence which would enable this court to decide this issue we are of opinion that the case must be remitted to the magistrate for a rehearing and determination of this issue.

As the appellant alleged as one of the grounds of appeal that the damages were excessive we think it pertinent to consider the principle on which damages should be awarded on a claim laid on the grounds alleged by the respondent in his plaint. This court accepts as a correct statement of the law, the decision of the learned Chief Justice in the case of Jeffrey v. Mendes (1928) L.R.B.G. 43 that where an Ordinance enacts that a plaintiff is entitled to compensation for damage or loss, the compensation is restricted to the actual pecuniary loss suffered by the plaintiff. Similarly in an action for deceit the damages are limited to the loss which follows as a natural consequence from the misrepresentation. In assessing damages in cases of this nature a court must be careful not to import considerations appropriate to an action for trespass in which vindictive or exemplary damages may be awarded. In the rehearing of this matter the magistrate should be careful to satisfy himself of the actual loss or damage alleged to have been suffered by the respondent.

The order of the court is that the case be returned to the magistrate for rehearing and that each party bear its own costs of this appeal.

PESTANO *v.* COMMISSIONERS OF INCOME TAX

(In Chambers (Worley C. J.) February 6, 7, 17, 1951)

Income Tax—gain or *profit for employment—lump sum payment to employee for medical and holiday expenses—taxable.*

A company paid the appellant, its managing director, a sum of money to meet his expenses for medical treatment and a holiday in the United States of America. The Commissioner of Income Tax held that the payment arose directly within his employment with the company and was taxable under the provisions of section 5 of the Ordinance. The managing director contended that the lump sum payment was neither a gain nor profit which accrued from his employment with the company nor an allowance granted in respect of his employment. On appeal.

Held: The amount was taxable under section 5 of the Ordinance.

J. O. F. Haynes for appellant.

A. C. Brazao Solicitor General for respondent.

Worley, C.J. The following statement of facts is taken from the Commissioners' Statement of Material Facts and from their written decision on the Objection to Assessment.

The appellant is the Managing Director of Pestano's Outfit Stores Limited (hereinafter referred to as the Company) a private company incorporated in the Colony under the Companies (Consolidation) Ordinance, Chapter 178. The appellant holds a large number of shares in the company, the rest of the shares being held by his immediate family. During the year 1946, the appellant visited the United States of America in the interest of his health and, before he left the Colony, the Company paid to him the sum of $2,400 partly to meet expenses in connection with the business of the company and partly to meet medical and holiday expenses

which would be incurred during this visit. In making a return of income for the year 1946, the Company charged this sum as an expense wholly and exclusively incurred in the production of its income under section 10 of the Income Tax Ordinance. The Commissioners at first disallowed this charge but, on appeal, allowed it as an expense incurred partly on the company's business and partly as a payment to the appellant for the aforesaid purposes. The appellant agreed the latter sum at $1,408. This sum was not included in the appellant's return of his income for the year ending 31st December, 1946, and formed no part of the assessment thereon. Accordingly, on the 20th January, 1950, the Commissioners, acting under section 41 of the Ordinance, made an additional assessment on the appellant in this sum which resulted in an additional tax of $563.20. The appellant having served a notice of objection, the Commissioners, after hearing the objection, confirmed the additional assessment and found as a fact that the sum of $1,408 was paid by the Company to the appellant for the purpose of meeting medical and holiday expenses to be incurred by him and that this sum arose directly from his employment with the company and was taxable under the provisions of section 5 of the Ordinance.

The appellant has appealed against this assessment on the ground that this sum was wrongly classified as an allowance given to him in respect of his employment under section 5 (b) of the Ordinance and that it was not chargeable income under the Ordinance.

The material portion of Section 5 of the Ordinance reads:—

> "Income Tax, subject to the provisions of this Ordinance, shall be payable "at the rate or rates herein specified for every year of assessment upon the "income of any person accruing in or derived from the Colony or else-"where and whether received in the Colony or not in respect of:
>
> "(b) gains or profits from any employment, including the estimated an-"nual value of any quarters or board or residence or of any other allow-"ance granted in respect of employment, whether in money or other-"wise."

The respondent's case is that the sum of $1,408 was a gain or profit which accrued to the appellant from his employment with the Company, whereas the appellant contends that it is neither such a gain or profit nor is it an allowance granted in respect of his employment. Counsel for the appellant contended that in order that an allowance should be paid in respect of employment, it must be shown to have been paid either as a term or condition of the employment, or as part of his remuneration, or for the purpose of the employment.

Although it does not appear to be material what name is given to the payment, it seems to me that if, in truth and in fact, this sum of $1,408 was paid in respect of the appellant's employment, it can properly be termed to be a gain or profit from that employment. In Tennant v. Smith (1892) A.C. 150, Lord Watson at p. 159 defined the word "profit" as, in its ordinary acceptance, appearing to denote "something acquired which the acquirer becomes possessed of and can dispose of to his advantage—in

other words money — or that which can be turned to pecuniary account." And in Herbert v. McQuade (1902) (C.A.) 87 L.T. 349, Stirling L.J. said at p. 355:

> "I think that a profit accrues by reason of an office when it comes to the "holder of the office as such, in that capacity, and without the fulfilment of "any further or other condition on his part."

The fundamental question in this, as in all similar cases, is not what the payment was called or should be called, but whether it was paid to the appellant by reason of his employment or whether it was a personal gift; that is to say, a gift made on personal grounds irrespective of and without regard to the question whether services have been rendered or not: (per Atkinson J. in Calvert v. Wainwright (1947) 1 All E.R. 282).

It is not always easy to decide in which of these categories a particular payment should be placed and in some of the numerous causes cited to me, fine distinctions have sometimes been drawn and dicta uttered which are not always easy to reconcile but the question, as Lord Carson said in Reed v. Seymour (1927) 11 T.C. 625 at p. 656 "must depend upon the particular facts proved and previous authorities are of little assistance." In the same case. Lord Phillimore, at p. 653, pointed out that there are two quite different classes of authorities, namely, those which deal with a public officer receiving some emolument, not from his employers (if indeed he has any) but from persons with whom he has official relations; and those which deal with an employee receiving from his employers some benefit other than and additional to his contractual salary; and he went on to remark that the conditions of these two classes of case seemed so different that very little assistance can be derived in one case from the decisions applicable to another. He further pointed out (at p. 654) that, in the cases relating to ministers of religion; "there is always, I think, some element of periodicity or recurrence which makes another distinction between them and the cases of a single gift by an employer."

It is now well settled that the voluntary nature of a payment is immaterial. This principle was laid down by Collins M. R. in Herbert v. McQuade (supra) in a passage which has frequently been cited with approval:

> "A payment may be liable to income tax although it is voluntary on the "part of the persons who make it and the test is whether it accrues to the "person who receives it by virtue of his office; and that, if it does, it does "not matter whether it was voluntary on the part of the persons who make "it."

See also Blakiston v. Cooper (1909) A. C. 104. The question is in what capacity was the payment received, not what was the motive of the payment; (per Buckley L.J. in Cooper v. Blakiston (1907) 2 K. B. 688).

Again, it is well settled that a payment by an employer to an employee may attract tax although it is something over and above his contractual remuneration and is an isolated or single payment. The appellant, in this case, suggested that the type of allowance

contemplated in paragraph (b) of section 5 of the Ordinance was one to which some element of periodicity or recurrence attached, but as was said by Rowlatt J. in Ryall v. Hoare (1923) 92 L. J. K.B. 1010 at p. 1013, the word "annual" as used in income tax legislation, can only mean "in any year" and annual profits or gains or allowances mean profits or gains or allowances in any year as the succession of the years comes around. Examples of isolated payments which have been held chargeable for tax will be found in the cases of Ryall v. Hoare (supra); Lyons v. Cowcher (1926) 10 T.C. 440; Radcliffe v. Holt (1927) 11 T.C. 621 and Wilson v. Daniels (1943) 25 T.C. 473.

Nor, as I have said, does it matter what the payment is called. As Macnaghten J. said in Western v. Hearn (1943) 2 A.E.R. 421 at p. 422:

> "to say it was intended as a "personal gift" is merely to say it was not in-
> "tended to be remuneration. But if the payment is in fact remuneration for
> "services rendered, the employer cannot relieve the employee from the ob-
> "ligation to pay income tax by saying: 'I do not intend it to be remunera-
> "tion'."

This is not to say that an employer cannot make a personal gift to an employee which will not attract tax. In Cooper v. Blakiston (1908) 5 T.C. 343 at p. 351, Lord Loreburn L.C. drew a distinction between a sum of money given in respect of services on the one hand and, on the other, a gift of an exceptional kind such as a testimonial, or a contribution for a specific purpose as to provide for a holiday or a subscription peculiarly due to the personal qualities of the respondent, the latter class not being a voluntary payment for services but a mere present. And again in Reed v. Seymour (supra) Lord Phillimore at p. 655 said:

> "I do not feel compelled by any of these authorities to "hold that an em-
> "ployer cannot make a solitary gift to his employee without rendering the
> "gift liable to tax . . . . . nor do I think that it matters that the gift is
> "made during the period of service and not after its termination or that it is
> "made in respect of good faithful and valuable service."

But, as Rowlatt J. pointed out in Davis v. Harrison (1927) 11 T.C. 707 at p. 721, after referring to this passage,

> "it must always be a question of fact in the application of the statement of
> "law laid down by the learned Lord, how the particular payment is to be
> "regarded."

In coming to a decision on this question of fact, the Court must have regard to all the circumstances in which and terms on which the payment was made and it must look at the substance of the matter. One very important factor to be taken into consideration is whether or not the office or employment is at an end (per Lord Sterndale in Cowan v. Seymour (1919) 7 T.C. 372 at p. 379) and another equally important factor is whether the payment is made by the employers or by someone else. Both these tests were adopted by Finlay J. in Denny v. Reed (1933) 18 T.C. 254. A third factor is to see whether tax has already been paid in

respect of the sum charged or whether, when paid by an employer, it has been deducted as an expense to be set against profits: See Denny v. Reed (supra). Where it has been so deducted, that is evidence at least that the employer regarded it as paid to the employee in respect of services rendered in the course of his employment otherwise it could not be allowed as an expense incurred.

In the present case, the facts are that this sum of $1,408 was part of a sum of $2,400 paid to the appellant out of the funds of the Company, his employer. Although the Case is not explicit upon the point, I infer from the statement of material facts that there was no apportionment by the company before the appellant went to the United States but the sum of $1,408 has been subsequently agreed by the appellant as having been spent by him on medical and holiday expenses out of the sum of $2,400 which the Company gave to him. He was and is an employee of the Company and no doubt a valued one. He was in bad health and, as the Company was desirous of retaining his services and wished him to conduct business for them in the United States, it was clearly in their interest that he should receive the medical attention and rest required to enable him to perform these services.

This was not a case of an employer making a payment to save the pocket of the employee, as appellant's counsel suggested: it was a case of money going into his pocket and being taken out again to be spent for particular purposes but, if it was given to him in the course of his employment, it is immaterial that it was to be used to benefit him in a particular way.

By subsection (5) of section 45 of the Income Tax Ordinance, the onus of proving that the assessment complained of is wrong is placed on the appellant, and he has failed to discharge that onus. It is clear from the record that the Commissioners appreciated the questions of law raised and that there was evidence to lead them to their conclusion on the question of fact. It would seem that in appeals under the Ordinance, the Court is not bound by the Commissioners findings of fact, but, to quote the words of Finlay J. in Denny v. Reed (supra), "in these circumstances — a sum paid by employers to an employee, paid to that employee while he is still in their employment, and deducted by them in computing their own profits — is it possible to say that there is not evidence, and amply evidence, on which the Commissioners who heard the case quite properly could arrive at the conclusion that this sum was nothing but a perquisite or profit paid to the appellant in respect of his office?"

In my opinion the Commissioners came to a correct conclusion in this matter and this appeal must be dismissed with costs.

DE FREITAS *v.* SERRAO AND PERREIRA. Trading Under the Name and Style of PERREIRA & SERRAO.

DE FREITAS v. IDEM AND DE BARROS.

(Civil Jurisdiction (Boland, J.) January 12, 18, 24; February 19, 1951).

Promissory note—parole agreement to vary terms—unenforcible—surety—principal debtor—effect of giving time—release of surety—interest—excessive—when relief granted.

These two actions were taken together by consent of the parties. In each one the plaintiff claimed against the defendants Serrao and Perreira, trading under the name and style of Perreira and Serrao, amounts due on promissory notes and in addition in the second action against the defendant de Barros who signed the notes as an accommodating party.

The partnership firm admitted the making of the promissory notes but pleaded payment. The plaintiff admitted receiving various sums of money from the firm but alleged that any money paid was for interest in accordance with an oral agreement to pay interest.

The defendant de Barros contended that as the notes were made payable on demand and as the plaintiff on his own admission had without his consent given the principal debtors time to pay, he should be released from liability.

Held: Although the parole agreement to pay interest was bad in law and unenforceable, moneys paid in pursuance of that agreement would be irrecoverable.

The period on a demand note commences to run from the date of the note. If demand was not made because of the payment of interest under an unenforceable agreement to pay interest, the surety cannot claim to be released because of time being thereby given to the principal debtor. The surety, however, was entitled to be credited with the sums paid as interest although the principal debtors were not so entitled.

The giving of time by a creditor to the principal debtor will release the surety if such time is given under a binding agreement or if it amounts to legal fraud by the creditor on the surety.

Relief is not claimable on the ground that interest on a loan was excessive and unconscionable unless the creditor was a money-lender within the meaning of the money-lenders Ordinance.

Jainarine Singh for plaintiff.

W. J. Gilchrist for defendants.

Boland, J.: These two actions brought by the plaintiff, Norbert J. deFreitas, were by consent of the parties, taken together. The claim in both cases is for moneys alleged to be due and owing on promissory notes drawn in favour of the plaintiff. In action No. 902 of 1950 the defendants are Leo F. Serrao and John L. Perreira trading under the name and style of Perreira & Serrao and the claim is on one promissory note only which is dated 14th March, 1949, and is for the sum of $1,215 made payable on demand; in action No. 903 of 1950 the defendants are the same partnership firm, whose partners are sued by name, and one Joseph De Barros, and the claim is in respect of two promissory notes, the first dated the

6th September, 1948, for the sum of $2,000 and the second, dated 15th October, 1948, is for the sum of $910. Both of these notes were made payable on demand. So far as the defendants Serrao and Perreira are concerned, it is admitted that all three notes were signed by the defendant Serrao for and on behalf of the partnership firm, while it is not denied by the plaintiff that although De Barros signed the two notes in the action in which he is joined as a defendant, he was in truth and in fact, as understood by the plaintiff at the time De Barros signed, a mere accommodating party not having received any part of the consideration.

I propose to deal first with the defence of the two defendant partners, as de Barros being a mere accommodating party, as admitted, relies in addition, as he is entitled, on the defence available to a surety or guarantor. This requires an examination or the evidence beyond what is necessary for the determination of the liability of the two other defendants.

The defence set up by the partnership firm is payment of $2,300 on the total indebtedness leaving a balance of $1,800 admitted as owing in both actions but there were some other payments amounting to $280 proved in evidence making) the total payment $2,580. As against this, plaintiff at the trial confessed his inability, because of not keeping a proper record himself of these payments, to admit or deny the receipt of this amount alleged to be paid; but whatever sums were paid the plaintiff stated had been paid towards interest, the payment of which he deposed had been orally agreed upon at the time of the making of the first note on 6th September, 1948, and also towards the increased interest agreed upon orally at the time of the further advance to the firm of the sum of $1,215 secured by the last note of the 14th March, 1949.

On the question of interest, I would cite at once, the well known rule of law that parole evidence is not admissible to vary or contradict a written instrument. In the case of a contract which by law is not required to be in writing, there may be an independent collateral oral agreement adding new terms not contradictory of the written contract. This would be enforceable. Not so, however, in the case of promissory notes which by law must be in writing. With regard to these documents, there can be no extrinsic oral contract between a drawer and payee importing new terms not embodied in the note. Consequently, where a note is silent as to interest, an oral agreement to pay interest would be unenforceable.

The defendant partners, however, cannot avail themselves of the above rule of law because I find on the evidence that the amount of $2,580 was in fact paid as interest to the plaintiff in pursuance of that oral agreement between the plaintiff and Serrao, acting for and on behalf of the partnership.

The plaintiff, as I stated, declared that he kept no records of the payments made to him, but he is entitled to rely on the burden of proof which the law places upon the defendants to establish payment. No receipts were produced in proof of any payment

because, as was admitted by plaintiff, no receipts were issued. The defendant Serrao was not present at the trial having left the colony suddenly before these proceedings were instituted. It would appear that the defendant Perreira, as he deposed in his affidavit asking for leave to defend, was a mere "ostensible" partner, that is to say, he took no active part in the running of the business, which was managed and controlled entirely by Serrao, his brother-in-law, whom he had assisted by investing money in the business. An examination of the firm's books and correspondence by an accountant employed by Perreira since the departure of Serrao and the closing of the business, has revealed that payments were made to plaintiff which amounted to $2,580. Some of those payments were made by cheques, the counterfoils of which, produced before me, record in some cases that the cheques were in payment of interest on the loan. The same inference of payments being for interest and not on account of principal can be drawn from some of the letters written by Serrao in reference to these payments. The various sums recorded as paid monthly are more or less the amounts stipulated for interest according to plaintiff's evidence. In the circumstances, I have no difficulty in finding that the defendants have not established that there were any payments on account of principal moneys secured by the notes. And here it must be stated that while as mentioned above a parole agreement to pay interest which would be a variation of the terms of a pro-note, which is silent about interest, is bad in law and therefore unenforceable, money in fact paid as interest under such a parole agreement would be irrecoverable nor can the payor subsequently direct that such payment be allocated to a reduction of the principal. A payment of interest in pursuance of a parole agreement collateral to a promissory note would no doubt in most cases be made because of a mistake of law. It is well settled that moneys paid through mistake of law is irrecoverable. If the payment of interest is made not through a mistake of law but with full appreciation of the unenforceability of the agreement to pay interest, the payor would, I hold, be estopped from setting up that this payment was for any other purpose than as interest.

In the circumstances unless I am satisfied on an examination after reopening the transaction that the sum of $2,300 paid for interest was excessive to the degree of being harsh and unconscionable, 1 am bound to give judgment in both cases against both partners—the defendants Serrao and Perreira for the full amount claimed. Perreira's passive attitude towards the affairs of the business, of which as he admitted he is a partner, cannot save him from the liability to which a partner is subject in regard to the indebtedness of the firm. I propose after considering the liability of the surety de Barros to give my findings on the question raised by the defence whether these defendants should be accorded some relief on the ground that the interest was excessively high and the transaction therefore unconscionable.

As to the liability of de Barros he, as stated, is admitted to be a mere surety with reference to the two pro-notes on which

his signature appears as a joint maker. What are the rights and liabilities of a surety? The liability of the surety is secondary, that is to say, it does not arise until the principal debtor whose liability is primary, has made default. It is co-extensive with that of the principal debtor but cannot exceed it. Also the surety is entitled to insist upon a rigid adherence by the creditor of the terms and conditions under which there would exist the liability of the principal debtor. It is only after there has been default of the principal debtor in breach of those terms and conditions that the liability of the surety would arise. Accordingly, the giving of time to the principal debtor by the creditor without the consent of the surety will release the surety provided the giving of time is by a binding agreement founded upon consideration which is capable of enforcement—not the obtaining of time by the principal debtor as a result of pure passive inactivity on the part of the creditor. In Philpot v. Briant 4 Bing 717, the executrix of the acceptor of a bill orally promised to pay the holder out of her own estate if he would forbear to sue, and she paid him interest for so forbearing, it was held that as the promise was unenforceable (not being in writing as required by the Statute of Frauds), the drawer was not discharged by the delay. *Vide* also Bell v. Banks 3 M. & G. 258.

The obtaining of time by the principal debtor as a result of the laches of the creditor may result in the surety having his position altered for the worse—his right to indemnity as against the principal debtor may be seriously prejudiced by this conduct on the part of the creditor. In those circumstances although there was no binding contract between creditor and principal debtor, the surety may be released on the ground that the creditor has been guilty of "legal" fraud.

I now turn to examine the evidence and on my findings of fact to decide, in the light of the law stated above, whether, and if so, to what extent de Barros as surety is liable under the two promissory notes signed by him.

There is a sharp conflict between the evidence of plaintiff and de Barros as to what took place on the signing of the notes. Plaintiff stated that the first note—that of the 6th September, 1948, was signed at the business premises of Serrao and Perreira in Lombard Street, and that before signing Serrao agreed orally in the presence of de Barros to pay as interest the sum of $70 monthly on $2,910—he was to receive $2,000 that day and some time later $910, and that $910 was subsequently paid to Serrao more than a month after on the 15th October, 1948. According to a plaintiff's evidence both Serrao and de Barros signed that note for $910 on the distinct understanding that the interest of $70 was payable on the aggregate sum of $2,910 secured by both notes. What interest was payable for the period intervening between the first and second notes, plaintiff in his evidence did not make clear. On the other hand de Barros stated that the first note was not signed at Lombard Street, but at his place of occupation at Bettencourt's in Water Street, and that there was no talk in his

presence about interest and that he never heard of interest until he got a letter from Serrao immediately before Serrao left the colony in which letter Serrao said that he had been paying interest to plaintiff. Seeing plaintiff in the box, it is difficult to believe that he is the sort of person who would lend so large a sum of money even to a very intimate friend or relative without arranging for payment of interest, but it is possible that he did not think it necessary to have de Barros' guarantee for the payment of interest. I am inclined to accept de Barros' evidence that there was no talk of interest in his presence.

But in my view in regard to the liability of de Barros under the notes, it is immaterial whether de Barros was present or a party to the alleged agreement about interest. That agreement being by parole was not binding on the parties to the notes because it would be in contradiction of the notes on neither of which there is provision for the payment of interest. As regards defendants Serrao and Perreira whatever was paid, the payments were clearly on account of interest and accordingly I have held, as stated above, that they would not be allowed now to say that these payments are to be deemed to have been paid on account of the principal. But as regards de Barros if he is not released from his liability as a surety for other reasons, he would be entitled to the benefit of the payment of $2,880 by the partnership firm as payment towards principal secured by the earlier note, and to the extent of that sum be realised from his guarantee.

It has been contended for de Barros that the principal debtor was given time and this operated to release the surety de Barros. But was the partnership firm given time? These two notes were payable on demand. Demand for payment could be made at any time the payee or holder chose so long as demand was not made beyond the expiry of the period of limitation under the Limitation Ordinance, Chapter 184. The period on a demand note commences to run from the date of the note. *Norton v. Elian* 1837 2 M. & W. 461. If demand was not made because of the payment of interest under an unenforceable oral agreement to pay interest, the surety cannot claim to be released because of time being thereby given to the principal debtor. I see nothing in the correspondence which was admitted in evidence, nor was there any testimony given in court, which established that plaintiff had made a formal demand for payment of the notes and had then made a binding agreement with the principal debtor, the partnership firm, to give them time. The sum of $1,215 was further advanced to the firm on the security of the note of 14th March, 1949, so as to enable the firm, as they requested, to take out goods and so enable them, out of the business effected with these goods, to pay off the other notes in two weeks. But this was not a binding agreement to give time, all that can be said is that the plaintiff was guilty of delay in pressing the principal debtors, and this as I have stated above does not discharge the surety—except in circumstances which amount to legal fraud.

It is indeed a difficult question to determine what are the

circumstances of delay or laches in pressing the principal debtor for payment of a pro-note which would suffice to release the surety on the ground of legal fraud.

It is imagined that legal fraud like actual fraud must be established by the party who feels that he is entitled to claim this as a defence. The defendant de Barros has not so claimed. Nevertheless, if on the evidence, there are disclosed such circumstances that might be deemed legal fraud by the plaintiff as against de Barros, the Court will give him the relief to which he would be entitled. The plaintiff would seem to have been well aware early that the partnership firm was in financial difficulties. Letters written to plaintiff by Serrao asked for time to pay the month's interest, and more than one cheque was post-dated and there were requests not to cash others until a later date when the account with the Bank would be in credit. Then again the third note was given as security for the further sum of $1,215 which Serrao stated would be used in payment of money necessary for the release of imported goods detained in bond. Serrao stated that he would pay the moneys owing under the other notes in two weeks as the result of the business to be done on getting out these goods. He got the loan but he was never able to pay, declaring that he had sold the goods on credit. If all these facts had been brought to the notice of de Barros, de Barros himself might have paid the amount and, before the utter collapse of the business, taken such steps to indemnify himself from partnership assets. When de Barros did get informed of all this, it was when Serrao was about to abscond leaving the business a complete failure. But it would seem on the authorities of the cases on this point that in the absence of a binding contract giving time to the principal debtor, the above circumstances would not be sufficient to discharge the surety — there must be something in the nature of a fraudulent mind on the part of the creditor, or such recklessness that an inference of fraud could be made. Therefore on this point also I hold that de Barros as surety is not discharged. I am satisfied too that before action was brought, de Barros was duly notified that the partnership had failed to pay.

On the question whether the defendants Serrao and Perreira are entitled to relief on the ground that the interest charged was excessive and unconscionable, such relief is only claimable if the plaintiff is a "moneylender" within the meaning of the Moneylenders Ordinance, Chapter 68. The defendant Perreira in his affidavit in support of his application for leave to defend alleged that the plaintiff is a moneylender. This the plaintiff in his evidence before the Court denied. No evidence was given showing that the plaintiff was at the time engaged in the business of money-lending or advertises or announces himself or holds himself out as carrying on such a business; this would require him to be registered as a moneylender and he is in fact not so registered. The fact that he has lent out money at a remunerative rate of interest is not sufficient.

Accordingly, the partnership firm is not entitled to the relief which is accorded under the Moneylenders Ordinance to borrow-

ers as against money lenders, and therefore this defence is not available to the defendant partners even if it were established that the payments would make the rate of interest excessive and unconscionable.

In the result, in action No. 902 of 1950, there will be judgment against the defendants as partners of the firm for the full sum of $1,215 with costs, and in action No. 903 of 1950 there will be judgment against the defendants Serrao and Perreira as partners of the firm for the full sum of $2,910 and as against the defendant de Barros for the sum of $332 which sum is to be deemed part of the sum recoverable from the defendants Serrao and Perreira. Costs in this latter action No. 903 will be paid by the three defendants but the costs payable by the defendant de Barros shall be on the lower scale. As the two actions were taken together, the costs of the joint trial will be as if one single action were heard and such costs of trial will be divided equally between both actions.

Solicitors: *S. M. N. Nasir* for plaintiff.
Carlos Gomes for first defendant.
J. E. de Freitas for second defendant.

LEMMEL, CABORET and BOUMANIS *v.* REX

(In the West Indian Court of Appeal on appeal from the Supreme Court (Furness-Smith C.P., Worley, C.J., Jackson, C.J.) February 19, 26, 1951).

Criminal Law—alleged illegal arrest in foreign country—court's jurisdiction.

During the trial of the three appellants on charges of breaking and entering a pawnbrokery and stealing therein and receiving stolen goods it was objected that the Supreme Court of British Guiana sitting in its Criminal Jurisdiction had no jurisdiction to proceed with the trial on the ground that the appellants were illegally arrested or detained by officers of the foreign state of Venezuela and illegally arrested by officers of the Police Force of the colony. The trial judge ruled that the Court had jurisdiction. The appellants were convicted and on the application of counsel, a case was stated under the provisions of the Criminal Law (Procedure) Ordinance. (Crown Cases reserved).

Held: The trial judge's ruling was correct and in accordance with the established principle of law that "summonses, warrants and arrests are mere machinery for securing the attendance of an accused person and the invalidity of any of these preliminary steps will not affect the jurisdiction of the justices if the accused person appears and the charge is one which the justices have power to investigate."

W. Robert Adams for the appellant.

A. C. Brazao Solicitor General for the respondent.

Judgment of the Court: This matter came before us by way of a case stated under the provisions of Title 12 (Crown Cases Reserved) of the Criminal Law (Procedure) Ordinance by a Judge of the Supreme Court at the October Criminal Sessions Demerara 1950. The material facts and the objections raised to the jurisdiction are fully set out in the Case and need not be repeated here: the question reserved for opinion was whether or not the ruling of the learned judge that the accused were lawfully before the Court of trial and that the Court had jurisdiction to proceed with their trial on the indictment preferred was correct. After hearing counsel who appeared for the three accused persons, Leon Lemmel, Barnard Cabaret and Louis Boumanis, we determined that the ruling was correct and now briefly set out our reasons therefor.

In our opinion the objections raised are fully met by the provisions of subsection (2) of section 57 of the Criminal Law (Procedure) Ordinance, which provides as follows:

> " (2) When any accused person is before a magistrate, whether volun-
> "tarily or upon summons, or after being apprehended with or without war-
> "rant, or while in custody for the same or any other offence, the prelimi-
> "nary inquiry may be held notwithstanding any irregularity, illegality, de-
> "fect, or error in the summons or warrant, or the issuing, service or execu-
> "tion thereof, and notwithstanding the want of any information upon oath,
> "or any defect in the information, or any irregularity or illegality in the ar-
> "rest or custody of the accused person."

This subsection embodies the principle set out in Vol. IX para. 102 of Halsbury's Laws of England, 2nd Ed. p. 77 as follows:

> "Summonses, warrants and arrests are mere machinery for securing the at-
> "tendance of an accused person, and the invalidity of any of these prelimi-
> "nary steps will not affect the jurisdiction of the justices if the accused
> "person appears and the charge is one which the justices have power to in-
> "vestigate."

See also Reg. v. Hughes 1879 4 Q.B.D. 614: and ex parte Elliott (1949) 1 A.E.R. 373.

In so far as it is alleged that these men were illegally arrested or detained by officers of the foreign sovereign state of Venezuela, it is very clear that this Court has no jurisdiction to enquire into the conduct of those officers or to pass judgment on them. In this connection the words of Lord Tenterden in Ex parte Susannah Scott (1829) 9 B. & C. 446 at p. 448 are very apt:

> "If the act complained of were done against the law of the foreign country,
> "that country might have vindicated its own law. If it gave her a right of
> "action, she may sue upon it."

These words are also, *mutatis mutandis*, an apt reply to the allegations against the officers of the Police Force of this Colony who were concerned in affecting the arrest of these men.

The legality or otherwise of the arrest or of the warrant leading to the arrest of a prisoner cannot be put in issue in his trial

upon a criminal charge: the action for false imprisonment is the proper remedy.

C. FURNESS-SMITH,
Chief Justice
Trinidad & Tobago,
(President)
N. A. WORLEY,
Chief Justice
British Guiana.
D. E. JACKSON,
Chief Justice
Windward & Leeward
Islands.

Monday, 26th February, 1951.

IN RE ESTATE M. G. DE FREITAS (DECEASED)

Application by F. O. Richards for an order on his solicitor in previous proceedings to furnish him with a bill of costs in respect of those proceedings.

(In the Supreme Court, In Chambers (Ward J.) March 3, 17, 19, 1951).

Legal Practitioners Ordinance—Solicitor and client—Bill of costs—special agreement.

After and action had engaged the attention of a judge of the Supreme Court, it was settled. One of the agreed terms of settlement was for payment of a sum of money for costs. The applicant who had specifically agreed to the settlement and knew of the amount fixed for costs, then called up on his solicitor to furnish his with a bill of costs.

There was no special agreement in writing signed by both parties as to the remuneration of the solicitor.

Held: It was the solicitor's duty to deliver a bill of costs to his client. But the client was not entitled to make a profit in the name of costs by receiving and amount in excess of what he had properly expended.

Applicant in person

P. A. Cummings for the Solicitor.

Ward J.: This is an application under Section 23 (a) of the Legal Practitioners Ordinance, Chapter 26, for an order on Mr. Zitman, a solicitor employed by the applicant, to furnish him with a bill of costs.

Mr. Zitman was employed in the later stages of a protracted litigation, which terminated, after the case came on in Court, in a settlement. Among the terms of the agreement which were endorsed on counsels' briefs is the following: "All debts of the company shall be paid forthwith out of the moneys in the Bank as well as a sum of $16,000 which shall be paid as follows:— the sum of $9,000 to Carlos Gomes, Solicitor, as the balance of counsel's

fees and costs of the defendants, and $7,000 to Ivan Zitman, Solicitor, as the balance of counsel's fees and costs of the plaintiff herein." This agreement in settlement of the action was concluded on April 19, 1950, but the formal agreement was not actually drawn up and signed by the parties until November 20, 1950. Of the sum of $7,000 agreed on as the balance of counsel's fees and costs of the plaintiff a sum of $2,500 was paid to Mr. Zitman sometime before June 2, 1950. On this date the applicant wrote Mr. Zitman asking to be furnished with an itemized bill of costs as between solicitor and client "in respect of services rendered by you to the Executors of the estate of M. G. De Freitas, deceased as from and including the date of your appointment as solicitor." To this letter Mr. Zitman replied on June 14, 1950, not delivering a bill of costs as demanded, but informing the applicant that he had made disbursements amounting to $2,488.71, including a sum of $800 (retained on account of the solicitor's fee) and $1,500 paid to counsel on account of his fees. At the same time Mr. Zitman informed the applicant that $1,000 was due to him on account of his fees and $3,500 to counsel.

Promptly on receipt of this letter the applicant wrote a fulminating letter on June 19, 1950 to the solicitor revoking his authority to act as solicitor, and denying any agreement to pay Mr. Zitman a fee of $1,800. To this diatribe Mr. Zitman replied in a letter on July 8, 1950. (Exhibit C.1. attached to the application).

The first question to be decided is whether there was a special agreement as to the remuneration of the solicitor. It is agreed that under the provisions of the Legal Practitioners Ordinance such an agreement must be in writing and signed by both parties. That Mr. Zitman was of the opinion that no written agreement had been entered into between applicant and himself is clear from the letter of July 8. Ex. C.1. The relevant passage is as follows:— "You have written at great length but make no reference whatever to my discussion with you relating to my fees or that the amount paid to me on the settlement of the (case) was to be used to pay Mr. Cummings and myself on account of our fees. In the presence of Mr. Cummings you agreed to my fee which I then told you would be between $1,500 and $2,000. I then suggested to Mr. Cummings (not in your presence) that my agreement with you should be reduced into writing, but he said he did not think it was necessary, as he was quite certain you would pay the amount agreed." In the course of the argument by Mr. Cummings it has been suggested that although no written agreement was entered into prior to the settlement of the actions the fact that both the applicant and the solicitor signed the formal agreement on November 20, 1950 provides the solicitor with a written agreement as to his costs. This submission does not appear to me to be well-founded. On November 20 when the formal agreement was signed the applicant had already hotly repudiated any agreement with the solicitor; and in any case the terms of settlement endorsed on counsels' briefs refer specifically to balance of counsel's fees and costs of the plaintiff. Further it is

clear from Mr. Zitman's letter of July 8, 1950 that no definite sum had been agreed on even orally. It is clear to me that the applicant was profuse of vague promises while his principal's interests were still in jeopardy and the lis was not decided, but he was careful not to enter into any binding agreement with the solicitor. Mr. Cummings has endeavoured to show that the understanding between counsel and solicitors of all the parties was that the $7,000 should be applied in paying him and Mr. Zitman and some disbursements. But the case of Tanner v. Lee (1842) 2 Manning and Grainger 617, 134 E.R. 253 is an authority for the proposition that even when the attorneys of the respective parties arrange a settlement and fix a definite sum as an ascertained amount of costs between solicitor and client the Court will, in the absence of a special agreement, order the solicitor to deliver his bill of costs.

I find that no agreement in writing was made between the solicitor and the applicant as to a lump sum payment for the solicitor's services, and I therefore order that the solicitor deliver a bill of costs to the applicant within one month from the date of this order.

I have been asked by the Registrar to indicate the opinion of the Court as to the rights of parties in respect of costs recovered either on taxation or as a result of a settlement. The basic rule is that costs are an indemnity to the successful party to reimburse him for the amount he has paid or agreed to pay in respect of the cause or matter for which counsel and solicitor are retained. A party cannot make a profit out of his costs, and therefore in the taxation of this difficult matter the taxing officer will be entitled to take into account all the money necessarily expended by the applicant's principal in retaining counsel and in payment of solicitors in all the actions in respect of which the settlement was made and to apportion costs in such a manner that no profit accrues to the applicant's principal out of the $7,000 agreed upon as balance of counsel's fees and plaintiff's costs in the settlement.

Liberty to apply.

CUMBERBATCH *v.* THE SCOTTISH FLOWER LODGE and by their Trustees Nicholson and Gabb.

(In Chambers (BOLAND, C.J. acting) July 3, 7, 21; August 22, 23, 1950; April 2, 1951).

Friendly Societies Ordinance—rules of Society—provision for arbitration—Jurisdiction of Court—Mortgage—Opposition—member of society—interest in the res.

A friendly society advertised the passing of a first mortgage to secure a loan to be made by the Society. The plaintiff a member of the society opposed the mortgage on the ground that an amended rule of the Society which purported to empower it to mortgage its immovable property was null and void and of no effect.

The defendants applied by way of summons to have the statement of claim struck out on the ground that it disclosed no right in the plaintiff to oppose the passing of the mortgage.

In support of the application to strike out the statement of claim it was argued that the rules of the society provided a procedure by arbitration for the determination of disputes and that the jurisdiction of the Courts was ousted.

It was contended, in addition, that the right to oppose was founded on the opposer having dominion in the res itself or same right, title or interest therein or is a creditor of the intending mortgagor in respect of a debt which is a liquidated sum of money.

Held: A rule purporting to give a new power to trustees to mortgage immovable assets of the society is a question of vital importance to the members and not purely to internal administration. The rule for arbitration could not therefore oust the jurisdiction of the Court. Heard v. Pickthorne 1913, 3 K.B. 299 (C.A.) followed.

It is an arguable point whether a member of the society having an equitable interest in the land is entitled to oppose but as the point is fit to be decided by the trial judge, the application to strike out must be refused.

Application refused.

R. H. Luckhoo for the plaintiff.

P. A. Cummings for the defendant.

Boland, J.: The plaintiff is a member of the Scottish Flower Lodge No. 12, a friendly society registered under the Friendly Societies Ordinance, Chapter 214. Against the Society and Edward G. Nicholson and Alexander Gabb, alleged to be the two trustees thereof, he caused the writ in these proceedings to be issued. He had entered opposition in the Deeds Registry to the passing of a first mortgage by the Society of the Society's property known as lot 130, Cummingsburg District, Georgetown, in favour of the New Building Society Limited to secure a loan to be made to the Society.

Furnishing his reasons for opposition, plaintiff declared in substance that as a member of the Society he had an interest in the property sought to be mortgaged, and that a certain amended rule which purported to empower the Society to mortgage its immovable property was null and void and of no effect, because, as plaintiff claimed, the amended rule was not made in the manner required by law or by the rules of the Society in that

no sufficient notice of the meeting at which the said amended rule was passed was given to the members nor, if given, was there notice of the purpose for which the meeting was being called. The writ in this action, in conformity with the Rules of the Supreme Court (Deeds Registry) 1921, was duly filed by plaintiff to enforce his opposition asking that an order for an injunction be made by the Court in restraint of the passing of the mortgage. The writ was served on Alexander Gabb, and appearance was entered but under protest for the Society and for Edward G. Nicholson and Alexander Gabb the last named in addition, protesting that though named as a trustee in the writ he was not a trustee at any material time. It would appear that though according to a notice duly registered with the Registrar of Friendly Societies, Alexander Gabb had resigned from his position as trustee on 1st February, 1949, yet he continued to be a member of the Committee of Management and service on him as a member of the Committee of Management would be good service of the writ on the Society according to section 44 (2) of Chapter 214 of the Friendly Societies Ordinance.

This matter comes before me on the hearing of a summons by which it is claimed by the defence that the Statement of Claim. which re-affirms the endorsement on the writ in the terms stated above, discloses no right in the plaintiff to oppose the passing of the mortgage by the Society and is frivolous and vexatious; that the action be dismissed that the opposition be declared unjust, illegal and not well founded and that the plaintiff be made to pay the costs of the defence.

Counsel for the defence in support of the application contended *in limine* that the action was not maintainable. Rule 38 of the rules of the Society provides a procedure by arbitration for the determination of disputes between a member of the Society and the Society, and it was submitted that plaintiff, if he is aggrieved by any act of the Society, should resort to the remedy available to him by the rules, and would be bound by any decision made thereunder. For the settlement of this dispute, the jurisdiction of the Courts, it was contended, was ousted.

In Heard v. Pickthorne 1913 3K.B. 299 (C.A.), Williams L.J. in his judgment states at p. 306: “It really has not been disputed that there may be cases in which an injunction would properly be obtained against the Society from doing things which are beyond the power of the Society or *ultra vires.*” The learned Lord Justice conceded that: “There are such matters, matters of internal administration of the business of the Society, in respect of which there ought not to be an injunction granted. These things are properly left to be decided by arbitration.” He then went on to refer to the dispute in the case under appeal. The Society had passed a resolution purporting to vary the provisions of an existing rule by making it imperative that in submitting a claim for sick benefit a member could not support his claim by any other medical certificate than that of a panel doctor. Bailhache J. from whose decision the appeal was brought, in his

judgment stated that while he agreed that there may be illegal acts by the Society which the courts will interfere with and restrain notwithstanding the arbitration provisions in section 67 of the National Insurance Act of 1911, it was his view that the resolution whose validity the plaintiff challenged dealt with a matter purely of internal administration, and as such would come within section 67 of the Act and therefore determinable only by arbitration between the plaintiff and the officers of the Society as provided by the statute. On appeal, Bailhache J.'s decision was reversed on the ground that this was "not a matter of internal administration but one of vital importance as improperly restricting the rights of insured persons". Accordingly, it was held that the courts had jurisdiction to decide the question.

Section 14, subsection (1) of the National Insurance Act 1911, provided that sickness benefit, disablement benefit and maternity benefit shall be administered, in the case of insured persons who are members of an approved society, by and through the society, or a branch thereof, and in other cases through the insurance committee; medical and sanatorium benefits shall in all cases be administered by and through the insurance committees. Section 14 empowered an approved society to make new rules with regard to, amongst other matters, notices and proof of disablement. Section 67 which was taken verbatim from section 68 of the Friendly Societies Act 1896 directed that: "Every dispute between a member or person claiming through a member, or under the rules of a registered society or branch, and the society or branch or an officer thereof shall be decided in the manner directed by the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction."

Notwithstanding these provisions for the settlement of disputes within the society itself, in Heard v. Pickthorne the Court of Appeal, holding that the jurisdiction of the court was not ousted, decreed that the plaintiff was entitled to the declaration asked for and granted an injunction to restrain the society from acting, upon the resolution.

It is to be noted that section 43 of our local Friendly Societies Ordinance gives the same directions for the settlement of disputes as section 68 of the Friendly Societies Act of 1896. The House of Lords in the case of Mc Ellistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society Ltd. (1919) A.C. 548 approved of the decision of the Court of Appeal in Heard v. Pickthorne.

In the instant case there can be no doubt that the validity of an amended rule purporting to give a new power to the trustees to mortgage immovable assets of the society is a question of vital importance to the members of the Society and cannot be said to relate purely to the internal administration of the Society so as to be cognisable, in absolute exclusion of the jurisdiction of the courts only by the machinery set up by the rules for the settling of disputes. Accordingly I hold that on this point the submission of counsel for the applicant must fail.

Having determined the question of jurisdiction I now pass on to consider the submission that the action which is in enforcement of an opposition is bad because, as contended, the plaintiff did not have a right to enter opposition. A right to oppose, it is urged, is founded either on the opposer having *dominium* in the res itself or some right, title or interest therein such as an easement; or is a creditor of the intending transporter in respect of a debt which is a liquidated sum of money.

The plaintiff clearly does not claim to be such a creditor of the Society. His right to opposition is based on a claim to an interest in the *res* — that is the property intended to be mortgaged. No member of a friendly society has, it was submitted, any interest, legal or equitable, in the assets of the Society whether such assets be movable or immovable. In support of his submission, counsel cited the case of Cunnack v. Edwards 75 L.T. 122 where it was held that where the purposes for which a certain society had been established no longer existed there was no resulting trust in favour of the personal representatives of the contributors. This, as Halsbury, Lord Chancellor, said in his speech before the House of Lords, was not a consequence of the association of persons being that of a friendly society. The question the court had to determine would have remained the same if they had been an associated body of persons for the purpose intended, which was to make provision for the widows of members. There was never any interest remaining in any contributor save that his wife, if she survived him, should become entitled to a widow's portion as provided — nor was it a charitable trust. When the last annuitant died, the purpose for which the association was formed ceased to exist, and it was held that the assets in the hands of the trustees were *bona vacantia* and fell to the Crown.

I cannot agree that Cunnack v. Edwards is an authority which establishes that there is no interest held by a member of a society in the immovable assets of the society such as would entitle him to oppose on proper grounds the transport by conveyance or mortgage of an immovable asset of the society.

Counsel cited also a number of cases which decided that a member of a friendly society had no right to the vote for the election of members to Parliament or to municipalities on the alleged qualification of the ownership of land or an interest in land based on a claim to be a joint owner of the real estate of the friendly society of which he was a member. It is obvious that membership of a friendly society cannot give qualification for the franchise based upon the joint ownership or interest in the society's assets. In my view, these authorities do not apply to the case now before me which concerns the right which every member of a friendly society has to protect the society's assets from being disposed of in violation of the rules.

There can be no doubt that by way of protection of the interests of members in the assets of the society, the courts will at the instance of a member issue an injunction restraining the trus-

tees, in whom all the society's property is vested for and on behalf of members, from doing any act affecting the society's property which is *ultra vires* and prejudicial to the interest of members. Avery v. Andrews (1882) 51 L.J. Ch. was a case which arose out of an injunction issued by the court restraining the trustees of a branch of a friendly society from dividing certain monies among the members of the branch. For disobeying the injunction, the court dealt with the trustees as for contempt of court.

It is contended that the remedy by way of opposition, available only to certain categories of persons, though analogous, is not co-extensive with that afforded by the remedy of an injunction Certainly the right to oppose transport which a creditor has does not give him any title to the remedy of injunction in the absence of fraud. But it is indisputable that where an equitable interest in the land would give title to the remedy of an injunction in restraint of the disposal of the land by the legal owner in prejudice of the equitable interest, the remedy by way of opposition would also be available by the law of this colony.

That a member of a friendly society having an equitable interest in the land of the society which gives him the remedy of an injunction for the protection of that interest should also be entitled to enter opposition would at any rate seem to be arguable. In resistance of an application for the striking out of a statement of claim as disclosing no cause of action, or for the dismissal of the action because of no right in the plaintiff to institute the proceedings, it is not necessary for the respondent plaintiff to establish conclusively that a good cause of action is disclosed and that he is a person having capacity to bring the action. It is sufficient for him to show that he has an arguable case in law fit for the decision of the trial judge. This the plaintiff has established beyond question and in the circumstances I must dismiss the application with costs to the plaintiff. I certify the matter as fit for counsel.

Solicitors: *S. M. A. Nasir* for the plaintiff.

W. D. Dinally for the defendant.

HUTT *v.* BOOKER BROS. MC CONNELL & CO. LTD. AND SCHULER.

(In the West Indian Court of Appeal on appeal from the Supreme Court of British Guiana (Worley C.J. In Chambers) March 21; April 2, 3, 4, 1951)

Privy Council—1921 *rules*—1925 *rules*—"*Application to admit an appeal synonymous with* "*application for leave to appeal*."

The West Indian Court of Appeal dismissed an appeal from an order of a judge of the Supreme Court refusing leave to defend on a writ specially indorsed with a claim for $18,036.63, within the time limited by rule 3 of the 1921 Rules, the appellant filed a petition for the admission of his appeal to His Majesty in Council and gave the respondents notice in writing of his intended application. The respondents appeared under protest and objected that the appellant had not yet obtained leave to appeal as required by the 1925 rules.

Held: There are two sets of rules governing appeals from the West Indian Court of Appeal to His Majesty in Council. The 1921 Rules relate to appeals from the West Indian Court of Appeal while the 1925 Rules are general in scope and relate to all matters within the appellate jurisdiction of His Majesty in Council.

An application to admit an appeal is synonymous with an application for leave to appeal.

Objection overruled.

Peer Bacchus v. Christmas Hookumchand (W.I.C.A. B.G. No. 6 of 1944) not followed.

P. A. Cummings for appellant

H. C. Humphrys K.C. for respondent

Worley, C.J.: In this matter the appellant desires to appeal to His Majesty in Council against the order of the West Indian Court of Appeal dismissing his appeal from an order of a judge of the Supreme Court of this Colony refusing him leave to defend on a writ specially indorsed with a claim for $18,036.63 interest and costs issued by the respondents. After the dismissal of the appeal, counsel for the appellant applied for leave to appeal to the Privy Council and for a stay of execution. Counsel for the respondents objected on the ground that such an application should not be made *ex tempore* but by petition or motion. Some discussion ensued as to the effect of the relevant rules, at the end of which the Court of Appeal made no order on the application but, according to my note, informed appellant's counsel that the application must be made in the manner laid down by the Rules. The minute recorded in the Registrar of the Court reads:

"ORDERED that the application for stay of execution is deferred until proper steps are taken to obtain leave to appeal under the appropriate rules."

It is, I think, common ground that there are two sets of rules governing appeals from the West Indian Court of Appeal to His Majesty in Council. The earlier and particular rules are those enacted by an Order-in-Council made under the Judicial Committee Act 1844 on the 7th February, 1921 and having effect in this Colony from the 31st March, 1921 by virtue of the Governor's proclamation of 24th March of the same year: these I shall refer to

for convenience as the 1921 Rules. They relate only to appeals from the West Indian Court of Appeal. The later and general rules are the Judicial Committee Rules 1925, which came into force on 1st January, 1926 by virtue of an Order-in-Council made on 2nd May, 1925: these I shall refer to for convenience as the 1925 Rules. They are general in scope, rule 87 providing that:

"Subject to the provisions of any statute or of any statutory rule or order to the contrary, these Rules shall apply to all matters falling within the Appellate Jurisdiction of His Majesty in Council."

A number of previous Orders-in-Council are revoked by this Order-in-Council but the Order-in-Council of 7th February, 1921 is not among them.

After the close of the sitting of the West Indian Court of Appeal and within the time limited by rule 3 of the 1921 Rules, the appellant filed a petition for the admission of his appeal to His Majesty in Council and gave the respondents notice in writing of his intended application. The petition was laid before me in chambers in pursuance of rule 27 of the 1921 Rules on 21st March, 1951 when the respondents appeared under protest and objected *in limine* that the appellant had not yet obtained leave to appeal. After hearing argument I over-ruled the objection and now state my reasons for so doing.

As the value of the subject matter exceeds £300 and the judgment complained of is a final judgment, an appeal will lie as of right under rule 2 of the 1921 Rules; but this does not dispense with the leave of the Court appealed from.

"Appeals though as of right must be allowed by the Court from which the ap-
"peal is brought. The right given is not to operate automatically; it forms the basis
"of application to the Court for leave to appeal, and it is the duty of the Court to
"form a judgment whether the appeal lies or does not lie. Failure to express an
"opinion on the right, while accepting the necessary security from the appellant for
"the prosecution of the appeal, is incorrect, and in such a case the Judicial Com-
"mittee will determine for itself if the appeal is within the grant and allow it or
"refuse it accordingly."
(Halsbury's Laws of England: 2nd Ed. Vol. 11 p. 222 para. 429.).

When it appears to the Court that the case is one where an appeal lies as of right, leave to appeal cannot be refused if it is applied for within the prescribed time and the appellant is willing to fulfill the prescribed conditions.

Counsel for the respondents grounded his objection mainly on rule 2 of the 1925 Rules and drew a distinction between applications for leave to appeal and applications to admit an appeal, the latter being, it was urged, the first step in the appeal itself and therefore a step which could not be taken until the condition precedent of obtaining leave had been satisfied. I find myself unable to accept this distinction and have come to the conclusion that for the purpose of the relevant rules the expression "application to admit an appeal" is synonymous with "application for leave to appeal."

It is clear from what has been said above that even where an appeal lies "as of right" the grant of leave to appeal is not a mere formality but is a judicial act to be performed only after due consideration and hearing all proper objections: if then, the matter is governed by the 1925 Rules it is strange that they omit to provide any time limit for applications for leave to appeal, notice to the other party and so on.

But the true view, as I see it. is that rule 2 of the 1925 Rules lays down a general rule applicable to all appeals to the Privy Council, namely, that no appeal shall come before the Judicial Committee unless by leave of the Court appealed from or special leave of the Council itself; but the mode of obtaining leave of the Court appealed from is prescribed, so far as concerns the West Indian Court of Appeal, in the 1921 Rules. This is merely an application of the general principle of interpretation "*generalia specialibus non derogant*", and provides a reasonable and sensible construction of the two sets of Rules.

It is true that a change of intention may often be presumed from a change of language but, *in* my view, such a presumption would here be unjustified. The variation in the expressions used, may be accounted for by the circumstance that the two Orders-in-Council were drafted at different periods, and it may be that the later Order adopted the more commonly used expression because its scope was so much wider.

I am fully aware that in the view here expressed I am differing, however reluctantly, from the construction put upon the Rules by Verity C.J. in Peer Bacchus v. Christmas Hookumchand (W.I.C.A. B.G. No. 6 of 1944). In that case the West Indian Court of Appeal had itself given leave to appeal at the time of the delivery of judgment; the appellant subsequently filed a petition applying for the admission of the appeal in pursuance of the 1921 Rules but did not give the respondent notice of his intention to do so. The respondent appeared to the petition under protest and objected successfully that the petitioner had not complied with rule 3. The point now in issue was not the point directly in issue in that case but, nevertheless, the judgment seems to be based on the view that the application for leave to appeal and the application to admit the appeal are two distinct and different steps in the prescribed procedure, for, unless that be so, it is difficult to see why the application in open Court for leave to appeal, which was granted, should not have been taken as sufficient notice of intention for the purposes of rule 3. It appears to me, with all respect, that in Peer Bacchus's case as in the present case, the impromptu application in open Court for leave to appeal caused confusion and misunderstanding. If my interpretation of the Rules is correct, it follows that the only impromptu application which the Court should entertain is one to stay execution until a petition or motion can be filed, or, perhaps, if the respondent has obtained execution, to require him to furnish security (see Bentwich: Privy Council Practice 3rd Ed. p. 112).

Solicitors: H. B. Fraser for the Appellant.

J. E. deFreitas for the Respondents.

GREENHEART PRODUCERS LIMITED *v.* SUTTON AND LOWTON (In Liquidation).

(In the Supreme Court, Civil Jurisdiction (Worley C.J.) March 12, 13; April 7, 1951).

Crown Lands Regulations 1919—*Wood-cutting licence—sale without transfer—execution—valid.*

A wood-cutting licence and permission to cut wood were issued to the first-named defendant Sutton by the Department of Lands and Mines in pursuance of the Crown Lands Regulations 1919. Sutton sold his right, title and interest in and to the licence and permission to the plaintiff company under an agreement in writing filed with the Registrar of Companies but the transfer required by regulations 12 to 15 of the 1919 Regulations were not finalised as certain departmental surveys were pending.

Subsequent to the sale, the second-named defendant obtained a judgment and costs against the first defendant and levied upon the said licence and permission in execution thereof.

The plaintiff company claimed a declaration that it was the beneficial owner or holder of the licence and permission, and that Sutton was holding the same as trustee for it.

Another declaration was also claimed.

Held: Regulation 13 of the Crown Lands Regulations 1919 is in effect a statutory re-enactment of the old Roman Dutch Common Law that the title to immovable property did not vest in any purchaser or other transferee or claimant unless and until the transfer had been registered and this provision is still effective in spite of the abrogation of the old common law.

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

First-named defendant in person.

Mungal Singh for second named defendant.

Action dismissed.

Solicitor for plaintiff *J. Edward de Freitas.*

Solicitor for second defendant *H. A. Bruton.*

Worley, C.J.: The subject matter of this action comprises wood-cutting licence No. A2380 and permission No. 1132/45 to cut wood, which were issued to the first-named defendant Sutton by the Department of Lands and Mines in pursuance of the Crown Lands Regulations 1919, and were levied upon by the second-named defendant on the 19th April 1947, in execution of a judgment for $720 and $534.57 costs obtained on the 6th April, 1946, against Sutton and others in an action for damages for negligence.

The plaintiff company is being wound up under an Order of Court made on 14th April, 1947, and by consent of the parties, an Order was made on the 9th June, 1947, appointing the Official Receiver of British Guiana to be receiver of the said licence and permission and authorising their sale and there is at present in the hands of the Official Receiver the sum of $1,500 (being part of the proceeds of sale of the said licence and permission) to abide the result of this action.

The material facts, which are not in dispute, are that the licence and permission were, prior to and at the time of the levy,

in the name of the defendant Sutton and that prior to the levy, namely on the 26th May, 1944, the right, title and interest of Sutton in and to the licence and permission had been sold by him to the plaintiff company under an agreement in writing filed with the Registrar of Companies.

By this agreement, the company purchased Sutton's woodcutting business as from 31st January, 1944, (including his interests in the licence and permission) and undertook, *inter alia*, to discharge all the liabilities of his business and his obligations under a Deed of Arrangement with his creditors, the later to be satisfied by the issue of debentures. It was further provided that until the completion of the purchase, Sutton should carry on the business in the same manner as before so as to maintain it as a going concern and that he should be deemed, as from the 31st January, 1944, to be carrying on the safe on behalf of the company.

In pursuance of this agreement, the plaintiff company, on the 18th May, 1945, issued mortgage debentures of a total value of $16,850, conferring a first charge on the property and assets of the Company.

After the sale of the business the rent payable in respect of the licence and permission was paid by the plaintiff company, which was put in possession of the tracts of Crown land covered by the licence and permission and proceeded to cut and remove timber therefrom at its own expense. The timber so cut and removed was shipped by the plaintiff company from the Crown land in the name of the defendant Sutton, but the cost thereof and the royalty thereon were paid by the company which sold the timber and received the proceeds of sale thereof.

Execution on the licence and permission was levied at the instance of the defendant Lowton after the winding-up order had been made, but at the time of the levy, Lowton was unaware off the facts above recited.

It is further agreed that no advertisement of the proposed transfer had been made and that the licence and not been transferred to the plaintiff company as provided in Regulations 12 to 15 of the Crown Lands Regulations 1919, for the reason that Sutton had, prior to the sale to the Company, applied to the Department of Lands and Mines for the amalgamation into one licence, of the tracts held by him under the licence and permission aforesaid and the Department had decided that the transfer to the company should not be put through until after a survey of the two areas had been made to effect the amalgamation. This survey had not been made at the time of the levy.

The plaintiff company is therefore claiming:

(1) a declaration that it was the beneficial owner or holder of the licence and permission and that Sutton was holding the same as trustee for it; and

(2) a declaration that the company is, or alternatively the debenture holders are, entitled to the sum of $1,500 now in the hands of the Official Receiver.

The second-named defendant claims that he was entitled to levy on the whole property in the licence and permission because they stood in Sutton's name at the time; the first-named defendant did not enter appearance but stated in Court his willingness to abide by any order the Court might make.

Shortly, the point in issue is whether or not it was competent in law for the defendant Lowton to levy execution on the licence and permission, or, to put it in another way, whether a licence or permission issued under the Crown Lands Regulations is in the same position as land held under transport, that is to say. that until a transfer has been passed pursuant to the Regulations a creditor of the holder is not precluded from levying on the property.

It will be convenient to deal first with a preliminary question, namely, whether the licence and permission are under the law of the Colony, to be classified as immovable or movable property. Licences and permissions to collect and remove forest products or minerals from Crown lands have been held in more than one local case to be immovable property: see in *re* Camacho 1915 L.R.B.G. 107; In re Shorey *ex parte* Krakowsky Bros. 1933 L.R.B.G. 1931—37, 173 at p. 179; and Ross and Buchanan v. Royal Bank of Canada 1940 B.G.L.R. 2. See also for servitudes in the Roman Dutch period. Steele v. Thompson (1860) Py. Co. 8 W.R. 374.

If the definition of immovable property enacted in section 2 of the Civil Law of British Guiana Ordinance, Chapter 7, be taken as the test, it would seem that such licences are immovable property in the ordinary sense of that term. The section provides that wherever the words "immovable property" are used in an Ordinance or in another statute or in a document they shall ordinarily be deemed to mean and include both real property and "chattels real" as understood by the common law of England and *vice versa.* A licence to enter upon land to cut wood and carry it away is not a bare licence which would die with the licence, but is a licence coupled with a grant which descends to the heirs and assigns of the holder (Regulation 10). In England the type of licence which is here under consideration would be a profit a prendre in gross, which is an incorporeal hereditament and is real property: See in re Earnshaw-Wall 1894. 3 Ch. 156: Halsburys Laws of England 2nd Edition Vol. XI p. 385 paragraph 676 and Vol. XXVII p. 572 para. 1034.

But though it is true that this licence and permission come within the definition of immovable property in a general sense, it seems that the Civil Law Ordinance also uses the term "immovable property" in a special or limited sense in relation to land held in full ownership, and distinguishes between immovable property in this special sense on the one hand and easements, profits a prendre and real servitudes on the other: see, for instance, provisos (a) and (b) of paragraph (D) of section 3 and also proviso (c) to subsection (4) of section 3 of the Ordinance as originally enacted (Ordinance No. 15 of 1916). In making this distinction the Ordinance seems to have followed the classification of Roman-

Dutch law in which real servitudes were one form of limited or defective ownership: see Morice, English and Roman-Dutch Law 2nd Ed. p. 39.

Counsel for the defendant Lowton did at one stage of the argument suggest that sections 12 and 21 of the Deeds Registry Ordinance, Chapter 177, applied to ail immovable property of whatever description; but I think it is beyond doubt that those sections cannot apply to licences and permissions for which special statutory provision as to transfers is made in the Crown Lands Regulations.

I have treated this distinction as a preliminary point because it seems to me necessary to bear it in mind when one comes to consider the effect of the Civil Law Ordinance and local decisions thereupon.

I will next set out for convenience the propositions of law put forward on behalf of the plaintiff.

1. Under Roman-Dutch law, there were two classifications of property, only namely:—

(I) Immovable property which consisted of the following categories:—
  (i) Land in full ownership, and
  (ii) All other interests in land such as incorporal rights, easements, profits a prendre, and servitudes; and

(II) Movable property which consisted of any property which did not come under the general classification of immovable property.

2. Under Roman-Dutch law, all transfers of immovable property (in the general sense) had to be completed coram legi loci (see Dalton's Civil Law of British Guiana p. 81).

Immovable property in the first category i.e. land in full ownership had to be passed by transport. Immovable property in the second category by transport or the appropriate form of transfer.

3. Under Roman-Dutch law, equitable interests, as such, in immovable property were unknown, although Roman-Dutch law recognised a trust or fidei commissa as affecting the person in whose name the property was held and the person on whose behalf the property might be held.

4. Under Roman-Dutch law, a creditor or any other third party was entitled to treat the legal owner of immovable property in the general sense as the absolute owner of the property and had a right of opposition in respect of any debt owing by such legal owner and probably a right to levy on such property in respect of any judgment debt owing by such legal owner.

5. When the Civil Law Ordinance came into force Roman-Dutch law was abrogated and

  (i) The common law of England (except the common law of real property), and

(ii) The doctrines of equity were introduced but the law and practice relating to mortgages, transports and a right of opposition were retained.

6. Under the Civil Law Ordinance, the two classifications of property were retained (see section 3 (D) of Chapter 7 in which the term immovable property is used in the general sense) but it was provided that the principles of the common law of England applicable to personal property shall be applied as far as possible.

7. Under the Civil Law Ordinance, equitable interests in property were introduced subject to the provisos in section 3 of Chapter 7 (see British Colonial Film Exchange Limited v. S. S. de Freitas (1938) L.R.B.G. 35).

8. Under the Civil Law Ordinance, 1916 by original proviso (c) of original section 3 (4) (in which the term immovable property is used in the limited sense) and by the retention of the right of opposition in the case of transports and mortgages, the law and practice set out under paragraph 4 above was retained and remained the law until the introduction of the Deeds Registry Ordinance on 1st January, 1920.

9. When the Deeds Registry Ordinance, 1919 came into force original proviso (c) was repealed and section 12 replaced only that part of it which related to immovable property in the limited sense with the result that the law and practice under paragraph 4 above in so far as it related to categories of immovable property in the general sense which were not subject to the law and practice of transports, was repealed.

10. Under the Civil Law Ordinance as it is at present, equitable interests in these categories of immovable property must be recognised and regulation 10 of the Crown Land Regulations 1919 which was passed in 1919 in the form in which it previously existed, is to be interpreted accordingly and effect given to any established equitable interest."

I do not think that there can be any doubt that, if the issue now before me fell to be decided in England, it would be determined in favour of the plaintiff. As Lord Chelmsford said in delivering the judgment of the Judicial Committee of the Privy Council in Wickham v. New Brunswick and Canada Railway Company (1865), 3 Moore P.C.N.S. 416 at p. 431; 146 R.R. 135:

"There is no doubt upon principle, as well as on the authority of the cases . "." . . . . that the right of a judgment creditor under an execution is to take "the precise interest and no more, which the debtor possesses in the prop- "erty seized, and consequently that such property must be sold by the sher- "iff, with all the charges and encumbrances, legal and equitable, to which "it was subject in the hands of the debtor. In other words, what the debtor "has power to give is the exact measure of that which the execution credi- "tor has the right to take."

In in re Morgan: Pillgrem v. Pillgrem (1881) L.R. 18 Ch. D. 93 at p. 101, Fry J. said:

"Nothing is plainer than this that the property which can be taken under an "execution is only that property to which the

"execution debtor is beneficially entitled, and that no property of which he "is only a trustee can be taken."

See also Stevens v. Hince (1914), 110 L.T. 935.

In the British Colonial Film Exchange case cited above, Verity J. (as he then was), pointed out that the Civil Law Ordinance requires this Court to apply the principles of the common law and to exercise the equitable jurisdiction as administered by Courts of Justice in England except in so far as that law and those principles are repugnant to specific enactments or impossible of application to the legal system in force in the Colony.

In my view therefore, the plaintiff must succeed unless the defendant can show that under the law of the Colony the beneficial interest in the licence and permission cannot pass until a transfer is registered as prescribed by the regulations.

Counsel for defendant Lowton relied chiefly upon the case of Gangadia v. Barracot 1919 B.G.L.R. 216 and the Crown Lands Rules 1919. The judgment of Dalton J. in the case cited is of course the foundation of the rule that the passing of the Civil Law Ordinance did not abrogate the rule of Roman-Dutch common law that the beneficial interest in immovable property is not conveyed to a purchaser until the sale is completed by formal delivery i.e. by a transport passed before the Court. But it is necessary to bear in mind that this decision was given before the repeal of proviso (c) to section 3 (4) of the 1916 Ordinance by the Deeds Registry Ordinance, 1919 (No. 17 of 1919) and that, since that repeal, the decision is only direct authority in relation to immovable property in the limited sense, that is land held in full ownership. I have not been referred to any case, nor have my researches discovered one, where this judgment has been cited as an authority for applying the rule to other forms of immovable property such as easements, profits a prendre and real servitudes. In relation to these, it can only provide a persuasive analogy.

Proviso (b) to paragraph (D) of section 3 of the Civil Law Ordinance preserves the law and practice with regard to easements, profits a prendre and real servitudes as administered by the Supreme Court on January 1, 1917. The decision of the Privy Council in Steele v. Thompson (1860) 3 W.R. 374 is authority for the proposition that in this Colony a servitude over land, unless acquired by prescription, could only be created or passed by judicial act, that is, by a transport. A profit a prendre is a servitude (Halsbury 2nd Edition: Vol. XI paragraph 491). The enactment of proviso (c) to section 3 (4) of the 1916 Ordinance preserved this rule and, until that proviso was repealed in 1919, it was perfectly clear that there could be no effective transfer of any easement, profit a prendre or real servitude except by a transport or transfer registered in the appropriate prescribed manner. It is not necessary for me in the present instance to decide what was the effect of the repeal of this proviso on the transfer of easements, profits a prendre and real servitudes in general, since the particular form of profit a prendre with which I am now concerned is governed by statutory rules made by the Governor and Legislative

Council and having the force of law (see the Crown Lands Ordinance, Chapter 171, section 17 (1) and (4), and my task is to see what restrictions, if any, those rules impose on the transfer of licences and permissions.

It should first be noted that the Regulations now in force though made in 1919, were unaffected by the repeal of the proviso (c) mentioned above (which was effective from 1st January, 1920) and so far as they relate to transfers of leases, licences and permission they merely re-enact the previous Crown Lands Regulations of 1915.

There is one variation between the two sets of Regulations which, at first sight, may seem significant but which I think is not really so. I refer to it only to show that I have not overlooked it. In the 1915 Regulations" (Official Gazette 26th January, 1915) the cross-heading "Transfers of Grants, Leases, Licences or Permissions" comes before Regulation 10 which reads:

> "Every grant, lease, licence or permission shall descend to the heirs of the "holders for any unexpired term thereof after the death of such holder; and "shall only be transferred in accordance with these Regulations."

These last words do not appear in Regulation 10 of the 1919 Regulations. In the 1919 Regulations, this cross-heading is replaced by another reading "Reversion of Grants, Leases. Licences and Permissions" and separate cross-headings are inserted before Regulations 11 and 12 relating to the transfers of grants, and of leases, licences and permissions respectively. This seems to me a sufficient explanation for the deletion of the last words from Regulation 10 of the 1919 Regulations.

When the Relevant Regulations are examined it is apparent that they create and confer on a licensee a real but, limited ownership on the subject matter of the licence or permission; for example:

(a) on the death of the holder the unexpired portion of the term descends to his heirs and assigns (Regulation 10);
(b) on the sale at execution of the holder's rights the chaser, on the fulfilment of the prescribed conditions, is entitled to have the licence or permission transferred to him (Regulation 16);
(c) Any proposed transfer has to be presented in the prescribed manner and advertised thrice (Regulation 12). It may be opposed by anyone claiming a right, title, or interest therein or to be a creditor of the holder for a liquidated sum, and no transfer can be approved by the Commissioner until the opposition has been cleared away (Regulation 13);
(d) The Commissioner may submit to the Governor any objections he may have to a proposed transfer and the Governor then has a discretion to approve or to refuse it (Regulation 14);
(e) The holder has a right to have the transfer put through if no opposition is entered and if no reason to the con-

trary appears to the Governor (Regulation 15). When this fasciculus of regulations is

considered as a whole it appears to me to exclude any possibility of the recognition by the Commissioner of equitable interests in a licence or permission. The Commissioner and the Governor are concerned with the proposed transferee solely from the point of view of whether he is a fit and proper person: if he is not the Governor may refuse to approve the transfer whatever beneficial interest the would-be transferee may claim to have acquired. Further, it would be futile to confer a right of opposition on a creditor of the holder or on a person claming a right, title or interest if the opponent could be defeated by an undisclosed equitable interest. In my view Regulation 13 is in effect a statutory re-enactment of the old Roman-Dutch common law that the title to immovable property (using that term in its general sense) did not vest in any purchaser or other transferee or claimant unless and until the transfer had been registered, and that this provision is still effective in spite of the abrogation of the old common law and in spite of the repeal of proviso (c) to section 3 (4) of the Civil Law Ordinance of 1916.

This is therefore another instance where the application of the principles of the English common law and equity is prevented by the statute law of the Colony. I have come to this conclusion with some reluctance and after careful consideration: one needs to be on one's guard against what a noble and learned Lord in the House of Lords recently called "the spade of the legal resurrectionist", but I feel bound to give these statutory provisions their full force and effect. The result may seem to be contrary to the real justice of the case as the plaintiff company had been in possession of the lands covered by the licence and permission for some time prior to the levy and had presumably done all that they were required to do to effect a transfer; but the Company is perhaps to some extent the author of its own misfortune in not insisting on the immediate transfer of the licence and permission without waiting for the survey.

In my judgment then, the plaintiff's claim for a declaration fails and must be dismissed with costs.

NAMSOO v. COELHO AND ABRAHAM trading under the style or firm of Coelho and Abraham.

(In the West Indian Court of Appeal, on appeal from the Supreme Court, Trinidad, (Collymore, Jackson C.J.J. Irwin J) April 9, 10, 1951).

Tort—Waiver—Implied contract—Sale—Reasonable price.

The appellant purchased from the respondents 1000 cases of beer and paid $4,600:—the price in full. The respondents delivered 200 cases but were unable to deliver the balance as they had sold all their stock. It was agreed that the remaining 800 cases should be treated as a sale by appellant to respondents at a price of $5.40 a case making a total of $4,320. The maximum wholesale price allowed by law was $5.06 a case. When the respondents failed to pay the sum of $4,320 the appellant issued a specially indorsed writ claiming $4,048:—as the price of 800 cases of beer sold at $5.06 per case.

The trial judge treated the transaction as a pretended sale and not a genuine one and, dismissed the claim. The plaintiff appealed.

Held: It was open to the appellant to sue in tort for damages in conversion or to choose another course by seeking a remedy in contract. In the circumstances the law implied a sale and the contract was not tainted with illegality because the appellant had claimed at the legitimate price of $5.00 per case.

Appeal allowed.

Louis Wharton K.C. with *Algernnon Wharton* for the appellant.

Malcolm Butt, K.C. with *Churchill Johnson* for the respondent Caelho.

Judgment of the Court: This is an appeal from a judgment in favour of the defendants (respondents), John Vieira Coelho, Senior, and David Malcolm Abraham trading under the style or firm of Coelho and Abraham, on a claim by the appellant James Thomas Namsoo for $4,048 alleged to be due and owing to him.

The writ in the action was specially indorsed and the claim reads:—

> "The plaintiff's claim is against the defendants for the sum of $4,048.00 being, the amount due and owing by the defendants to the plaintiff for the price of goods sold and delivered.
>
> PARTICULARS
>
> To—800 cases of beer at $5.06 each sold and delivered by the plaintiff to the defendants in or about the month of July, 1948—$4,048.00".

The respondent Abraham did not defend the action arid did not appear at the trial; the first-named respondent Coelho delivered his defence, and paragraph 3 which substantially contains the defence to the claim is as follows:—

> 3. "The defendant John Vieira Coelho, Senior, denies that the firm of Coelho and Abraham, and/or the said defendant, John Vieira Coelho, Senior, purchased from the plaintiff 800 cases, or any quantity of beer whatsoever, in or about

the month of July, 1948, or at any other time, or that the said or any quantity of beer was delivered by the plaintiff to the firm of Coelho and Abraham and or the defendant Coelho, or that the said firm and/or the defendant Coelho is indebted to the plaintiff in the sum claimed or in any sum".

The facts in the case are not in dispute. In January, 1948, the appellant bought 1,000 cases of beer from the respondent firm and in payment issued two cheques of $2,300 each in favour of the firm. These cheques were substantially credited to the firm's account at Barclay's Bank. Two cheques were issued instead of one for the whole amount, as it had been arranged that for the convenience of the appellant one should be held over until the end of the month of issue. A receipt for the full amount was given the appellant and, despite the arrangement, both cheques were presented for payment on the same day, January 17th, and honoured the appellant having secured with the Bank the availability of sufficient funds to cover the amount. The parties agreed that the respondents would store appellant's beer and allow him to remove it in instalments as he required it for his business. 100 cases of beer were delivered to appellant at his request on the 23rd June and again on the 25th June, but on the 6th July, 1948, another request for another 100 cases was not complied with. On inquiry appellant learnt that the remaining 800 cases of beer had been sold by the firm; he spoke to the first-named respondent who told him to treat the transaction as a sale by him to the firm; and at the suggestion of the respondent Coelho the price was agreed at $5.40 per case. A bill for the sale was made out by the firm for 833½ cases at $5.06 a case. When appellant objected that the bill did not show the correct number of cases he was told that it was made cut in that way as the maximum wholesale price in law was $5.06 a case; on being assured that he was only concerned with what he was going to receive, namely $4,320, appellant acquiesced. Thus it is clear that respondent Coelho on behalf of the firm at this stage accepted a contractual relationship between the firm and the appellant.

In spite of repeated demands appellant failed to get either his money or his beer and so he filed his writ. In the action appellant alone gave evidence, respondent Coelho electing to lead none. The learned trial judge gave judgment for the respondent in these terms:

"I am satisfied there was no contract of re-sale here by the plaintiff to the defendants, but only the pretence of one. The present claim is founded solely on such a Contract of sale and it must fail. Judgment for the defendant with costs".

Now it cannot be denied that in this class of case the correct legal position is that on a conversion a claim in contract may lie against the tortfeasor.

In Halsburys Laws of England (*Hailsham* Edition) Volume 29, *page* 21, *para.* 16 the law is stated simply thus:—

"When one person has wrongfully obtained possession of,

> or dealt with, the goods of another, the owner of the goods may waive the tort and recover the value of the goods as on a sale to that person".

In *Benjamin on Sale* (Eight Edition) at page 94 the matter is dealt with in this way:—

> "If the owner of the goods, or his assignees in bankruptcy, instead of suing in respect of the tortious conversion, elect to affirm the act of the wrongdoer, the tort is thereby waived. But it would seem that it is not open to the owner in all cases to elect to treat the transaction as a sale, unless the other party assent. But if the defendant has sold the goods, or in any way admitted that the plaintiff is entitled to sue him in contract, the plaintiff may do so and waive the tort. And if the defendant has sold the goods, the inference will be drawn that he agreed to pay the plaintiff a reasonable price for them".

Thus it was open to the appellant to sue in tort for damages in conversion or to choose another course by seeking a remedy in contract.

The appellant sued in contract and it is contended by the respondent that he has sued on an express contract for the price and is therefore precluded from recovering in this action on an implied contract. Let it be assumed that, appellant has sued on an express contract; this would seem to make no difference; in the case of *Kelly vs. Metropolitan Railway Company*, 1895 1 Q.B.944, at page 946 Lord Esher made the following observations on the question whether a claim for injury by a passenger was founded in contract or in tort:—

> "In old times the question of injury to a passenger through something done by the servants of a railway company gave rise to a dispute whether such an action was an action of contract or one of tort, and it was ultimately settled that the plaintiff might maintain an action either in contract or in tort. In the former case, he might allege a contract by the railway company to carry him with reasonable care and skill, and a breach of that contract; and on the other hand, he might allege that he was being carried by the railway company to the knowledge of their servants, who were bound not to injure him by any negligence on their part, and if they were negligent, that was a matter in which an action of tort could be brought. At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim on one ground and proves it on another he is not now embarrassed by any rules as to departure".

Again Lord Atkin in the case of *United Australia Ltd. v. Barclays Bank Ltd.* 1941 *A.C. at page* 29 said in commenting on quasi contracts arising out of tort:—

> "These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action

> which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred".

These words seem apt and can justly be applied to this case where the respondents have had the appellant's beer and his money and instead of offering to pay the value of the beer vigorously resist the claim with technical defences.

Appellant has in his evidence laid bare all that transpired between him and the respondents; in his narrative he disclosed that it was agreed between them to treat the transaction as a sale of the 800 cases of beer at $5.40 a case, a sum above the maximum wholesale price permitted by the law.

Counsel for the respondent Coelho urged that this agreement is unlawful and that the illegality of the consideration vitiates the whole contract. He pressed upon the court the view that the pleading discloses only an express contract referable to the one just mentioned, and that in consequence the appellant must fail Before testing the soundness of this contention we shall examine the foundation on which it is based. The law in the circumstances of this case implies a sale; the appellant pleads a sale; the express contract alleged to be tainted with illegality is for the sum of $4,320 (800 cases at $5.40) whereas the sum claimed is expressed in the statement of claim as $4,043 and the particulars show 800 cases at the legitimate price of $5.06 a case. This pleading amply justifies appellant's submission, which we accept, that the claim was brought on a contract implied by law, the particulars furnishing the means of calculating what would be a reasonable assessment of the value of the goods. Moreover, respondent Coelho in paragraph 3 of his amended defence seems to have appreciated that a contract was implied. Any further consideration of the question of legality of the express contract or as to whether that contract is enforceable becomes unnecessary.

A series of questions was addressed to the appellant as to whether there was a sale or re-sale of the beer to the respondents and whether his object was to sue in tort; we are unimpressed by the object and the result of this inquiry as these matters were at all times matters of law for the Court.

At the close of the appellant's case in the Court below defence counsel submitted, "This writ discloses a claim of goods sold and delivered. The plaintiff has not shown that there was any true sale. I ask that the claim be dismissed and I elect to call no evidence." We have already expressed the view that whether there was in fact no "true sale" or only the "pretence of one" there was a sale based on a legal fiction. The law on this point has long been settled. The election not to lead any evidence is in this setting absolute.

In the result the appeal is allowed. The judgment is set aside

and judgment will be entered for the appellant with costs of the appeal and in the court below.

E. A. COLLYMORE,
Chief Justice of Barbados.
(President).
D. E. JACKSON,
Chief Justice of the Windward Islands and Leeward Islands.
W. H. IRWIN,
Puisne Judge, Trinidad and Tobago.

Dated this 18th day of April, 1951.

SUE-A-QUAN *v.* ROCK

(In Chambers (Worley C.J.) February 5, 12, 13; April 12)

Rent Restriction Ordinance 1941—(*Amendment Ordinance*) 1947 *and* 1950—*Assessor's certificate—effective date.*

In 1946 a two flat building was erected and the lower flat let at $25:—per month. Subsequently the lower flat was divided into five rooms and each let separately, the result being that the rooms on the lower flat were not within the scope of the Rent Restriction Ordinance until the amendment of 1950. On the 7th November, 1950 the Assessor reduced the rental of one of the rooms of the lower flat from $3.50 per week to a maximum rent of $1.60 per week and issued his certificate with the effective date as the 1st December, 1948. The landlord appealed with regard to the effective date of the certificate.

Held: In 1948 the premises were not subject to rent control and the effective date should be 5th August, 1950 (the date when the amending ordinance came into force).

Sugrim Singh for Appellant.

T. A. Morris for Respondent.

Worley, C.J.: This is an appeal by a landlord brought under section 4E of the Rent Restriction Ordinance 1941 (as amended by section 5 of the Rent Restriction (Amendment) Ordinance No. 13 of 1947) against a certificate issued by the Rent Assessor, Georgetown in pursuance of his powers under section 4B (22) (b) of the Principal Ordinance (as enacted by section 5 of Ordinance No. 13 of 1947) and section 2 of the Rent Restriction (Amendment) Ordinance, 1950 (No. 24 of 1950). The only point in dispute is whether in the circumstances of this case the Assessor's certificate can legally be, or, in any event, should be given retroactive effect.

The material facts are that on 13th July, 1950 the tenant (respondent on the appeal) applied to the Assessor to fix the standard rent and maximum rent of a room situate at Lot 39, Robb Street, Georgetown. The house in question is a two flat

building erected by the appellant in 1946. The upper and lower flats were first let at $25 per month each. Subsequently the lower flat was divided into five rooms of which the respondent's is one. There is one kitchen, a bathroom, vat and lavatory all used in common by the five tenants and it is agreed that the accommodation was only brought within the control of the Rent Restriction legislation by the enactment of Ordinance No. 24 of 1950, which came into force on the 5th August, 1950.

On 7th November, 1950 the Assessor completed his certificate fixing the standard and maximum rent and in pursuance or purported pursuance of subsection (23) of section 4B certified that it should take effect from the 1st day of December, 1948. The room was first let to the respondent at $3.50 a week in 1948 and the Assessor, being of opinion that this was excessive having regard to all the circumstances exercised his powers under section 4B (1A) of the Principal Ordinance (as amended by section 4 of the Rent Restriction Amendment) Ordinance 1948 No. 30 of 1948 and section 3 of Ordinance No. 24 of 1950) and certified the standard rent at $1.00 and the maximum rent at $1.60 a week.

As the certificate stands therefore the respondent is entitled to claim recovery of rent overpaid from the effective date of the certificate. The result of this would be to create an injustice because in 1950, the building was assessed for municipal rates and taxes on the footing of the uncontrolled rentals and although it is, in my view, open to the appellant to apply under section 20 of the Georgetown (Valuation and Rating) Ordinance (No. 30 of 1942) for amendment of the valuation list, any such amendment would not have retrospective effect and in the meantime, rates are levied at the current valuation.

It is true, as the Assessor has pointed out that the present high valuation is attributable to the appellant's action in subdividing the flat into cubicles and thereby decontrolling the premises but it has to be remembered that was perfectly lawful, even if morally reprehensible, at the time and that it is not the policy of the law to inflict retrospective penalties.

It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication (see Maxwell: Interpretation of Statutes 9th Ed. pp. 221 et seq.). It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts, that the rule in question prevails (ibid).

The enactment of Ordinance No. 24 of 1950 by imposing control on premises previously exempt attached "a new disability in respect of transactions already past" and must be presumed out of respect to the Legislature not to have a retrospective operation and the application of subsection (23) of section 4 B to premises brought under control by the Ordinance should be limited to the date of its coming into force, namely 5th August, 1950.

My attention has been drawn to the appeal of Tibbutt v. Barker and Chow No. 829/1950 where Boland J. appears to have taken a similar view. These Rent Assessment Appeals come before a single Judge and as uniformity is desirable in these matters, I have consulted the other Judges of the Court before giving this decision.

The appeal is therefore allowed and the Assessor's certificate varied so as to have effect from 5th August, 1950.

ISHRIPRASAD EXECUTOR OF RAMLAKHAN SINGH, (Deceased) *v.* JAIKARAN AND SONS LIMITED.

(In the Supreme Court of British Guiana, Civil Jurisdiction (Ward J.) April 4, 5, 6, 13, 1951).

Lessee's option to purchase — equitable liabilities applicable thereto — effect of delay in exercising option.

Marionville Plantation Limited owners of Plantation Belle Plaine leased a portion of Belle Plaine to the plaintiff's father Ramlakhan Singh. Clause 10 of the lease conferred on the lessee an option to purchase the demised premises on certain terms and conditions. The option was not to be exercised unless the lessors sold or disposed of Marionville plantation of which the demised premises formed a part.

In 1929 the lessors transported the demised premises to Marionville Estates Limited. In 1931 Marionville Estates Limited sold to Joseph Jaikaran who subsequently transported to the defendant company. In 1945 the defendant advertised transport to U.S. and others subject to a lease of the demised premises in favour of Ramlakhan Singh. The latter opposed on the ground that the option to purchase contained in clause 10 of the lease had been exercised.

Held: On the evidence there was no valid exercise of the option in 1929; any purported exercise of it in 1931 or 1945 was in effectual since on those dates the time within which the option could be exercised had expired. An option in a lease to purchase confers on the lessee an equitable interest in the land but such an interest does not run with the land. If the option was in fact exercised in 1929, his right to specific performance or to a declaration that the option had been exercised was lost by his delay in accordance with the principle stated in Mills v. Haywood (1877) 6 Ch. D 197.

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

P. A. Cummings for defendant.

Ward, J.: The substituted plaintiff in this action is the son of Ramlakhan Singh, who on the 14th day of April, 1927 entered

into an agreement for the lease of a portion of land consisting of 153 square rods situate at Belle Plaine in the island of Wakenaam, Essequibo. The lease, which was for a term of twenty years, determinable by six months' notice in writing by either party, reserved a rent of one dollar per annum payable in advance. The lease contained covenants on the part of the lessee to keep the premises in good sanitary condition and the trenches weeded, not to open a shop or to sub-let any portion of the land without the consent in writing of the lessors, and that all erections and buildings acquired or to be erected should be subject to the approval of the lessors and the Sanitary Inspector of the District. Clause 10 of the lease conferred on the lessee an option to purchase the demised premises on certain terms and conditions. Unfortunately these conditions are not clear from ambiguity and it would appear that certain words have been omitted; but on the whole document it appears that the option was not to be exercised unless the lessors, Marionville Plantation Limited, sold or disposed of Marionville Plantation, of which the demised premises formed a part.

This condition was fulfilled on May 30, 1929 when Marionville Plantation Limited transported Marionville Plantation to Marionville Estates Limited according to the evidence of Ishriprasad, on the day following the contract for sale between the lessor and Marionville Estates Limited, Ramlakhan Singh spoke to Mr. R. E. Brassington, the managing director of Marionville Estates Limited, and told him "he would like to buy the portion of land he occupied under the lease." No price was offered by Ramlakhan Singh and nothing further was done in the matter until September 24, 1931 when, Marionville Estates Limited, having advertised the sale of Plantation Belle Plaine cum annexis to Joseph Jaikaran, Ishriprasad, on behalf of his father, wrote to Mr. Brassington. The letter is not available, but, according to Ishriprasad, he asked Mr. Brassington "to sell us the land, if not we would oppose the transport.' Nothing was said in the letter about a previous exercise of the option, and even at this stage the plaintiff and his father allowed themselves to be put off by Mr. Brassington's promise that "he would do all in his power to get Mr. Jaikaran to sell the property to my father at a reasonable rate." Later there was some negotiation with Philip Jaikaran, who was manager of Plantation Belle Plaine, but there was no agreement as to the price, and nothing further was done by the plaintiff or his father until September 19, 1945. On that date, as the defendant Company had advertised the sale of the demised premises subject to a lease of .153 (decimal one five three) roods in favour of Ramlakhan Singh for transport to one Umrao Singh and others, the plaintiff through his solicitor wrote to the defendant. A carbon copy of this letter was tendered in evidence and shows that no mention was made, even at this date, of any alleged exercise of the option at the time of the sale of Marionville plantation in 1929.

Much of the argument in the case has been directed to the question of the precise right conferred by an option to purchase

granted to a lessee. This question has, I think, been clearly decided in the cases of the London and South Western Railway Company v. Gomm (1882) 51 L.J. N.S. 530 and Woodall v. Clifton (1905) 2 ch. 257. Such a covenant confers on the lessee an equitable interest in the land, for as Jessel M.R. puts it, "the right to call for a conveyance is an equitable interest or equitable estate." But although it is an equitable interest it does not run with the land. Romer L.J. at p. 279 of the report of Woodall v. Clifton puts the matter in this way: "The covenant is aimed at creating at a future time the position of vendor and purchaser of the reversion between the owner and the tenant for the time being . . . . . Properly regarded it cannot, in our opinion, be said directly to affect or concern the land, regarded as the subject matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so." It follows from this that, if when the option is exercised, the reversioner has parted with the land the tenant cannot obtain an order for specific performance against the assignee of the reversioner unless the assignee is specifically bound by the terms of his contract for the purchase of the land. Nor can the doctrine of equitable notice apply, since it was authoritatively laid down in Haywood v. The Brunswick Benefit Building Society 51 L.J. Q.B. 73 that the doctrine enunciated in Tulk v. Moxhay 2 Ph. 774 cannot be extended to other than restrictive covenants.

It appears to me that the option covenanted for in clause 10 of the lease conferred on the lessee the right to exercise it within one year from the date of the sale of Marionville plantation by the lessor provided that this event happened within the duration of the term; and I have no doubt that Marionville Estates Limited as purchasers subject to the lease were bound by the covenant giving the option. It is contended for the plaintiff that the option was exercised on the day following the sale in 1929 to Marionville Estates Limited. It is noteworthy that the plaintiff never asserted this exercise of the option either in the letter of September 24, 1931 to Mr. Brassington, or in the letter of Mr. Sharples to Jaikaran & Sons Limited of September 19, 1945 or in the pleadings filed on October 2, 1945. If it were necessary for me to decide whether in fact the option had been validly exercised in 1929 following the sale of Marionville Estates Limited I should be inclined to hold that there was no exercise of the option and that neither Mr. Brassington or Ramlakhan Singh or the substituted plaintiff considered that the option had been exercised. It is clear, in my opinion, that any purported exercise of the option in 1931 or in 1945 would be ineffectual since on those dates the time within which the option could be exercised had expired; and further as far as the defendant company is concerned it would not be bound by any notice of its exercise. But even if the option had been properly exercised in 1929 Ramlakhan Singh has shown by his subsequent actions that he considered the exercise of the option abandoned. Between 1929 and 1931 he took no steps to get the price of the land fixed in accordance with the procedure set out in Clause 10 of the lease. When the land was being sold to Mr.

Joseph Jaikaran he claimed the right to exercise the option, but failed to assert that it had already been exercised. When Mr. Jaikaran demanded rent in 1939 he did not assert that he had exercised his option. On the contrary in his letter to Mr. E. V. Luckhoo, dated 7th April, 1940, he gives particulars of payment and concludes as follows: "Both myself and my father are grateful to Mr. Jaikaran for all his consideration to us since he owned this estate." Even if the option had in fact been exercised in 1929, this claim would fall within the principle stated in the case of Mills v. Haywood (1877) 6 Ch. D. 197 and the plaintiff's right to specific performance or to a declaration that the option had been exercised was lost by his delay. For as Cotton L.J. pointed out "it is a well established principle that a party cannot call upon a Court of Equity for a specific performance unless he has shown himself ready, desirous, prompt and eager." If the plaintiff was being put off by Mr. Brassington it was his duty to have filed a notice of opposition to the proposed transport to Mr. Joseph Jaikaran in 1931. There is nothing to show that Mr. Jaikaran at any time was made aware that the plaintiff had exercised his option. Mr. Jaikaran denies any knowledge of this and the plaintiff admits that at no time did he ever speak to Mr. Jaikaran on the matter. Further it is clear that Mr. Brassington himself never undertook to tell Mr. Jaikaran that the option had been exercised, but promised to do all in his power to get Mr. Jaikaran to sell the land to Ramlakhan at a reasonable price. There is absolutely no evidence of any communication to the defendant Company, which is of course a legal persona entirely different from Mr. Joseph Jaikaran.

I find therefore that as far as the plaintiff's opposition is based on an alleged exercise of the option to purchase contained in Clause 10 of the lease it is not legal, just and well-founded. But paragraph 1 of the indorsement of the claim asks for a rectification of the lease. It is clear that the plaintiff was entitled to this rectification, as in the advertisement of transport, dated 8th September, 1945, the lease was described as being in respect of .153 of a rood. There is some dispute as to the point of time at which the defendant company admitted the rightness of this claim and its readiness to rectify the lease. This certainly was done in the defence filed on December 14, 1948. Since the commencement of this action the lease has expired and therefore rectification is now unnecessary since the plaintiff holds over as a tenant from year to year and his rightful occupation of the true area demised is acknowledged by the plaintiff. But the necessity for and the right of claiming rectification must be reflected in any order as to costs, and I shall also take into consideration the fact that the defendants pleaded breaches of covenant which they have failed to establish. The order of the Court therefore is that the claim for rectification is well-founded; that the claim for a declaration that the plaintiff exercised the option granted to him by the lease dated the 14th day of April, 1927, is not just, legal or well-founded; that inasmuch as the lease has expired and the defendant company has admitted that the plaintiff is rightfully in possession as tenant of

153 roods of land an order as to rectification would be unnecessary and ineffectual and that the action stand dismissed, each party to bear its own costs.

Solicitors: I. G. Zitman for the plaintiff.
F. I. Dias for the defendants.

ADAMS AND CHRISTMAS *v.* RAGHUBIR also known as RAGHUBIR MISIR

In the Supreme Court of British Guiana, Civil Jurisdiction (Worley C.J.) March 6, 7, 8, 9, 12; April 16.

Immovable property—transport—opposition—ownership by prescription—absence of title no bar.

The plaintiff Adams, his grandfather, father and others, were in continuous and uninterrupted occupation of certain portions of Pln. Zeelandia from 1870. In 1932 the defendant's father purchased the whole of Zeelandia and it was subsequently acquired by the defendant. In 1946 he sought to transport the portion occupied by the plaintiff. The plaintiff opposed. The defendant submitted that if the plaintiff had acquired title by prescription, he was guilty of laches or acquiescence in not obtaining a declaration of title in accordance with section 3 of the Civil Law Ordinance and alternatively that the plaintiff had lost any title acquired by the adverse possession of third persons.

Held: The affect of "acquisitive prescription" under Roman Dutch Law was to vest the ownership of the property in the possessor and ownership so acquired can be defended without a declaration of title. The right to assert that ownership is unimpaired unless a third party can show possession *nec clam nec vi nec precario* for at least twelve years prior to. action brought.

S. L. van B. Stafford. K.C., John Carter with him for the plaintiffs.

C. V. Wight for the defendant.

Worley, C.J.: In this matter the sole surviving plaintiff, Adams, seeks to oppose transport of a parcel of land described by him as lots 85 to 112 Zeelandia Village and by the defendant as Field No. 1, Section Letter E, Plantation Zeelandia.

In 1842, Plantation Zeelandia cum annexis belonged to one William Arrindel who, in that year, caused a portion of it to be laid out in one hundred and twelve lots as a village. The portion so laid out was itself part of an area formerly known as Rust-Na-Onrust. These lots and the layout of the village are shewn on a plan made in March, 1842 by one J. Hadfield (Exhibit A) in which the village is shewn as divided into four sections, the westernmost being situated between the Rio Essequibo and a public road; the second and third sections being separated by Arindell Street, the third and fourth by Mary Anne Street, while the fourth section is separated by William Street from the Estate. These streets run North to South across the width of the village. The lots in the

different sections are also divided longitudinally by streets called King's Street, Queen's Street and Prince's Street, which run from East to West. The village appears to be separated by dams from Plantation Zeelandia on the north and Plantation Glenarrah on the South. The land in dispute in this case is that shewn in Exhibit A as comprising the fourth or Easternmost section (lots 85—112) together with the portions of King's, Queen's and Prince's Streets separating those lots and it also includes William Street.

Some of the village lots were transported to purchasers while others were occupied by persons holding under a "bill of sale" or mere receipt, but all subsequent transports of Plantation Zeelandia have excepted "such parts of the said Rust-na-Onrust, known as Zeelandia Village, as are transported to several persons, et cetera."

The evidence shews that the villagers always have for the most part lived in the first and second sections and that the third and fourth sections have generally been used for cultivation. There is, however, no conclusive evidence whether any lots in the fourth section have ever been transported: the probabilities are against it but all that can be said with certainty is that none are recorded in the Index of Dealings with Lands which was compiled in the Deeds Registry about 1920, but which is admittedly incomplete. The village has never been declared a village district for the purposes of the Local Government Ordinance and therefore has no legal corporate existence, but the villagers seem always to have had a rudimentary form of self government, choosing their own headman or chairman, cleaning out trenches and drains by communal labour and so on. Plaintiff is the present headman, a position occupied by his father and grandfather before him.

The plaintiff's case is that from the time of his earliest memories (and because he was born in 1860 they go back to about 1870) the proprietors of Plantation Zeelandia have been out of possession of all the village lands as shewn on Hadfleld's plan and that the back sections, particularly the fourth section, have been occupied by the villagers, that is to say, the persons from time to time holding lots and living in the front sections, for cultivation and grazing without paying any rent or asking leave or licence of the estate proprietors. I shall consider later the legal consequences which might flow from this adverse occupation if established.

The defendant's father bought Plantation Zeelandia in 1932 and the defendant himself subsequently acquired the whole interest therein, partly by inheritance and partly by purchase from his brothers. His case is, firstly, that as owner by transport of Plantation Zeelandia, cum annexis, he is the owner of and consequently entitled to sell, all lots in Zeelandia Village which cannot be proved to have been transported to another owner; secondly, that since the time his father purchased the estate the land in dispute has been cultivated by persons living in the village but occupying as tenants of the estate proprietor and paying rent first to his father and subsequently to himself. Thirdly he has pleaded that if the plaintiff has or had a good possessory title to this land or any of it, he is guilty of laches in not having acquired a declaratory title as provided in subsection (1) of section 4 of the Civil Law

Ordinance; and, fourthly, that he himself, having been in possession as landlord receiving rents for over twelve years prior to this action, can successfully protect his possession against any attempt by the plaintiff or others to oust him.

The first necessity is therefore to determine the questions of fact in issue. I accept the evidence of the plaintiff and his witnesses that the villagers occupied and planted cane in the fourth section up to the time when the estate factory shut down, that is round about 1900. Most of the cane so grown was sold to the estate though there is evidence that some of it was crushed in the village. After Zeelandia ceased to be a "grinding estate" they continued to occupy the land, planted it with ground provisions and used it for grazing until rice-cultivation started about 1930. I accept also their evidence that during al those years they paid no rent and the proprietors of the plantation laid no claim to the fourth section. It appears that after cane cultivation was given up on Plantation Zeelandia, the estate lands adjoining the fourth section were used for pasture and that about 1910 the villagers impounded cattle belonging to the then owner of the estate, one Fausett. Fausett's failure to pursue the matter suggests that he realised he would be met with a plea of long possession. About this time, at Fausett's instance, Mr. Klautky, a land surveyor, made a plan of "Part of Zeelandia Village" (Exhibit O). It would seem from his remarks on the plan that the purpose was principally to determine a dispute over lots J and K in the section lettered A to K adjoining the front section on the North and to determine the areas and South boundaries of the three southernmost lots, 28, 29 and 84 in the front three sections. It could scarcely have been made in connection with Fausett's dispute with the villagers over the back or Eastern section, for Klautky leaves his lines open at that end and, without demarcating the fourth section at all, merely writes "formerly laid out in lots." This fits in with the plaintiff's story that this section was under cultivation, but throws no light on the question as to who was in occupation.

I do not accept the defendant's evidence that he has collected rent for padi lands occupied in the disputed area since 1932. His story is that when his father bought the estate he took over the tenants he found in possession, copied out the names from the books of the Company from whom he purchased and continued to collect rent from them and allocate land to them as tenants. This story was corroborated by two witnesses, Raghubir Sharma and Joseph Manbodh both of whom were discredited and unreliable. The defendant could not produce any contemporary documents to support his story and his attempted explanation of how he came to lose his earlier account books and receipt counterfoils was singularly unconvincing. I prefer the version related by the plaintiff and his witnesses, namely, that the villagers started planting rice on their own initiative but, after a few years, found that they could not do so successfully without irrigation water and, about the year 1937, made an arrangement with the defendant whereby the street or dam which separated the "vil-

lage" from the "estate" on the East was cut through and water brought on to the ricelands from the estate trenches. I shall have to consider presently the terms of this arrangement and its effect in law but for the moment I am concerned solely with trying to ascertain as a fact when it came into being. It is in my view very significant that this fourth section was until then cut off from the irrigation system of the estate and that, as the defendant admitted, none other than villagers planted rice there, that the padi was taken to a mill in the village and the adjoining estate lands were abandoned. The earliest receipts produced were dated 1937 and that fact is, to my mind, practically conclusive as to when the arrangement was made.

The circumstances which have brought about the present dispute are that the defendant, being desirous of selling up his whole interest in Plantation Zeelandia, is claiming the right to sell the land in dispute. His first step towards this was to employ the surveyor, Insanally, to survey the fourth section and part of the third section. When Insanally started to survey, a number of the villagers protested, the plaintiff's son, J. M. Adams, produced a print of Hadfield's plan, and there was a dispute about the disappearance of a "trespass board" which they had put up. In this connection I am satisfied that the notes on Insanally's plans (Exhibit P and Exhibit M) are incorrect and that he confused the names of the plaintiff and the plaintiff's son. The mistake is not material except as reflecting on Insanally's reliability as a witness. He was, as a witness, verbose, excitable and biased and I should not be prepared to give any weight to his uncorroborated testimony.

In his plan Exhibit M he describes the land now in dispute as "Field No. 1": the portion of the third section which he surveyed he describes as "Number O" (Exhibit P.). This latter portion was sold and transported by the defendant without any opposition and I see no reason to doubt the assertions of the plaintiff and his witnesses that the advertisements of this did not come to their notice. That, of course, is no bar to their opposition to the proposed transport of "Field Number One."

I now pass on to consider more closely the plaintiff's case in the light of these facts. The effect of "acquisitive prescription" under Roman-Dutch law was to vest the ownership of the property in question in the possessor, so that he could vindicate it, if he subsequently lost possession, from the original owner as well as from third parties (Lee—Introduction to Roman-Dutch law 3rd Ed. p. 152—3. Abdul Rohoman Khan v. Boodhan Maraj (1930) L.R.B.G. 9 at p. 15). All that was required was that the possession or quasi-possession of the person claiming by prescription should be "peaceable, open and as of right" and uninterrupted (Lee op. cit. p. 151). For immovables the period was a third of a century and in calculating this period, the possession of the predecessor in title, if adverse to the original owner, may be reckoned without any distinction of good or bad faith in either party. It is upon these doctrines and upon the "saving of existing rights" in sub-

section (3) of section 2 of the Civil Law Ordinance that the plaintiff's case, as finally presented, mainly rests. The effect of the continuous and uninterrupted occupation of the land in dispute, which I have found proved as a fact from 1870, was to transfer the ownership of the land from the original owners to the plaintiff's grandfather, father and others who occupied in common: the plaintiff himself purchased lot 84 in 1901, his father died about 1911 and the plaintiff then succeeded to his father's undivided interest in these lands and exercised his right to graze stock there. In my view therefore he had a right of ownership which was in existence on 1st January, 1917 and which was preserved by section 2 (3) of the Civil Law Ordinance. On that date any one of the co-owners was entitled to assert or to defend his right without having to join all the other co-owners or to shew who they all are: see Petition of Benjamin (1933) 1931—37 L.R.B.G. 168.

The only question then is whether this right has been impaired by any subsequent legislation, by laches or acquiescence or by adverse possession.

As to the first it is settled law that the Deeds Registry Ordinance, Chapter 177 does not affect possessory rights and that a title acquired by prescription prior to 1922 is not defeated by the provisions of section 21 (2) of that Ordinance (see Lalbahadursingh v. McPherson (1939) L.R.B.G. 80 at p. 89).

Next it has been suggested that, even if a person had acquired ownership by prescription under the Roman-Dutch law before the 1st January, 1917, the Civil Law Ordinance imposed upon him a duty to perfect his title by obtaining a declaration under the provisions of section 4 (1) of that Ordinance, and that the plaintiff ought not to have stood by and allowed the defendant to think that the lands in dispute were his and is guilty of laches. During the Roman-Dutch period no judicial act was required to transfer the ownership in land acquired by "acquisitive possession" and a simple affidavit was sufficient to evidence such acquisition if the owner desired to transport, but it is well settled that since the passing of the Civil Law Ordinance, positive title to land acquired by long possession can only be obtained and evidenced by a declaration under section 3 (1). But this is not to say that ownership acquired before 1st January, 1917 cannot be defended without a declaration of title, for that would nullify the saving of existing rights in section 2. I can see no provision in the Ordinance which imposes the suggested duty and I do not accept the view that an owner who has not obtained a declaration is thereby debarred from defending his possession against a trespasser.

Nor can the intermediate mortgages or transports of Plantation Zeelandia impair the plaintiff's position in the absence of any admission or evidence that he had actual notice that the lands he claims were affected: Abdul Rohoman Khan v. Boodhan Maraj (supra) at p. 16 et seq.

Next, it was argued that the plaintiff's rights had been lost because he himself is no longer in physical possession of any portion of the land, either for planting or grazing and that he

and the other alleged co-owners have permitted strangers to come in and occupy and that, in fact, the defendant has entered and re-asserted any rights of ownership which his predecessors might have forfeited. This argument, if supported by the facts, would certainly be fatal to the plaintiff's case if he were relying on the "negative" possessory right under section 4 (2) of the Civil Law Ordinance; but since he and others had, in my view, acquired complete ownership in common prior to 1st January, 1917, the right of any one of these to assert that ownership against trespassers is unimpaired unless the trespasser can shew possession *nec clam nec vi nec precario* for at least twelve years prior to action brought. Possession by a third party will not avail the defendant unless the third party is shewn to have occupied as the defendant's tenant: nor is the defendant himself, though owner by transport of Plantation Zeelandia cum annexis, in any better position than a trespasser in view of the extinguishment of his predecessor's ownership of the fourth section prior to 1st January 1917.

The defendant has however failed to satisfy me that he exercised any rights of ownership over this section or was in occupation of it either directly or through tenants prior to 1937, which was less than twelve years before the institution of this action in September 1946. He has admitted that in 1932, when his father bought the estate, the land in dispute was occupied and cultivated solely by villagers and, in my view, they remained in undisturbed possession until 1937 the year in which arrangements were made for the supply of water from the estate. From that year until 1945 some, if not all, of the cultivators paid what the defendant calls rent and what the plaintiff's witnesses call water-rate based on the acreage occupied. On this point the defendant's case is supported by the receipts in which the payment is described as "rice-farm rent". It would be unsafe to accept the bare word of the witness Lawrence that he protested to the defendant's father against the form of the receipt and, in any case, it is clear that he accepted the receipts so worded and when sued for rent in 1942 paid without protest. I think the truth probably is that the land being of little use for rice cultivation without irrigation water, the farmers had no option but to accept the water on the defendant's terms and the defendant saw in this an opportunity of asserting what he may well have honestly regarded as his lawful ownership. It appears from the defendant's account book, Exhibit K, that the deceased plaintiff Christmas paid him rent in 1942 and that might perhaps have operated as an estoppel to Christmas's claim: but it has not been suggested that the plaintiff ever paid any rent or in any way acquiesced in the defendant's assertion of ownership, and no estoppel has been pleaded.

My conclusion therefore is that the plaintiff's right of ownership has not been impaired or destroyed by anything which has taken place subsequent to the 1st January, 1917 and that he is entitled to a declaration that he and others are in possession of the lands sought to be transported, that the defendant's predecessors in title had lost the ownership of the said lands by adverse

possession in the plaintiff and his predecessors and other persons for a period of a third of a century prior to the year 1917, that the defendant and his predecessors had not re-acquired possession for any length of time sufficient to oust the plaintiff and others and that the opposition is just, legal and well-founded.

The defendant must pay the plaintiff's costs of suit.

Solicitor for the plaintiff: W. D. Dinally.
Solicitor for the defendant: A. G. King.

REX *v.* NG-A-FOOK

(In the Supreme Court of British Guiana in its Criminal Jurisdiction (Hughes J.) April 16, 17, 18, 19, 20, 23, 25, 1951).

Criminal Law—Larceny—Receiving—Acquittal by Jury on counts for larceny—disagreement on counts for receiving—re-trial.

The proviso to subsection (2) of section 236 of the Criminal Law (Offences) Ordinance Chapter 17 reads—

"..... No person, however tried for receiving as foresaid, shall be liable to be prosecuted a second time for the same offence."

The prisoner was indicted on three counts for larceny and three for receiving. The jury acquitted him on the counts for larceny and disagreed on the counts for receiving. It was submitted that the proviso referred to above was an absolute bar to his retrial on the counts for larceny.

Held: A person has been tried even though the jury fail to agree on a verdict and the proviso was a bar to his re-trial.

Accused discharged.

(Editor's note: See the later case of Rex *v.* Ching et al where this case was distinguished by Ward J).

J. A. Luckhoo for the Crown.

C. Lloyd Luckhoo for the prisoner.

Hughes, J.: In this matter the indictment contains three counts for larceny and three alternative counts, laid under section 236 of the Criminal Law (Offences) Ordinance, Chapter 17, for receiving. The accused has been acquitted by the jury on the counts for larceny and on the counts for receiving the jury has failed in each case to agree upon a verdict.

The question for decision is whether the proviso to subsection (2) of section 236 operates as a bar to further proceedings on the same facts, for the offence of receiving. That proviso reads —

"Provided that no person, however tried for receiving as aforesaid, shall be liable to be prosecuted, a second time for the same offence."

The matter would have been placed beyond doubt if the phrase "tried and acquitted or convicted" had been adopted: that phrase is to be found in the English Piracy Act, 1744 and in other English Acts passed at about the same time.

It seems to me clear that the intention of the Legislature in inserting that proviso was to give effect, quite unnecessarily in my view, to the pleas of autrefois acquit and autre fois convict.

If the proviso as it stands, that is to say, without supplying any words to it, permits of the implementation of what I consider to be the intention of the Legislature, then no difficulty arises for the Legislature will have actually expressed its intention: but if that intention can only be carried into effect by interpolating certain words then, unless the proviso would be otherwise meaningless, such words may not be interpolated if the effect of so doing is to extend the penal scope of the proviso. In this connexion I quote the words of Lord Lyndhurst, L.C. in Re Wainwright referred to at page 240 of the eighth edition of Maxwell on the Interpretation of Statutes —

> "It is not the Court's province to supply an omission in an Act, and if any such correction would extend the penal scope of an Act, still less will the Court be inclined to correct."

The foregoing makes it necessary to interpret the word "tried" in the proviso. If that word may properly be taken as synonymous with "tried to finality" or "tried and acquitted or convicted" then quite clearly the proviso does not operate as a bar to further proceedings in this case; if, on the other hand, it is the case that a person has been "tried" where the only step or proceeding short of finality is agreement of the jury on a verdict, then the proviso operates in favour of the accused and he should be discharged.

The matter is by no means free from doubt. There is some ground, but no clear authority, on which I might hold that the interpretation first referred to in the preceding paragraph may be adopted. The Crown Prosecutor has referred to the case of Attorney General v. Beauchamp, 13 Cox's Criminal Law Cases at page 563. In that case the learned Judges, in holding that although the wording of a section was faulty it must be read as imposing a penalty on a certain category of persons, were guided by that part of the section which preceded the words which gave rise to the necessity for interpretation by the Court, by what is referred to as "the scheme of the section" and, it would appear, by the marginal note. In the case under consideration by this Court the section of which the proviso is a part throws no light on the construction to be placed on the proviso. In support of an interpretation favourable to the accused there is the following sentence, at page 196 of the thirty-second edition of Archbold's Criminal Pleading, Evidence and Practice:—

> "After conclusion of the trial the jury are not allowed to separate until they have considered and returned their verdict, or have been discharged for failure to agree."

There is no difficulty in coming to the conclusion that in the opinion of the author a person has been "tried" even though the jury fail to agree on a verdict. Again, at page 204 of the same work, under the heading "Disagreement of jury" there is the passage "If the jury agree on a verdict on some counts of an indict-

ment, but disagree on others, it would seem that the prisoner can be retried on the counts on which the disagreement has taken place . . . . .” The use of the word “retried” can mean only that though the ‘jury’ have failed to arrive at a verdict the proceedings before them constitute a trial.

As already stated, the matter is to me one that is not free from doubt but, bearing in mind the principle that where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must taken that no one is brought within it who is not within its express language, I deem it proper to hold that the proviso operates in favour of the accused in this case and accordingly he is discharged on each of the relevant counts in the indictment.

In her capacity as the administratrix of the estate of JOSEPH FREDERICK FUNG, deceased.

(In the Supreme Court, In Chambers, (Ward J.) April 2, 9; May 5, 12, 1951).

Rules of Court—revivor—Limitation Ordinance—oral acknowledgment.

The last step in an action the filing of the defence, was taken on May 12, 1950. On March 16, 1951 the plaintiff applied for an order of revivor to enable him to file a reply and to have the matter set down for hearing. The defendant filed an application on March 28, 1951 asking that the action be declared deserted and abandoned, as it would be inequitable to grant an order for revivor and as, in any event, the plaintiff's action was statute barred and an oral acknowledgment, as pleaded, did not operate to take the case out of the Limitation Ordinance.

Held: Order XXXII 23 gave a defendant the right to request the Registrar to put the case on the hearing list and as the defendant had not so requested, that was a circumstance to be taken into account in deciding whether an order for revivor should be made. Principles in the Argosy Co. Ltd. v. Booker Brothers McConnel and Co. Ltd. 1949 L.R.B.G p. 145 and Cumberbatch v. The Scottish Flower Lodge No. 101 of 1950 applied. Revivor ordered.

An oral acknowledgment is sufficient to deprive a party of the benefit of the Limitation Ordinance.

Theo Lee for plaintiff.

J. E. de Freitas for defendant.

Ward, J.: Two applications have been filed in this cause, the first by the plaintiff on March 16, 1951 for an order of revivor, and the second by the defendant on March 28, 1951 asking that this action and the opposition entered on March 11, 1950 be declared deserted and abandoned. By consent both applications were taken together. Both applications were supported by affidavits sworn by the respective solicitors for the parties, and a further affidavit was filed by Mr. Fraser, solicitor for the plaintiff.

on April 20, 1951 at the request of the Court. From these affidavits it appears that an opposition to the transport of certain properties belonging to the estate of J. F. Fung, deceased, from Felicia Fung as administratrix of the estate of J. F. Fung, deceased to Felicia Fung in her own right was filed on March 11, 1950, the writ in the action was filed on March 20, 1950 and the last step in the action viz. the filing of the defence was taken on May 12, 1950. The grounds of opposition are that the estate of J. F. Fung deceased is indebted to the plaintiff in the sum of $3,829.00 on account of money loaned to the deceased Fung by the plaintiff. The sum of $3,500.00 is alleged to have been lent on July 16, 1925 and the sum of $329.00 on June 17, 1948. It is further alleged that there was a verbal acknowledgement by the deceased that he was indebted to the plaintiff in the sum of $3,829.00 on July 23, 1948 coupled with a promise to pay the debt at an early date.

The plaintiff now asks for an order of revivor and for leave to file a reply. It was submitted by counsel for the plaintiff that there is a practice among solicitors in the colony that an extension of time is always agreed to, and that in the usual course an application for enlargement of time was made by letter to the defendant's solicitor on March 17, 1951. A similar statement as to the practice of the profession was made by Mr. C. V. Wight, counsel for the Argosy Company Ltd., in the case of The Argosy Co. Ltd., v. Booker Brothers, McConnell and Co., Ltd., No. 133 of 1948. This statement was contradicted by Mr. H. C. Humphrys, K.C. counsel for the defendant company, who stated that the practice was to allow extensions of time to file pleadings subject to the proviso that the period of six months referred to in Order XXXII r. 5 (1) had not elapsed. It would probably be of benefit to the profession if the practice were embodied in a rule of practice by the Law Society, but it appears to me that the statement made by Mr. De Freitas as to the practice is correct, namely that extensions of time are granted as a courtesy up to the period of six months provided that such an enlargement of time does not prejudice the party by whom it is granted or take away a ground of defence which the delay has given him; and that after the six months period has elapsed such an extension will only be granted after consultation with the client and he makes no objection.

Mr. De Freitas has submitted in support of the defendant's application that there are special circumstances in this case which would make the exercise of the Court's discretion in favour of the plaintiff inequitable. The plaintiff's action is in support of an opposition to transport, the effect of which is to delay the administration of the estate of the deceased. The plaintiff has been dilatory throughout and the circumstances are such as to show that he has no genuine claim and has brought the action and entered the opposition for the purpose of forcing the defendant to settle the claim. He further submits that an oral acknowledgment does not operate to take the case out of the Limitation Ordinance.

The argument from delay and the effect on the administration

of the estate of the deceased would have greater force if the provisions of Order XXXII r. 3 had not given the defendant the right to request the Registrar to put the case on the hearing list. The last step in the action was taken on May 12, 1950, and it was open to the defendant to have the cause set down for hearing at any time after May 22, 1950. If the delay had been so prejudicial to the administration of the estate it would have been expected that the defendant would have taken the steps provided for by Order XXXII r. 3 so as to have the questions in issue decided as early as possible.

With respect to the second submission it is necessary to consider the history of statutes of limitation and the decisions of judges in respect of statute-barred debts. Periods of limitation were unknown to the Common Law, and the earliest statute creating periods of limitation to the recovery of debts is the Limitation Act of 1623 — 21 Jac. I c. 16. Section 3 of this Act was embodied in local legislation before 1856 for in an Ordinance enacted on September 15, 1856 the preamble says:— "Whereas it is expedient to alter and amend the laws now in force in this Colony relating to the prescription of certain actions and claims". This Ordinance is in effect still in force with one significant exception. Section 8 of the Ordinance provided that no term of prescription provided by this Ordinance may be waived, or the right of action or suit continued for any further period, whether there shall have been any part payment or not, unless such waiver or continuance be in writing signed by the party to be bound thereby. If I understand this section correctly it established, as far as simple contract debts were concerned, the principle enunciated in Lord Tenterden's Act, (9 Geo. IV c. 14) that a party could only be deprived of the benefit of the Ordinance by an acknowledgment in writing signed by the party to be bound thereby. This was the law of this Colony until July 27, 1918 when an Ordinance No. 27 of 1918 repealing this section of the Limitation Ordinance was published in the Official Gazette. The explanatory memorandum attached to the bill, which was published in the Official Gazette on June 29, 1918 recites that "the object of this amending bill is by the deletion of section 10 to make it clear that part payment or payment of interest on foot of a mortgage or other debt shall amount as under the Common Law of England to a waiver of prescription and a continuance of the right of action". The repeal of this section makes it clear, in my opinion, that the intention of the Legislature was that the judicial interpretation placed upon section 3 of the Limitation Act until the passing of Lord Tenterden's Act should be part of the law of this Colony. The explanatory memorandum may show that its author did not truly comprehend that the Common Law knows nothing of periods of limitation and that the judicial interpretation had been directed, as Lord Sumner put in Spencer v. Hemmercle (1922) A.C. at p. 519, "to the task of decorously disregarding an Act of Parliament". As the section requiring an acknowledgment in writing was repealed it must be taken that the legislature intended that oral acknowledgments should be sufficient to deprive a party of the benefit of the section.

The principles which should guide the Court in considering applications for orders of revivor have been stated by Worley C.J in the case of The Argosy Co. Ltd., v. Booker Brothers McConnell & Co. Ltd. in his judgment dated the 7th day of December, 1949, and it is unnecessary to repeat them here. An application for an extension of time is an appeal to the Court for increased facilities to carry on the action, and the Court in such a case is always inclined to act with clemency towards the applicant provided he can show that his opponent will not thereby be injuriously affected. Further as has been pointed out by Boland J. in the case of Cumberbatch v. The Scottish Flower Lodge No. 101 of 1950 it is sufficient for a party in an opposition action to show that he has an arguable case fit for the decision of the trial judge. In this matter I am of opinion that there is such an arguable case and that the refusal to grant the application for revivor will be more prejudicial to the plaintiff than the granting of the application will be to the defendant. The application for revivor is therefore granted and liberty is given to the plaintiff to file a reply within seven days of this order. The defendant's application is dismissed. The plaintiff must pay the costs of the application for revivor which I fix at $35.00.

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1951

AND IN

THE WEST INDIAN COURT OF APPEAL

[1951].

EDITED BY

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British Guiana.

The Editor acknowledges the valuable assistance rendered in the preparation of these reports by the following members of the Law Reporting Committee:

The Honourable Chief Justice, Chairman.
The Solicitor-General.
H. C. B. HUMPHRYS. Esq., Solicitor.

EAST DEMERARA, BRITISH GUIANA.
THE "ARGOSY" COMPANY, LIMITED, PRINTERS TO THE
GOVERNMENT OF BRITISH GUIANA.

1954.

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1951.

SIR NEWNHAM ARTHUR WORLEY	—Kt. Chief Justice. Left the Colony on 18th April, 1951, to take up appointment as a Justice of Appeal in the East African Court of Appeal.
EDWARD PETER STUBBS BELL	—Appointed Chief Justice. Arrived in the Colony on 16th December, 1951, and assumed office.
FREDERICK MALCOLM BOLAND	—First Puisne Judge. Acted as Chief Justice from 18th April, 1951, to 16th December, 1951.
ERNEST RUEUL LA TOURRETT WARD	—Second Puisne Judge. Acted as First Puisne Judge from 18th April, 1951, to 16th December, 1951. Appointed a Puisne Judge in Trinidad. B.W.I., and he left the Colony on 18th December, 1951, to take up his new appointment.
HAROLD JOHN HUGHES	—Third Puisne Judge.
KENNETH SIEVEWRIGHT STOBY	—Acted as a Puisne Judge from 12th June, 1951, to the end of the year.

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 (1951) L.R.B.G.

SUMMARY

1. In the matter of The Deeds Registry, Ordinance, Chapter 177, -and-
In the matter of The Transport by J. Jaikaran to C.P. Jaikaran, of lot 129 Regent Road, Bourda, Georgetown, and The Transport by J. Jaikaran to E. S. Jaikaran of north half lot 2, Albouystown, Georgetown (No. 369/1950)
2. In the matter of The Georgetown Town Council Ordinance, Chapter 86, -and-
In the matter of an election of a Councillor for Ward No. 3, South Cummingsburg (East and West) holden upon the 6th day of December, 1950. Cyrus v. Wight and Jagan (No. 835/1950)
3. King v. Powell and Powell (No. 647/1949)
4. Braithwaite v. Harris (No. 687/1950)
5. Lowe v. La Borde (No. 614/1950)
6. Henry v. Blackman (No. 191/1950)
7. Sharples v. Lawrence (No. 126/1950)
8. Cummings v. Jackman (No. 554/1950)
9. Mahadeo v. The Chief Immigration Officer (No. 749/1950)
10. Cameron v. Daly (No. 210/1950)
11. Pestano v. Commissioners of Income Tax (No. 342/1950)
12. De Freitas v. Serrao and Perreira trading under the name and style of Perreira & Serrao
De Freitas v. Idem and De Barros (No. 903/1950)
13. Lemmel, Cadoret and Boumanis v. Rex (W.I.C.A. No. 1/1950 British Guiana)
14. In re estate M.G. de Freitas (deceased)
Application by F. O. Richards for an order on his solicitor in previous proceedings to furnish him with a bill of costs in respect of those proceedings (No. 324/1946)
15. Cumberbatch v. The Scottish Flower Lodge and by their Trustees Nicholson and Gobb (No. 101/1950)
16. Hutt v. Booker Bros. McConnell & Co. Ltd. and Schuler (W.I.C.A. No. 4/1950 — British Guiana)
17. Greenheart Producers Limited v. Sutton and Lowton (In Liquidation) (No. 186/1947)
18. Namsoo v. Coelho and Abraham trading under the style or firm of Coelho and Abraham (W.I.C.A. No. 8/1950— Trinidad)
19. Sue-A-Quan v. Rock (No. 38/1951)
20. Ishriprasad executor of Ramlakhan Singh, deceased, v. Jaikaran and Sons Limited (No. 404/1945)
21. Adams and Christmas v. Raghubir also known as Raghubir Misir (No. 441/1946)

SUMMARY